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SECOND SERIES

34 Cal.2d 777

PEOPLE v. WALLIN.

Cr. 5033.

Supreme Court of California, in Bank.

Feb. 24, 1950.

L. O. Wallin was convicted of drawing checks without having sufficient funds in the bank in the Superior Court for Los Angeles County, Walter S. Gates, J., and he appealed.

The Supreme Court, Edmonds, J., held that the guilt of defendant was for the trier of fact and that defendant was not deprived of his constitutional right of confrontation of witnesses.

Judgment affirmed.

Prior opinion, 208 P.2d 400.

1. False pretenses ☞51

Whether defendant was guilty of issuing a check without sufficient funds or credit was for the trier of fact. Pen.Code, § 476a.

2. Criminal law ☞1144(13)

Supreme Court must assume in favor of verdict of guilty the existence of every fact which the trier of fact could have deduced from the evidence and then determine whether the guilt of defendant is deducible therefrom.

3. Criminal law ☞1159(2)

The question for the Appellate Court to pass upon on appeal from conviction is whether there was evidence in the record justifying inference of guilt.

4. Criminal law ☞662(8)

The right of accused to confront witnesses at his trial, whether reserved in the Constitution or in the statutes, may be waived. U.S.C.A.Const.Amend. 6; Const. Cal. art. 1, § 13; Pen.Code, § 686.

5. Criminal law ☞662(6, 8)

Defendant was not deprived of his constitutional right to be confronted with witnesses against him where his attorney cross-examined the prosecution's witnesses at the preliminary hearing in the presence of defendant and thereafter defendant waived his right of confrontation during trial by stipulating that the people's case might be submitted upon the transcript of the preliminary hearing. U.S.C.A.Const. Amend. 6; Const.Cal. art. 1, § 13; Pen. Code, § 686.

Robert E. Austin, John N. Helmick and A. K. Phelps, Los Angeles, for appellant.

Fred N. Howser, Attorney General, and William E. James, Deputy Attorney General, for respondent.

EDMONDS, Justice.

Defendant Wallin was charged in two counts with violations of section 476a of the Penal Code, in that he drew two checks upon a bank in favor of a named payee, knowing that the amount of money to his credit was not sufficient to meet the checks. The appeal is from a judgment of conviction on each count, and presents for decision the questions: (1) whether the evidence is sufficient to support a finding of the necessary criminal intent; and (2) whether a defendant can consent to the trial of a criminal action upon a transcript of the preliminary hearing, where the witnesses have been cross-examined by his counsel in the defendant's presence.

Wallin waived a jury trial and, upon stipulation, the People's case was submitted upon the transcript of the preliminary

hearing. He testified in his own behalf and was found guilty, as charged.

The record shows that Wallin was in the wholesale lumber business, operating with a narrow capital margin and employing two workmen. In the early part of March, he bought plywood from R. & S. Engineering & Manufacturing Company which he then sold to a Texas purchaser. Wallin paid for the plywood by a personal check in the amount of \$3,200. A few days later, Robert Schultz, the owner and operator of the R. & S. Engineering & Manufacturing Company, asked Wallin if he could use more plywood. Wallin replied affirmatively and the evidence tends to show that he intended to sell the additional material to the Fruehauf Trailer Company of California.

In order to clean and prepare the plywood for this sale, Wallin and his two workmen went to the R. & S. plant where they used that company's tools in sanding and cleaning the plywood. While they were at work, Schultz advised Wallin that the earlier check for \$3,200 had been dishonored. Wallin's explanation of such action was that the Texas purchaser's check had not yet been credited to his account. The two men went to the bank, where they ascertained Wallin had slightly more than \$1,800 to his credit. In order to make good on the check for \$3,213.83 Wallin withdrew \$1,800 in cash, which he gave to Schultz with a check for the balance of \$1,413.82. Wallin testified that at the time he gave this check to Schultz, he told him he "would need a few days" until a check from some Texas people had cleared. Subsequently, Wallin's check was paid.

Later, Wallin gave Schultz the two checks of \$1,955.20 and \$3,504.32, respectively, which are the basis of the present action. They were drawn by Wallin, to the order of Robert Schultz, and represented the purchase price of plywood which was delivered to him at the time he issued them. Neither check was honored.

Schultz was asked during the preliminary hearing, "Isn't it a fact, Mr Schultz, that you held those checks up to wait for Mr.

Wallin to deliver this merchandise to the Fruehauf Trailer Company and get their check to deposit in his bank to meet these checks as they came?" In response, Schultz stated: "No, sir. When those checks were given to me, * * * (Mr. Wallin) told me that the checks were absolutely good." Schultz further testified that he had later received \$2,400 in part payment of them.

Wallin testified that he had been engaged in the wholesale builders business for 25 years. He and his men completed sanding and cleaning the plywood on March 25th, when it was ready for loading and delivery to the Fruehauf Trailer Company. The Fruehauf Company did not issue its check immediately because all of the plywood did not pass the specifications required by the buyer. For that reason it was found necessary to sell a part of the plywood elsewhere. Eventually, Wallin received a check for \$1,200 from Fruehauf for the plywood which was acceptable. This check was endorsed to Schultz. Some of the rejected plywood was sold to Standard Wood Supply Company for \$1,600, but its check to Wallin for that amount was not honored by the bank, the drawer having insufficient funds to meet its payment.

Upon cross-examination, Wallin admitted that when he gave the two checks, he knew he did not have money enough in the bank to cover them. At these times, the record shows, he did not have more than \$25 to his credit. In response to the question, "Did you have any understanding with Mr. Schultz that the check (of \$1,900) was to be held?" Wallin replied: "He asked me where the plywood was sold. I said Fruehauf Trailer Company. He said very well, to make it thirty days. I said, 'No, not in this case. They will give a check right away when the plywood is delivered.' So I said, 'By the time that that check is in there, my check will be okay.' He said, 'Okay.'"

Wallin further testified as follows: "Q. You mean that you discussed that with Mr. Schultz and he said he would hold the checks until you got the check from these Texas people to cover it? A. That he would hold them, yes, definitely."

Wallin contends that the evidence does not support a finding of the criminal intent to draw a check for the purpose of defrauding the payee. According to his theory, the evidence compels the conclusion that at all times Schultz knew his account was overdrawn and payment of the check given to him was dependent upon the sale of the plywood to the Fruehauf Trailer Company. It is argued that since Schultz continued with the second plywood transaction after the first check was dishonored and then made good, he was fully aware of the status of Wallin's bank account, tacitly accepting that factor as one of the elements of the transaction. As he states it, he "did not in so many words, perhaps, advise the prosecuting witness that there were not sufficient funds to cover the check. But surely it cannot be contended that express words of warning are necessary."

[1-3] The record does not sustain these contentions. Schultz stated on cross-examination that he had received the money on the \$1,413 check before he accepted the two checks which are the basis for this prosecution. He also testified that Wallin told him those checks were "absolutely good." The evidence upon the question of intent to defraud is in sharp conflict, but it is sufficient to support the finding of criminal intent and the judgment of conviction upon both counts. The court must assume in favor of the verdict the existence of every fact which the trier of fact could have reasonably deduced from the evidence and then determine whether or not the guilt of the defendant is deducible therefrom. The question for the appellate court to pass upon is whether there was evidence in the record justifying the inference of guilt. *People v. Deysher*, 2 Cal.2d 141, 40 P.2d 259; *People v. Payton*, 6 Cal.App.2d 198, 44 P.2d 376. Certainly it cannot be said, as a matter of law, that there is no evidence in the present record from which the trial court could have drawn inferences necessary to support a finding of guilt.

Considering the procedure of the trial, Wallin's attorney cross-examined the prosecution's witnesses during the preliminary hearing and in Wallin's presence. In the superior court it was stipulated, in the de-

fendant's presence, that the People's case be submitted upon the transcript of the preliminary hearing.

The Sixth Amendment of the Constitution of the United States provides: Section 1. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence." The California Constitution does not have any provision relating to confrontation of witnesses, See: Article I, Section 13, California Constitution; *People v. Myers*, 77 Cal.App. 10, 245 P. 1106, but a statutory right is accorded to the accused in Section 686 of the Penal Code. That section provides:

"In a criminal action the defendant is entitled: * * *

"3. To produce witnesses on his behalf and to be confronted with the witnesses against him, in the presence of the court, except that where the charge has been preliminarily examined before a committing magistrate and the testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness; or where the testimony of a witness on the part of the people, who is unable to give security for his appearance, has been taken conditionally in the like manner in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, the deposition of such witness may be read, upon its being satisfactorily shown to the court that he is dead or insane, or cannot with due diligence be found within the state * * *."

[4,5] The right of the accused to confront witnesses at his trial, whether reserved in the Constitution or in statutes, may be waived. *Diaz v. United States*, 223

U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500, Ann. Cas.1913C, 1138; Schick v. United States, 195 U.S. 65, 24 S.Ct. 826, 49 L.Ed. 99, 1 Ann.Cas. 585; Kemp v. Government of Canal Zone, 5 Cir., 167 F.2d 938; People v. Bird, 132 Cal. 261, 64 P. 259; People v. Valdez, 82 Cal.App.2d 744, 187 P.2d 74; People v. Noorlander, 76 Cal.App.2d 274, 172 P.2d 766. The defendant has not been deprived of his rights under the United States Constitution where, as here, his attorney cross-examined the prosecutions witnesses at the preliminary hearing, in the defendant's presence, and thereafter the defendant waived his right of confrontation during trial by stipulating that the People's case be submitted upon the transcript of the preliminary hearing.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



34 Cal.2d 731

EL DORADO OIL WORKS v. McCOLGAN.
S. F. 17862.

Supreme Court of California.

Feb. 17, 1950.

Rehearing Denied March 16, 1950.

El Dorado Oil Works brought action against Charles J. McColgan, as Franchise Tax Commissioner of the State of California, to recover amount assessed against plaintiff as additional franchise taxes for the taxable years 1935 and 1936 and paid under protest.

A judgment for defendant was entered by the Superior Court, San Francisco County, Robert L. McWilliams, J., and the plaintiff appealed.

The Supreme Court, Spence, J., held that the applying of the three-factor formula of property, payroll, and sales by State Franchise Tax Commissioner and the allocating of all of plaintiff's sales to State of California by the State Franchise Tax Commis-

sioner in computing plaintiff's franchise taxes did not operate to tax extraterritorial values in violation of due process of law and equal protection of the law clauses of the Fourteenth Amendment.

Judgment affirmed.

1. Taxation ◊376(1)

Income of local corporation from business done within the state, for franchise tax purposes, may include income from interstate and foreign commerce to extent that such is done within the state, as well as income from purely intrastate business. Gen.Laws, Act 8488, §§ 4, 10.

2. Taxation ◊376(4)

A local corporation engaged in a unitary business within and without the state is subject to an allocation method of taxation in assessment of franchise tax. Gen. Laws, Act 8488, §§ 4, 10.

3. Taxation ◊376(4)

Under franchise tax statute directing that allocation of income, with respect to corporation engaged in a unitary business within and without the state, be made upon the basis of "sales, purchases, expenses of manufacture, payroll, value and situs of tangible property, or by reference to these or other factors," franchise tax commissioner could adopt a re-allocation formula for determining franchise tax of California corporation engaged in unitary business within and without the state based on only three of the five specified factors. Gen. Laws, Act 8488, §§ 4, 10.

4. Constitutional law ◊62

Taxation ◊37.8

The franchise tax statute directing that allocation of income, with respect to corporation engaged in a unitary business within and without the state, be made upon basis of "sales, purchases, expenses of manufacture, payroll, value and situs of tangible property, or by reference to these or other factors", is not invalid as an unlawful delegation of power to franchise tax commissioner. Gen.Laws, Act 8488, §§ 4, 10; Const. art. 13, § 16(5), as adopted in 1928.

5. Taxation ◊376(4)

The three-factor formula of property, payroll and sales in apportionment of cor-

poration's unitary business within and without the state for franchise tax purposes is sufficiently diversified to reflect relative contribution of out-of-state activities to production of total unitary income, so as to allocate to California its just proportion of profits earned from a unitary business. Gen.Laws, Act 8488, §§ 4, 10; U.S.C.A.Const. Amend. 14.

6. Estoppel ⇨62(2)

An official order addressed to California corporation from office of state franchise tax commissioner directing corporation to use five-factor formula in allocation of its income for franchise tax purposes would not estop commissioner from adopting another formula for measurement of the tax in conformity with standard established by statute. Gen.Laws, Act 8488, §§ 4, 10.

7. Statutes ⇨219

The long-continued administrative practice of not using all the factors enumerated in provision of franchise tax statute for allocation of income with respect to corporation engaged in a unitary business within and without the state, without a modification of the statute, was a strong factor indicating that the administrative practice was consistent with legislature's intent relative to franchise tax commissioner's power in carrying out the allocation principle. Gen.Laws, Act 8488, §§ 4, 10.

8. Taxation ⇨376(4)

No method of allocation of income with respect to corporation engaged in a unitary business within and without the state for franchise tax purposes can precisely determine exact amount of income attributable either to any given geographic area or to any given part of a series of business transactions culminating in realization of a profit, and any effort in that regard must be more or less arbitrary and fictitious as a matter of practical tax administration. Gen.Laws, Act 8488, §§ 4, 10.

9. Taxation ⇨376(4)

State franchise tax commissioner's omission of factor of purchases of raw materials from foreign country by California corporation engaged in a unitary business within and without state in adopt-

ing formula for allocation of corporation's income for franchise tax purposes did not produce an arbitrary assessment in unreasonably assigning to California taxable values not attributable to business done within the state. Gen.Laws, Act 8488, §§ 4, 10; U.S.C.A.Const. Amend. 14.

10. Constitutional law ⇨229(1), 283

Where California corporation engaged in a unitary business within and without state had no employees outside of state who made sales, and all proposals for out-of-state sales received from brokers or otherwise were acted upon at meetings held by corporation's executive committee in its California office, assignment of 100 per cent of corporation's sales to California in state franchise tax commissioner's re-allocation formula for franchise tax purposes did not operate to tax extraterritorial values in violation of due process of law and equal protection of law clauses of Fourteenth Amendment. Gen.Laws, Act 8488, §§ 4, 10; Civ.Code, § 1740(2); U.S.C.A. Const. Amend. 14.

11. Constitutional law ⇨48

The franchise tax statute directing that allocation of income, with respect to corporation engaged in a unitary business within and without the state, be made upon the basis of "sales, purchases, expenses of manufacture, payroll, value and situs of tangible property, or by reference to these or other factors," carries presumption of constitutionality which attaches to all legislative acts, and to rebut the presumption the burden is on taxpayer to make oppression manifest by clear, cogent evidence. Gen.Laws, Act 8488, § 10.

12. Constitutional law ⇨229(1), 283

Applying the three-factor formula of property, payroll and sales by state franchise tax commissioner in apportionment of California corporation's unitary business within and without the state for franchise tax purposes did not operate to tax extraterritorial values in violation of due process of law and equal protection of law clauses of the Fourteenth Amendment. Gen.Laws, Act 8488, §§ 4, 10; U.S.C.A. Const. Amend. 14.

Williamson & Wallace and W. F. Williamson, San Francisco, for appellant.

Swarts, Tannenbaum, Ziffren & Steinberg, Jacob Shearer and Shirley A. Siegel, Los Angeles, amici curiæ, on behalf of appellant.

Fred N. Howser, Attorney General, and James E. Sabine, Deputy Attorney General, for respondent.

SPENCE, Justice.

Plaintiff brought this action to recover the amounts assessed against it as additional franchise taxes by defendant, under authority of the Bank and Corporation Franchise Tax Act, Stats.1929, p. 19, as amended, Deering's Gen.Laws, 1931, Act 8488, p. 4763, 1933 Supp., p. 2329, 1935 Supp., p. 1929, for the taxable years 1935 and 1936, which taxes were based respectively upon income for the years 1934 and 1935, and were paid under protest. The trial court found in defendant's favor, and from the judgment accordingly entered, plaintiff appeals.

The sole point in controversy is the propriety of the reallocation formula used by defendant in computing plaintiff's franchise taxes for the two years involved. An examination of the record in the light of applicable legal principles compels the conclusion that the method of apportionment applied by defendant in determining the net income earned by plaintiff's unitary business for purposes of the state franchise tax may not be successfully challenged, and accordingly the judgment must be affirmed.

During the years 1934 and 1935 plaintiff, a California corporation, was principally engaged in the processing and sale of coconut oil and meal. Its manufacturing plant and all related facilities were located in this state. It purchased the bulk of its raw material, copra, in the Philippine Islands, where it maintained offices for that purpose. In the first four months of 1934, a portion of its required copra supply was obtained in the Dutch East Indies through a buying agency in which plaintiff owned a 40 per cent interest, but such purchasing practice was discontinued in May of that

year. The Dutch East Indies agency operated independently in making purchases on behalf of plaintiff as one of its stockholders, and plaintiff never had any of its own employees performing services outside of this state in connection therewith. Plaintiff's products were sold to purchasers throughout the United States, with the shipping terms "f.o.b. cars at [its] plant in California." It maintained no sales office or salesmen in any state other than California. Sales to customers out of the state were negotiated in the main through independent brokers—not employees of plaintiff—although occasionally such customers contacted plaintiff's local sales office directly by telephone or telegraph. Plaintiff's executive committee meeting in its local office passed upon all proposals relating to sales transactions. Plaintiff's only employees located out of the state were those engaged in its purchasing activities in the Philippine Islands. At the same time plaintiff also had certain employees within the state who performed limited buying services for it.

Plaintiff made and filed its tax returns for the two years mentioned and paid the taxes so reported, using as the basis for the returns, in computing the percentage of business done in California, the average which these five factors within the state—property, payroll, sales, purchases, and manufacturing costs—bore to the total of such factors within and without the state. On this basis plaintiff allocated to California for the respective two income years, 1934 and 1935, 63.6282 per cent and 59.0915 per cent of its total net income.

Defendant Tax Commissioner rejected the schedules and returns so filed by plaintiff and made a reallocation on the basis of a formula consisting only of these three factors—property, payroll, and sales. In making such reapportionment, defendant accepted plaintiff's figures for two factors, property and payroll, but assigned 100 per cent of plaintiff's gross sales to business done within the state in lieu of the apportionment figures of 38.5029 per cent and 22.2821 per cent of total sales submitted by plaintiff for the respective income years, 1934 and 1935, upon the basis that sales to

customers out of the state were not allocable to California. Under such reallocation, plaintiff's net income from business done within the state was fixed at 89.8786 per cent for the income year 1934 and at 82.18 per cent for the income year 1935, and additional tax assessments were accordingly made by defendant. After taking an appeal to the State Board of Equalization, which sustained defendant in his reallocation formula, plaintiff paid under protest the additional assessments with interest and then brought this action to recover such amounts.

As above indicated, the protested taxes were levied under authority of the Bank and Corporation Franchise Tax Act, Stats. 1929, p. 19, as amended, Deering's Gen. Laws, Act 8488, hereinafter referred to as the act. Section 4 provided that a corporation doing business within the limits of the state, and not expressly exempted from taxation, shall annually pay, for the privilege of exercising its corporate franchise in the state, a tax measured by 4 per cent of its net income earned during the preceding fiscal or calendar year, the minimum tax being \$25. As in effect during the period here involved, section 10 provided that if the entire business of the corporation is not done within the state, the "tax shall be according to or measured by that portion thereof which is derived from business done within this State. * * * determined by an allocation upon the basis of sales, purchases, expenses of manufacturer, pay roll, value and situs of tangible property, or by reference to these or other factors, or by such other method of allocation as is fairly calculated to assign to the State the portion of net income reasonably attributable to the business done within this State and to avoid subjecting the taxpayer to double taxation."

[1,2] Plaintiff concedes that income from business done within the state may properly include income from interstate and foreign commerce to the extent that such is done within the state, as well as income from purely intrastate business, *Matson Nav. Co. v. State Board of Equalization*, 3 Cal.2d 1, 43 P.2d 805, affirmed 297 U.S. 441, 56 S.Ct. 553, 80 L.Ed. 791;

United States Glue Co. v. Oak Creek, 247 U.S. 321, 38 S.Ct. 499, 62 L.Ed. 1135, Ann. Cas.1918E, 748; *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 41 S.Ct. 45, 65 L.Ed. 165; *Southern Pacific Co. v. McColgan*, 68 Cal.App.2d 48, 61, 156 P.2d 81, and that during the period here involved it was engaged in a unitary business within and without the state so as to be subject to an allocation method of taxation in the assessment of the franchise tax, *Butler Brothers v. McColgan*, 17 Cal.2d 664, 111 P.2d 334, affirmed 315 U.S. 501, 62 S.Ct. 701, 86 L.Ed. 991. The only question is whether defendant may be sustained in his reallocation of plaintiff's net income for franchise tax purposes.

As the disputed issue is so narrowed, plaintiff and amicus curiae argue that the legislature designated in the terms of the act *five* factors for use in the allocation formula—as a standard yardstick for determining that portion of a unitary business taxable within the state; that the statutory authority to use an alternative formula contemplates only a situation where the five factor formula would not truly reflect the income-producing elements of the unitary business, and to that limited extent the Franchise Tax Commissioner may exercise his discretion in the choice of a formula; and that since the five designated factors were all applicable to plaintiff's business, it was improper to substitute another formula for the computation of its franchise tax—and in particular, excluding as a separate factor plaintiff's purchase transactions in the consideration of its business activities, an omission which allegedly threw the entire reallocation formula off balance in reflecting plaintiff's overall business operations. Plaintiff also objects to defendant's "arbitrary" assignment of 100 per cent of its gross sales to within-the-state business, claiming that such treatment did not take into account its undisputed method of transacting sales without the state. Accordingly, plaintiff and amicus curiae contend that defendant's reallocation formula, in its application to plaintiff's unitary business, attributed to California a percentage of income out of proportion to the business done within the state and so

violated the due process and equal protection of the law clauses of the Fourteenth Amendment of the Federal Constitution.

On the other hand, defendant urges that the three factor formula he adopted in reallocating plaintiff's net income earned in its unitary business is recognized as a reasonable method of apportionment, *Butler Brothers v. McColgan*, supra, 17 Cal.2d 664, 677, 111 P.2d 334, affirmed 315 U.S. 501, 509, 62 S.Ct. 701, 86 L.Ed. 991; *Edison California Stores, Inc. v. McColgan*, 30 Cal.2d 472, 479, 183 P.2d 16, and is most frequently used throughout the states in working out allocation problems, *Silverstein, Problems of Apportionment in Taxation of Multistate Business*, 4 *Tax Law Review* (1949), 207, 258; *Altman and Keesling, Allocation of Income in State Taxation* (1946), pp. 37, 107-108; that the act authorizes the exercise of discretion in the adoption of an allocation formula deemed appropriate to the tax problem at hand in determining the income derived from business done within the state; and that his reallocation formula based upon *three* rather than five factors, omitting as an independent item plaintiff's purchase transactions and reassigning the sales' values attributable to California activities, fairly apportioned plaintiff's income within and without the state and so is free from constitutional objection. We have concluded that the trial court properly found in accordance with defendant's views, consistent with his statutory power and the reasonableness of his procedure.

[3] The fact that defendant's reallocation formula was based on only three of the five factors specified in section 10 of the act did not constitute a violation thereof, for under its express provisions the "commissioner is authorized to determine the net income derived from business done within this state by an allocation upon those specified factors, 'or by reference to these or other factors, or by such other method of allocation as is fairly calculated to assign to the state the portion of net income reasonably attributable to the business done within this State * * *.'" *Pacific Fruit Express Co. v. McColgan*, 67 Cal.App.2d 93, 104-105, 153 P.2d 607, 613. While in

the cited case the particular nature of the taxpayer's unitary business required special treatment and a three factor formula consisting of property, payroll, and mileage (the latter item in lieu of sales) was deemed applicable, the wording of the section does not indicate that the commissioner's power to adopt a formula is restricted to such limited factual situation, in which the general formula mentioned in the section would be inappropriate as a tax base in the measure of the taxpayer's business activities. On the contrary, the broad language of the section indicates that the factors therein designated are suggestive, but not mandatory or exclusive, and that the commissioner is empowered in his discretion to choose such tax base for his formula allocation as will carry out the act's purpose to achieve a proper apportionment of business done within and without the state, and at the same time avoid double taxation.

[4] Nor does the legislature's grant of such authority to the commissioner consistent with the flexible administration of the act constitute an unlawful delegation of power and render the act unconstitutional in that respect. So pertinent is the precise wording of the governing constitutional provision pursuant to which the act was adopted in 1929, Art. XIII, sec. 16, subd. (5), stating that "the legislature shall *define* 'corporations' * * * shall *define* 'net income' [but] shall *provide for the allocation of income* * * *." (Emphasis added.) Had it been the intent that the legislature should make the specific allocation, it would seem that the constitutional provision would have read "shall allocate" rather than "shall provide for the allocation of" income. Accordingly, in delegating to the commissioner the power of determining the formula to be used in apportioning the net income earned from business done within and without the state, the legislature has "provided for" the allocation of income within the meaning of the constitutional provision. *Pacific Fruit Express Co. v. McColgan*, supra, 67 Cal.App.2d 93, 101-102, 153 P.2d 607. Moreover, it has been held under similar provisions of the Constitution, Art. XIII, sec. 14, subd. (d), authorizing the imposition of the old corporation

franchise tax, that the legislature need not prescribe the exact method by which the tax is to be fixed, but "may delegate to its taxing officers the power to adopt a suitable method." *Utah Construction Co. v. Richardson*, 187 Cal. 649, 652, 203 P. 401, 402. The essential requirement is the legislature's specification of a standard—"an intelligible principle to which the person or body authorized to [administer the act] is directed to conform", *Hampton Jr. & Co. v. United States*, 276 U.S. 394, 409, 48 S.Ct. 348, 352, 72 L.Ed. 624—but it may leave to the administrative agency the precise determination necessary to bring the standard into operation. Section 10 complies with this principle in "calling for a method of allocation which is 'fairly calculated' to assign to California that portion of the net income 'reasonably attributable' to the business down there." *Butler Brothers v. McColgan*, supra, 315 U.S. 501, 506, 62 S.Ct. 701, 704, 86 L.Ed. 991.

[5] The three factor formula of property, payroll, and sales here applied by defendant in the apportionment of plaintiff's unitary business within and without the state has been recognized as sufficiently diversified to "reflect 'the relative contribution of [out-of-state] activities * * * to the production of the total unitary income', so as to allocate to California its just proportion of the profits earned * * * from [a] unitary business", *Butler Brothers v. McColgan*, supra, 315 U.S. 501, 509, 62 S.Ct. 701, 86 L.Ed. 991, and its "fairness" has been declared "settled", *Edison California Stores, Inc. v. McColgan*, supra, 30 Cal.2d 472, 479, 183 P.2d 16, consistent with practical administrative difficulties that necessarily arise in fixing upon a workable formula for general application. Cf. *Butler Brothers v. McColgan*, supra, 17 Cal.2d 664, 677, 111 P.2d 334. Although the principal issue in these cited cases was whether the taxpayer's business activities within and without the state were such as to render the formula allocation rather than a separate accounting method appropriate for the admeasurement of the franchise tax, nevertheless in resolving such controversial point the fairness and reasonableness of the specific three factor formula here in ques-

tion was a necessary consideration in sustaining the propriety of the commissioner's tax assessment upon the apportioned tax base. *Gwinn v. Hamilton*, 75 Cal. 265, 266, 17 P. 212; *Cameron v. United States*, 9 Cir., 250 F. 943, 947.

[6,7] Plaintiff argues the import of an official order addressed to it from defendant's office in 1933, directing it to use the five factor formula in the allocation of its income for franchise tax purposes, but such directive would not estop defendant from adopting another formula for the measurement of the tax in conformity with the standard established by the statute. *California Employment Commission v. Black-Foxe Institute*, 43 Cal.App.2d Supp. 868, 876, 110 P.2d 729. One of defendant's auditors testified at the trial that in the years following 1933 it was the "Commissioner's practice to use the three factor formula generally," and in line therewith the record shows that for the taxable year immediately preceding the years here involved, that is 1934, plaintiff was advised by defendant that its allocation would be made on the three factor tax base. Such long continued practice in the handling of thousands of allocation problems since the cited year 1933 was presumably within the knowledge of the legislature and yet it made no modification in section 10 of the act which would require a different construction as to defendant's authority thereunder, *Stats.1935*, p. 965, *Stats.1939*, p. 2944—a strong factor indicating that the administrative practice was consistent with the legislature's intent relative to the commissioner's power in carrying out the allocation principle of the section. *Coco-Cola Co. v. State Board of Equalization*, 25 Cal.2d 918, 922, 156 P.2d 1, and cases cited; *People v. Universal Film Exchange*, 34 Cal.2d 649, 213 P.2d 697; see, also, *White v. Winchester Country Club*, 315 U.S. 32, 41, 62 S.Ct. 425, 86 L.Ed. 619. As section 10 is so construed, it necessarily must be concluded that defendant's application of the three factor formula as a preferred general practice is not open to objection as an unauthorized exercise of power so long as it produces the desired proportionate result directed by the statute and at the

same time avoids subjecting the taxpayer to double taxation. To this latter point it need only be said here that it is undisputed that plaintiff, on the basis of its business activities during the years involved in this case, "paid [no] taxes in any state other than California." Cf. *Southern Pacific Co. v. McColgan*, supra, 68 Cal.App.2d 48, 52-53, 156 P.2d 81.

[8, 9] There now remains for consideration the constitutional challenge to defendant's reallocation of plaintiff's net income upon the claim that such procedure produced an arbitrary assessment in unreasonably assigning to California taxable values not attributable to business done within the state. As above noted, defendant's reallocation formula embraced only three of the factors mentioned in the statute—property, payroll, and sales—and omitted the other two—purchases and expenses of manufacture. Complaint is made only as to the first mentioned omission—purchases. In this regard reference is made to the testimony of plaintiff's secretary that the "company's profits came from three primary sources: purchase of raw material, manufacturing, and sales," and that the favorable buying of copra in the Philippine Islands did "definitely increase the profit; a decrease of cost increases profit." Accordingly, it is argued that defendant's reallocation formula, excluding plaintiff's "foreign purchases" as a separate factor, did not result in a proper apportionment of plaintiff's unitary business but rather denied plaintiff the benefit of a saving it effected through an income-producing activity without the state—an "exclusion [which] worked to decrease the out-of-state profits and increase the within state profits or income for taxation purposes." But conceding that plaintiff's "foreign purchases" contributed to the profits of its overall business, it does not appear that defendant, though excluding such item as an independent factor in the reallocation formula, failed to take it into account in the apportionment of plaintiff's activities within and without the state. Thus, in the *payroll* factor allowance was made for compensation paid to plaintiff's employees who were engaged in purchasing activities in the

Philippine Islands, and in the *property* factor the value of the foreign purchases of copra awaiting shipment or en route to plaintiff's manufacturing plant in the state was taken into account upon the estimate of plaintiff's total property holdings within and without the state, in the proportionate evaluation of plaintiff's integrated business. While it may be that such consideration was not equivalent to separate identification of the purchase item in the tax base, nevertheless it cannot be denied that the three factor reallocation formula in its application to plaintiff's business for the determination of its franchise tax represented an honest effort on the part of defendant "to reach only the profits earned within the state," *Underwood Typewriter Co. v. Chamberlain*, supra, 254 U.S. 113, 121, 41 S.Ct. 45, 47, 65 L.Ed. 165, and reflected with reasonable fairness a proper balance of plaintiff's respective activities in their relative contribution to plaintiff's total income. *Matson Nav. Co. v. State Board of Equalization*, supra, 3 Cal.2d 1, 8, 43 P.2d 805.

No method of allocation can precisely determine the exact amount of income attributable either to any given geographic area or to any given part of a series of business transactions culminating in the realization of a profit, and "any effort" in that regard "must be more or less arbitrary and fictitious," *Gorham Mfg. Co. v. Travis*, D.C., 274 F. 975, 978, as a matter of practical tax administration. In short, as was recently said by the Supreme Court of the United States in sustaining the validity of a franchise tax assessment, the "practical impossibility of a state's achieving a perfect apportionment of expansive, complex business activities * * * [makes] 'rough approximation rather than precision' * * * sufficient" in the formula allocation of income from a unitary business. *International Harvester Co. v. Evatt*, 329 U.S. 416, 422, 67 S.Ct. 444, 447, 91 L. Ed. 390. Within this principle, plaintiff's "foreign purchases" received reasonable consideration in defendant's apportionment of plaintiff's net income on the three factor tax base.

[10] Nor is there merit in plaintiff's constitutional objection to defendant's reallocation formula because of its assignment of 100 per cent of plaintiff's sales to California, contrary to plaintiff's contention that only its sales to California customers were so classifiable. It appears that plaintiff's out-of-state sales generally followed this pattern: the sales contract would be prepared by an independent broker, usually in Chicago, where "the principal brokers trading in [cocoanut oil and meal] held their offices"; copies of the contract would be simultaneously transmitted to plaintiff and to the buyer for signature—with plaintiff as seller executing one copy first, then returning it to the broker, who thereupon "passed [it] to the buyer for" signing, which would be "done out of state," and "so signed," the "copy came back to [plaintiff] * * * from the buyer direct or through the broker, usually through the [latter channel]"; shipment would then be made on the buyer's request over routes mutually agreeable, f. o. b. California; the bill of lading would be drawn to plaintiff's order, endorsed by plaintiff, and sent with a sight draft through plaintiff's bank to the correspondent bank in the city where the buyer was located; the buyer "would pay the draft, take up the bill of lading and take delivery" of the shipment upon arrival. As above stated, plaintiff did not have any sales office outside of California and had "no * * * employees outside of the state who made * * * sales"; and all "proposals for sales" received from out-of-state brokers, or otherwise, were "canvassed" and "acted upon" at "daily" meetings held by plaintiff's "executive committee" in its California office. One of defendant's auditors testified at the trial that it had been "the practice of the Franchise Tax Commissioner, since at least 1930 * * *, in [the] case of a corporation manufacturing goods in California which has no employees engaged in sales activities outside of California to treat the sales of that corporation as California sales regardless of whether title to the goods was transferred outside of the state of California or within the state."

Plaintiff maintains that such sales were not properly allocable to California because

consummated without the state—the contract was signed by the buyer without the state, and payment and delivery took place without the state. But disregarding the argument that "the property in the goods" sold by plaintiff "passed to the buyer" on delivery to the railroad carrier in California and the "bill of lading" was in form in favor of plaintiff "only for the purpose of securing" payment by the buyer in "performance * * * of his obligations under the contract," so as to make such sale one in fact consummated in California, Civ. Code, sec. 1740, subd. (2); Uniform Sales Act, it must be remembered that the tax problem here in question concerns not a sales tax upon the transaction itself but a franchise tax assessment measured by plaintiff's net income derived from business done within this state. Accordingly, the focal point for consideration is the place where the activities of the corporation occurred which resulted in the sales. This precise matter was at issue in the case of *Irvine Co. v. McColgan*, 26 Cal.2d 160, 157 P.2d 847, 167 A.L.R. 934, where the plaintiff taxpayer, a foreign corporation authorized to do business within the state, sought an allocation of its net income for franchise tax purposes on the claim that it shipped a portion of its agricultural crop, all of which was grown in this state, "directly to purchasers in other states upon orders obtained or sales made therein by independent produce brokers", 26 Cal.2d at page 168, 157 P.2d at page 852, 167 A.L.R. 934—a method of marketing which in its opinion constituted the transaction of business without the state. Plaintiff in that case admittedly had no employees outside the state and the proceeds from all its sales were received here. Accordingly this court, in rejecting plaintiff's theory as to its franchise tax liability for business done within this state, continued, 26 Cal.2d at page 168, 157 P.2d at page 852, 167 A.L.R. 934: "The argument that plaintiff is entitled to an allocation because the latter sales partook of the nature of transactions in interstate commerce, is successfully countered by the argument that plaintiff's entire business was done within this state since *all of its activities giving rise to income from interstate sales were carried on*

in California." (Emphasis added.) A parallel situation exists here insofar as plaintiff's out-of-state sales are concerned, with "all of *its* activities giving rise to income" therefrom—its passing upon the sales in executive committee meeting, its signing of the contracts, its shipment of the product, and its receipt of the proceeds—"carried on in California." In such circumstances the place where the buyer signed the contract with plaintiff or took delivery of the shipment from the carrier, *International Harvester Co. v. Evatt*, supra, 329 U.S. 416, 67 S.Ct. 444, 91 L.Ed. 390, or where title to the goods passed, *Montag Bros. Co. v. State Revenue Comm.*, 50 Ga. App. 660, 179 S.E. 563, affirmed 182 Ga. 568, 186 S.E. 558; *Trane Co. v. Wisconsin Tax Comm.*, 235 Wis. 516, 292 N.W. 897; see *Irvine Co. v. McColgan*, supra, 26 Cal.2d 160, 168, 157 P.2d 847, 167 A.L.R. 934, is not necessarily determinative of the sales situs for the purpose of computing the sales factor in the application of a "method of allocation * * * fairly calculated to assign to the State the portion of net income reasonably attributable to the business done within this State." Sec. 10.

In assailing defendant's reallocation formula as producing a wholly disproportionate result in the measurement of its net income from business done within and without the state, plaintiff mainly relies on these two cases: *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 129 N.E. 202, certiorari denied 256 U.S. 702, 41 S.Ct. 624, 65 L.Ed. 1179, and *Hans Rees' Sons v. State of North Carolina*, 283 U.S. 123, 51 S.Ct. 385, 75 L.Ed. 879. Both cases are readily distinguishable.

In the *Portland Cement Co.* case the question was whether the tax commissioner could constitutionally include within an allocation formula income received by the taxpayer—a foreign corporation—from stocks and bonds having a situs without the state and in nowise connected with the conduct of its unitary business. It was held that he could not since such income was clearly segregable "according to the situs of its origin" [230 N.Y. 48, 129 N.E. 205] and apart from the operations of the business, so that under constitutional limitations

it was subject to tax only in that state where it had its source. *Southern Pacific Co. v. McColgan*, supra, 68 Cal.App.2d 48, 57, 60, 156 P.2d 81. Here, in contrast, the tax problem concerns only income derived from the conduct of a unitary business, and the necessary use of a formula arises because of the recognized "impossibility of allocating specifically the profits earned by the processes conducted within [the state's] borders." *Underwood Typewriter Co. v. Chamberlain*, supra, 254 U.S. 113, 121, 41 S.Ct. 45, 47, 65 L.Ed. 165.

In the *Hans Rees'* case the formula method of allocating income earned by a unitary business was recognized as generally sound in application, but in that particular instance the formula employed, consisting of the single factor of property, failed to give proper weight to the extensive activities of the company without the state so that the result reached was unreasonable. There, by use of the formula, approximately 80 per cent of the entire income of the company, a foreign corporation, was allocated to the taxing state—"a percentage of income out of all appropriate proportion to the business transacted by the [company] in that state", 283 U.S. at page 135, 51 S.Ct. at page 389, 75 L.Ed. 879, in view of the company's evidence tending to show that for the years in question its average income having a source in its operations within the state was but 17 per cent, and in no event exceeded 21.7 per cent of its total business. Plaintiff here has made no such demonstration as to the unfairness of the result reached in the application of defendant's reallocation formula to its unitary business. See *International Harvester Co. v. Evatt*, supra, 329 U.S. 416, 423, 67 S.Ct. 444, 91 L.Ed. 390.

[11, 12] The "statute on its face carries [the] presumption of constitutionality which attaches to all legislative acts", *Maxwell v. Kent-Coffey Mfg. Co.*, 204 N.C. 365, 168 S.E. 397, 402, 90 A.L.R. 476, and "to rebut the presumption that the formula produced a fair result, 'the burden is on the taxpayer to make oppression manifest by clear, cogent evidence', *Norfolk & Western Ry. Co. v. [State of] North Carolina*, 1936, 297 U.S. 682, 688, 56 S.Ct. 625, 628, 80 L.

Ed. 977. * * * that more taxes have been exacted than in equity and good conscience should have been paid." *Pacific Fruit Express Co. v. McColgan*, supra, 67 Cal.App.2d 93, 96, 153 P.2d 607, 608. As the record has been here analyzed in the light of plaintiff's contentions, defendant's reallocation formula based on the three factor tax base—property, payroll, and sales—appears in its application to plaintiff's business, to have been an honest effort to apportion to California that part of plaintiff's net income fairly attributable to business done within this state, and to have given appropriate consideration to the various elements entering into the overall enterprise so as to be free from constitutional objection on the ground that it operated to tax extraterritorial values in violation of the due process and equal protection of the law clauses of the Fourteenth Amendment. It therefore follows that defendant's additional franchise tax assessments against plaintiff for the two years in question must be sustained. *Underwood Typewriter Co. v. Chamberlain*, supra, 254 U.S. 113, 41 S.Ct. 45, 65 L.Ed. 165; *Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm.*, 266 U.S. 271, 45 S.Ct. 82, 69 L.Ed. 282.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER and TRAYNOR, JJ., concur.

SCHAUER, J., concurs in the judgment.



34 Cal.2d 806

NATIONAL AUTOMOBILE & CASUALTY
INS. CO. v. AINGE et al.

L. A. 21290.

Supreme Court of California, in Bank,
Feb. 28, 1950.

The National Automobile and Casualty
Insurance Company, as a workmen's compen-

sation insurance carrier, sued Fannie S. Ainge and others for its subrogation rights and for damages suffered by an injured employee.

The Superior Court of Los Angeles County, Stanley N. Barnes, J., dismissed the action and the plaintiff appealed.

The Supreme Court, Shenk, J., held that the insurer's claim was not one which had to be filed against the decedent's estate before action could be maintained and that although action was barred by limitation as to the individual defendant it could be maintained against the estate.

Judgment dismissing action against Fannie Ainge as individual affirmed and judgment dismissing action as against Fannie Ainge as executrix reversed with directions.

For prior opinion see 209 P.2d 951.

1. Executors and administrators ⚡224

Statute providing that no holder of a claim against an estate shall maintain an action thereon unless claim is first filed with clerk or presented to executor or administrator applies only to contract claims. Probate Code, § 716.

2. Executors and administrators ⚡224

The phrase "arising upon contract" within statute requiring claims against a decedent's estate to be filed against estate before an action can be maintained thereon refers to contracts to which decedent was a party. Probate Code, § 707.

3. Executors and administrators ⚡224

Where employee was injured in automobile accident, claim of workmen's compensation insurance carrier as subrogee, against tortfeasor's estate was not one "arising upon contract" within statute requiring such claim to be filed against estate before action could be maintained thereon. Labor Code, §§ 3850-3862; Probate Code, § 707.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Arising Upon Contract".

4. Limitation of actions ⚡56(1)

Where Industrial Accident Commission made an award to injured employee on August 19, 1942, finding insurance carrier liable for workmen's compensation, suit filed by insurance carrier as subrogee

against individual tortfeasor on March 31, 1948, was barred under three-year limitation statute. Code Civ.Proc. § 338, subd. 1; Labor Code, §§ 3850-3862.

5. Workmen's compensation ☞2197

Under statute providing that a cause of action for reimbursement arises when insurance carrier pays or becomes obligated to pay compensation, it is not necessary that compensation payments be made before insurance carrier as subrogee can sue third party tortfeasor. Labor Code, § 3852.

6. Limitation of actions ☞83(2)

Action by workmen's compensation insurance carrier as subrogee against tortfeasor's estate commenced within one year after issuance of letters testamentary was not barred by one year statute of limitations. Code Civ.Proc. § 338, subd. 1, 353; Labor Code, §§ 3850-3862.

Robert McWilliams, Los Angeles, for appellant.

Reginald I. Bauder, W. I. Gilbert, Jr., Roger E. Kelly, Henry F. Walker and Everett W. Thompson, Los Angeles, for respondents.

SHENK, Presiding Justice.

This is an appeal by the plaintiff from a judgment dismissing the action.

The plaintiff is an insurance carrier. It paid workmen's compensation to an employee who was injured on March 27, 1942. It seeks reimbursement from the alleged wrongdoer under sections 3850 to 3862 of the Labor Code. It is claimed that the employee was injured by Gilbert Ainge who negligently ran over the employee with an automobile. Gilbert Ainge died on October 27, 1942. Fannie Ainge is sued as executrix of his estate. In a second cause of action directed against her individually it is alleged that she partly owned the automobile and that Gilbert Ainge was driving it with her consent. A general demurrer to both causes of action was sustained. Plaintiff declined to amend, and judgment of dismissal was entered pursuant

to section 581, subd. 3, of the Code of Civil Procedure.

The demurrer to the cause of action against the defendant as executrix was sustained on the ground that the complaint failed to allege that a claim had been filed against the estate. If filing a claim was necessary, the demurrer was properly sustained. *Morrison v. Land*, 1915, 169 Cal. 580, 585, 147 P. 259. The plaintiff argues that filing a claim was not necessary.

Section 716 of the Probate Code provides; "No holder of a claim against an estate shall maintain an action thereon, unless the claim is first filed with the clerk or presented to the executor or administrator, except * * *." The exception is not pertinent here. The defendant contends that this section prescribes a general rule applying to all types of claims. The plaintiff contends that it is limited by section 707 to cover only claims arising upon contract and that no claim need be filed here because the claim sounds in tort.

[1] That section 716 applies only to contract claims would seem to follow from a consideration of its historical background and from its application generally. The section is found originally in the Probate Act of 1851, 1851 Cal.Stats. 448, c. 124. The act set out the basic plan which is still in effect for payment of claims in probate. In the chapter on claims the opening section, section 128—now section 700 of the Probate Code, provided for publication of "notice to the creditors of the deceased, requiring all persons having claims against the deceased to exhibit them with the necessary vouchers, within ten months * * *." The sections that followed related to the type of claim dealt with in that opening section. Section 130 (now section 707 of the Probate Code) provided, "If a claim be not presented within ten months * * *, it shall be barred forever * * *." Section 132 (now section 710) provided for the manner of approving or rejecting a "claim." Section 134 (now section 714) said that if "a claim is rejected * * *, the holder shall bring suit * * * within three months * * *, otherwise the claim shall be forever barred." Section 136 contained what now appears in section

716 (quoted above). From the statute it is clear that the legislature was dealing only with claims of "creditors" as stated in the opening section. Though the language was reasonably clear some early cases hinted that tort claims must be presented. *Eustace v. Jahns*, 1869, 38 Cal. 3; *Coleman v. Woodward*, 1865, 28 Cal. 567. However all doubt was removed by the code amendments of 1873-1874 when what is now section 707 of the Probate Code was amended to read, "If a claim arising upon a contract heretofore made, be not presented * * *, it is barred forever * * *." At the time the present action was commenced section 707 read, "All claims arising upon contract * * * must be filed * * * [Any] claim not so filed * * * is barred forever * * *." Thus it is apparent that only claims "arising upon contract" as stated in section 707 were dealt with. Defendant's argument that the word "claim" in section 716 applies to all types of claims ignores the context and legislative history.

Ever since what is now section 707 was amended to include the phrase "arising upon contract", it has been regarded as defining what claims are meant by the other sections. In most cases this is implicit in the court's discussion. See *In re Estate of Hincheon*, 1911, 159 Cal. 755, 760, 116 P. 47, 36 L.R.A., N.S., 303; *Burke v. Maguire*, 1908, 154 Cal. 456, 462, 98 P. 21; *Morse v. Steele*, 1906, 149 Cal. 303, 304, 86 P. 693; *Bemmerly v. Woodward*, 1899, 124 Cal. 568, 574, 57 P. 561; *Hibernia Savings & Loan Soc. v. Wackenreuder*, 1893, 99 Cal. 503, 507, 34 P. 219; *Hays v. Bank of America, Nat. Trust & Savings Ass'n*, 1945, 71 Cal. App.2d 301, 303, 162 P.2d 679. All of those cases discuss what are now sections 707 and 716. See also 11A Cal.Jur. 682 et seq. Section 709 (requiring claims to be filed though action is pending) has been construed to be limited by section 707 to contract actions. *Thompson v. Byers*, 1931, 116 Cal.App. 214, 2 P.2d 496; *Millar v. Millar*, 1921, 51 Cal.App. 718, 728, 197 P. 811. Furthermore, section 716 has never been regarded as a bar to several kinds of suits not founded on contract. For example see *In re Estate of Dutard*, 1905,

147 Cal. 253, 256, 81 P. 519 (enforcing trust terms against property held by estate); *Kerns v. McKean*, 1884, 65 Cal. 411, 4 P. 404 (suit to recover real property from decedent's estate under forfeiture provision of purchase contract); *Back v. Farnsworth*, 1938, 25 Cal.App.2d 212, 77 P.2d 295 (replevin of specific property from estate); *Maguire v. Cunningham*, 1923, 64 Cal.App. 536, 548, 222 P. 838 (action to quiet title to real property claimed by decedent). Finally *Leverone v. Weakley*, 1909, 155 Cal. 395, 401, 101 P. 304 and *Hardin v. SinClaire*, 1896, 115 Cal. 406, 464, 47 P. 363 held that tort claims need not be filed. See also *Kagee v. Bencich*, 1938, 27 Cal.App.2d 469, 472, 81 P.2d 265. Defendant seeks to avoid the effect of the latter three cases because they did not discuss section 716. But their silence indicates again that section 707 is the section which defines the claims that must be filed.

Defendant argues that to limit section 716 to contract claims is to render it mere surplusage because section 707 provides that contract claims if not presented are "barred forever." But section 716 serves a distinct purpose. The original probate act set out a special procedure for paying claims by filing them with the executor. Section 130 (now section 707) provided a time limit for the availability of that special procedure. Section 136 (now section 716) dealt with regular civil suits and barred maintenance of them without first filing a claim. If the latter section were not present, a claimant could ignore the special probate procedure and commence his action. See *Quivey v. Hall*, 1861, 19 Cal. 97, 100, and *Pico v. De La Guerra*, 1861, 18 Cal. 422, 431. See also 11A Cal.Jur. 831-835.

The defendant relies on two cases to support his contention that tort claims must be filed. In *George v. McManus*, 1915, 27 Cal.App. 414, 418, 150 P. 73, the court mentioned in passing that section 716 applied to tort claims, although the issue was not before the court. In *Title Insurance & Trust Co. v. Gould*, 1920, 47 Cal.App. 533, 536, 191 P. 556, the court without discussion considered together a contract cause of action and a tort cause of action,

holding both were defective because no claim was filed. Language in those cases inconsistent with the views herein expressed is disapproved.

Section 707 has been amended since this action was commenced. 1949 Calif.Stats. 2400, c. 130. It now requires the filing of claims in certain tort actions, including the type here involved. The amendment is immaterial in the present action, however, since it does not purport to have retroactive effect.

[2,3] As an alternative the defendant contends that the plaintiff's claim is in reality founded on contract and therefore in any event is barred by section 716. The contention is without merit. It is true that the plaintiff is proceeding under an insurance contract. But the cause of action against the estate arose in tort. The language of section 707 referring to contracts means contracts with the decedent.

[4,5] The demurrer to the cause of action against the defendant as an individual was properly sustained on the ground that the statute of limitations had run. Plaintiff concedes that the maximum statutory period would be three years section 338, sub. 1, Code of Civil Procedure. On August 19, 1942, the Industrial Accident Commission made an award finding the plaintiff liable for workmen's compensation. Suit was filed March 31, 1948. At the latest, a cause of action arose on the date of the award. Under section 3852 of the Labor Code, a cause of action for reimbursement arises when the plaintiff "pays, or becomes obligated to pay compensation". Accordingly, it was not necessary that payments be made before plaintiff could sue. *Merino v. Pacific Coast Borax Co.*, 1932, 124 Cal.App. 336, 344, 12 P.2d 458.

[6] The statute of limitations had not run against the defendant as executrix even if a one year period is considered, section 340, subd. 3, Code of Civil Procedure. Gilbert Ainge died October 27, 1942, less than one year after his alleged wrongful act. Letters testamentary were not issued until September 24, 1947. Section

353 of the Code of Civil Procedure suspended the running of the statute until letters testamentary were issued and gave the plaintiff one year thereafter to bring suit.

The judgment dismissing the action against Fannie Ainge as an individual is affirmed. The judgment dismissing the action against Fannie Ainge as executrix is reversed with directions to overrule the demurrer and to allow time to answer.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



34 Cal.2d 772

LARSEN et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 21258.

Supreme Court of California, in Bank.

Feb. 24, 1950.

Proceeding by Oral E. Larsen and others, opposed by L. E. Dixon Company, employer, and Pacific Employers Insurance Company, insurer, to review an award of death benefits by the Industrial Accident Commission of the State of California.

The Supreme Court, Schauer, J., held that the deceased employee's mother-in-law and daughter were partial dependents entitled to death benefits, and that § 4702 of the Labor Code, limiting death benefits to \$6,000, except in the case of a surviving widow with one or more dependent minor children, applied to partially dependent minor children.

Award annulled, and cause remanded for further proceedings.

I. Workmen's compensation $\Rightarrow$ 469

A mother-in-law whose only income was \$23.23 a month in social security benefits, and who resided with employee and

his family and received room and meals, was a "partial dependent" within meaning of the Workmen's Compensation Act, and was entitled to benefits on death of employee. Labor Code, § 4702.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Partial Dependent".

2. Workmen's compensation ⇨462

A daughter who lived with her employed father and earned a take-home pay of about \$32, but because she was trying to save money contributed nothing to household expenses and received her room and board free, was a "partial dependent" within meaning of the Workmen's Compensation Act, and was entitled to benefits on death of father. Labor Code, § 4702.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Partial Dependent".

3. Workmen's compensation ⇨423

"Dependency" within meaning of the Workmen's Compensation Act does not mean absolute dependency for necessities of life, but it is enough that contributions of workman are looked to for support and maintenance of dependent's accustomed mode of living. Labor Code, § 4702.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Dependency".

4. Administrative law and procedure ⇨788

Workmen's compensation ⇨1939

Findings of the Industrial Accident Commission as to existence and extent of dependency entitling claimants to death benefits under the Workmen's Compensation Act will not be disturbed when supported by evidence in the record. Labor Code, § 4702.

5. Administrative law and procedure ⇨784

Workmen's compensation ⇨1939

Courts will annul a death benefit award based upon a finding of total dependency where evidence shows without contradiction that at time of deceased employee's injury another than deceased was making substantial contributions to the support of applicant; and the same rule will apply where a finding of no dependency is

based upon evidence which without contradiction shows partial dependency. Labor Code, § 4702.

6. Administrative law and procedure ⇨784, 786, 788

Workmen's compensation ⇨1939

Findings of the Industrial Accident Commission in a workman's compensation case will not be disturbed by an appellate court if based upon some evidence or upon conflicting evidence; but where there is no evidence to support a finding, review may be had on the theory that the Commission had no jurisdiction to make it. Labor Code, § 4702.

7. Workmen's compensation ⇨924

Under provision of the Workmen's Compensation Act limiting death benefits to stated amount except in case of surviving widow with one or more "dependent minor children", quoted phrase includes partially dependent children. Labor Code, §§ 3201, 3501-3503, 4700-4706; Const. art. 20, §§ 17½, 21.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Dependent Minor Children".

8. Statutes ⇨184

Language of a statute must be construed to effect its evident object and purpose.

Riedman & Silverberg, Fred M. Riedman and Milton H. Silverberg, Long Beach, for petitioners.

T. Groezinger, Kearney, McCartney, Scott & Clopton and Howard J. Scott, Los Angeles, for respondents.

SCHAUER, Justice.

Petitioners, surviving members of the household of an employe who suffered fatal injury in the course and scope of his employment, seek review of an award of death benefits. They contend that the evidence before the Industrial Accident Commission does not support its finding that the employe's daughter was not dependent upon him for support; that such evidence requires a finding that she was partially de-

pendent; and that the amount of the award should be increased. With these contentions we agree.

[1] Petitioners are the employee's widow, their 19 year old daughter, and the employee's mother-in-law. After hearing on petitioners' application for adjustment of claim for death benefits, the Industrial Accident Commission found that the widow was wholly dependent,¹ that the mother-in-law was partially dependent,² and that the daughter was not dependent.³ It made an award to the widow of \$6,000, the maximum benefit permitted by statute (Lab. Code, § 4702) under the findings.

The evidence which requires a finding that the daughter was partially dependent is as follows: "that the daughter made \$37.00 a week ["take home pay of about \$32"], and that she supported herself, and because she was trying to save money contributed nothing to the household expenses and received her room and board free." Whether she was successful in her effort to save money does not appear. There is no direct evidence of the value of the board and room which the employee gave his daughter; however, it was stipulated that the value of the substantially similar contributions of necessities to his mother-in-law was \$72 a month and, based upon this stipulation, the commission found that the annual amount devoted by him to support of the mother-in-law was \$864.

[2, 3] It is apparent that at the time of his injury the deceased was contributing substantially the same necessities of life to his mother-in-law and to his daughter, and that each of the latter (the mother-in-law through use of her social security income and the daughter through use of at

least part of her earnings) contributed to her own support. Although the daughter, unlike the mother-in-law, might have been able to purchase for herself the bare necessities of life without aid from deceased, both mother-in-law and daughter were partially dependent within the meaning of the workmen's compensation act. Dependency within the meaning of the act "does not mean absolute dependency for the necessities of life; it is sufficient that contributions of the workman are looked to for support in the maintenance of the dependent's accustomed mode of living." (1916A L.R. A., p. 248, quoted with approval in *London G. & A. Co. Ltd. v. Industrial Acc. Comm.* (1927), 203 Cal. 12, 16, 263 P. 196, 198; *London Guar. Co. v. Industrial Acc. Comm.* (1943), 57 Cal.App.2d 616, 619, 135 P.2d 7, 9. This view, it has been said, is that of the majority of jurisdictions. (See 58 Am. Jur., *Workmen's Compensation*, § 163.) In *London Guar. Co. v. Industrial Acc. Comm.* (1943), supra, it is further said that the facts "that the deceased may have furnished the applicant with most of what may be termed the necessities of life and that the applicant expended most of her earnings upon what may be termed the luxuries of life" and "that after the death of the deceased, the applicant could no longer maintain the same standard of living without assistance" "show a case of partial dependency rather than of total dependency."

[4-6] Respondent insurer asserts that "the existence and extent of dependency are questions of fact for the Commission's determination except where controlled by statutory presumptions." (Lab.Code, § 3501, setting forth such presumptions, is not applicable to the daughter.) We fully recognize that such findings will not be

1. There is no question of the total dependency of a wife who was living with her husband at the time of his injury; it is "conclusively presumed" (Lab.Code, § 3501).

2. Petitioners state that there is a question "whether [the mother-in-law] is not a total dependent" but they present no argument or authorities in support of this assertion. It is clear that the following evidence supports the finding that the mother-in-law was only partially de-

pendent: She resided with deceased and his family; the extent of his contribution to her support was to supply her with room and meals; "She gets \$23.23 a month from the social security * * * and she had no other income."

3. Counsel for the Industrial Accident Commission now concede that the undisputed evidence establishes as a matter of law that the daughter of deceased, at the time of his injury, was partially dependent upon him.

disturbed when supported by evidence in the record (see 27 Cal.Jur., Workmen's Compensation, § 25). But the courts of this state have not hesitated to annul a death benefit award based upon a finding of total dependency, and to point out that the case was one of partial dependency only, where the evidence showed without contradiction that at the time of deceased's injury another than deceased was making substantial contributions to the support of applicant. (*Tuttle v. Industrial Acc. Comm.* (1939), 31 Cal.App.2d 279, 282, 87 P.2d 881; *London Guar. Co. v. Industrial Acc. Comm.* (1943), *supra*, page 619 of 57 Cal.App.2d, 135 P.2d at page 8.) The case should be the same where a finding of no dependency is based upon evidence which without contradiction shows partial dependency. "Findings of the Commission will not be disturbed by an appellate court if based upon some evidence, or upon conflicting evidence, but as said in *Pruitt v. Industrial Acc. Comm.*, 189 Cal. 459, 466, 209 P. 31, where there is no evidence to support a finding, a review may be had on the theory that the Commission had no jurisdiction to make it." (*Owl Drug Co. v. Industrial Acc. Comm.* (1925), 71 Cal.App. 303, 306, 234 P. 921, 923 [finding of partial dependency but no evidence of dependency; award annulled and cause remanded]; see, also, *Sada v. Industrial Acc. Comm.* (1938), 11 Cal.2d 263, 269-270, 78 P.2d 1127 [finding of partial dependency; evidence did not support finding as to extent of dependency; award annulled and cause remanded]; *State Comp. Ins. Fund v. Industrial Acc. Comm.* (1931), 112 Cal.App. 329, 297 P. 38 [same].)

[7] Respondent insurer urges that, even if it be concluded that the evidence establishes partial dependency of the daughter, remand of the cause to the commission for further proceedings is unnecessary and improper because the award of \$6,000 is the maximum permitted by statute. In this contention the insurer is mistaken. Section 4702 of the Labor Code (as amended in 1947) provides in material part that "the death benefit * * * shall not exceed * * * the sum of six thousand dollars (\$6,000), except in the case of a surviving

widow with one or more dependent minor children, in which case the death benefit shall not exceed seven thousand five hundred dollars (\$7,500) * * *." It is the position of the insurer that the phrase "dependent minor child" in the quoted portion of section 4702 means *totally* dependent minor child. However, in other sections of the Labor Code which concern benefits to dependents (§§ 3501-3503, 4700, 4701, 4703-4706) and in section 4702 as it read before the 1947 amendment which added the provision under discussion, the unmodified word "dependent" includes both one partially and one totally dependent; the words "partially" and "totally" or "wholly" are always used when reference is to one or the other class of persons dependent. There appears to be no reason why, in the 1947 amendment of section 4702, the general term "dependent" should be understood as limited to those totally dependent.

[8] But if there be any question whether the word "dependent" includes those partially dependent, section 4702 should be construed liberally to extend coverage to partially dependent minor children. The section is in Division IV of the Labor Code. "Division IV and Division V of this code are an expression of the police power and are intended to make effective and apply to a complete system of workmen's compensation the provisions of sections 17½ and 21 of Article XX of the Constitution of this State." (Lab.Code, § 3201.) "A complete system of workmen's compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workmen *and those dependent upon them for support* to the extent of relieving them from the consequences of any injury or death incurred or sustained by workmen in the course of their employment, irrespective of the fault of any party * * *." (Cal.Const., art. XX, § 21.) (Italics added.) "The cardinal rule of statutory construction is * * * well settled, to the effect that the language of an act must be construed to effect its evident object and purpose * * *. The object and purpose of the workmen's compensation * * * laws is so clearly stated in the

[above quoted language of the state Constitution] that there can be no mistake concerning the purpose aimed to be accomplished." (Harlan v. Industrial Acc. Comm. (1924), 194 Cal. 352, 361, 228 P. 654, 658.

For the reasons above stated the award is annulled and the cause is remanded to the commission for appropriate further proceedings to include determination of the amount by which the death benefit should be increased.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SPENCE, JJ., concur.



34 Cal.2d 838

WARNER v. WARNER et al.

L. A. 20913.

Supreme Court of California, in Bank.

March 3, 1950.

Action by Anita Lipton Warner against Thomas William Warner, Jr., also known as T. W. Warner, Jr., and others, for separate maintenance.

From an order of the Superior Court for Los Angeles County, Stanley Mosk, J., awarding plaintiff's counsel \$10,000 counsel fees pendente lite the named defendant appealed.

The Supreme Court, Traynor, J., held that the trial court performed its statutory duty in fixing the award for counsel fees according to the value of services to be anticipated and that the award of \$10,000 for services was not an abuse of discretion.

Order affirmed.

Schauer, J., dissented.

Prior opinion, see 207 P.2d 622.

1. Appeal and error ⚡984(1, 5)

The allowance of alimony or attorney's fees pendente lite and amount thereof are questions for the trial court and its order will not be set aside unless there is clear

evidence that there has been an abuse of discretion. Civ.Code, § 137.

2. Divorce ⚡221

Husband and wife ⚡295

The statute providing that during pendency of an action for divorce or separate maintenance the court may require spouse to pay as alimony or as costs of action or as attorney's fees, any money necessary for prosecution of the action, is designed to enable wife to secure adequate representation to prosecute or defend the suit and to meet the legal expenses and fees as she can reasonably be expected to incur in that prosecution or defense. Civ.Code, § 137.

3. Divorce ⚡221

Husband and wife ⚡295

The allowance of fees under the statute for prosecution or defense of an action for divorce or separate maintenance is prospective in nature and the statute gives the court no authority to base an award on past services. Civ.Code, § 137.

4. Divorce ⚡227(1)

Husband and wife ⚡295

In making an award in action for divorce or separate maintenance of counsel fees under the statute, trial court must take into account the extent to which the action may be contested, the size of the marital estate, difficulties attending a determination of the value of the property and its classification as separate and community, and award is based upon value of services that can thus be anticipated. Civ.Code, § 137.

5. Husband and wife ⚡295

In an action for separate maintenance trial court in making an award of attorney's fees to the wife properly fixed the award according to the value of the services to be anticipated. Civ.Code, § 137.

6. Divorce ⚡225, 229

Husband and wife ⚡295

In making an award for counsel fees in action for separate maintenance or divorce, possibility that contingencies might occur making anticipated legal services unnecessary does not preclude court from making the allowance in the first instance, and after a pendente lite award has been made, trial court retains jurisdiction to

modify the award at any time during the pendency of the action when a change of circumstances occurs that alters extent of the services required. Civ.Code, § 137.

7. Divorce ☞229

Husband and wife ☞295

In making a pendente lite award for counsel fees in action for separate maintenance and divorce, should any of the contingencies occur that would preclude rendition of the anticipated legal services, trial court could reduce the award to an amount necessary to compensate the attorney for services actually rendered. Civ.Code, § 137.

8. Husband and wife ☞295

\$10,000 counsel fees pendente lite for wife's counsel in wife's separate maintenance action was not an abuse of discretion and should not have been reduced in view of extensive assets of the husband and fact that trial of plaintiff's action would be long and bitterly contested. Civ.Code, § 137.

Manuel Ruiz, Jr., Fink, Rolston, Levinthal & Kent, Los Angeles, and Nelson Rosen, Hollywood, for appellant.

Gold & Needleman, J. George Gold, James J. Needleman, Pacht, Warne, Ross & Bernhard, Isaac Pacht and Bernard Reich, Beverly Hills, for respondent.

TRAYNOR, Justice.

Plaintiff brought an action for separate maintenance. After a hearing on an order to show cause, the trial court ordered defendant to pay plaintiff \$500 per month temporary alimony, to give her the occupancy of the twenty-two room family home, and "to pay the attorney for the plaintiff \$10,000.00, \$2500.00 on August 25, 1948, September 25, 1948, October 25, 1948 and November 25, 1948. It is stipulated that balance of attorney fees be fixed at time of trial." Defendant appeals from that part of the order relating to the allowance of attorney's fees pendente lite.

[1] Defendant does not dispute that the allowance of alimony or attorney's fees pendente lite under Civil Code section 137, and the amount thereof, are questions for

the discretion of the trial court, and that its order will not be set aside on appeal unless there is clear evidence that there has been an abuse of discretion. *Comey v. Comey*, 8 Cal.2d 453, 66 P.2d 148; *Sword v. Sword*, 3 Cal.2d 266, 268-269, 44 P.2d 315; *Baldwin v. Baldwin*, 28 Cal.2d 406, 418, 170 P.2d 670; *Stewart v. Stewart*, 156 Cal. 651, 655, 105 P. 955; *Furniss v. Furniss*, 75 Cal.App.2d 138, 141, 170 P.2d 486; *Busch v. Busch*, 99 Cal.App. 198, 201-202, 278 P. 456. He does not question the sufficiency of the evidence to support the implied findings of the trial court that he is financially able to pay the fees and that his wife is not. *Mudd v. Mudd*, 98 Cal. 320, 321, 33 P. 114; *Westphal v. Westphal*, 122 Cal.App. 388, 390, 10 P.2d 122. He contends only that the trial court abused its discretion in ordering the payment of an amount that bears no relation to services already performed but is based entirely upon an estimate of the services that can be reasonably anticipated as necessary. He contends that a pendente lite award of attorney's fees is in the nature of a retainer and that the actual fees are to be fixed after the trial of the action, when the trial court can determine the value of the legal services actually rendered. In his view it is an abuse of discretion to base an award upon an estimate of the value of the services that may be anticipated, given the possibility that those services will not be rendered in the event of reconciliation or death of one of the parties or death of counsel.

[2,3] Defendant's contention is based on a misconception of the nature of pendente lite awards. Civil Code section 137 provides in part: "During the pendency of any such action [for divorce or separate maintenance] the court may, in its discretion, require the husband or wife, as the case may be, to pay as alimony or as costs of action or as attorney's fees any money necessary for the prosecution of the action * * *." The statute is designed to enable the wife to secure adequate representation to prosecute or defend the suit and to meet the legal expenses and fees that she can reasonably be expected to incur in that prosecution or

defense. The allowance of fees under Section 137 is therefore limited to those essential to such prosecution or defense and is necessarily prospective in nature. Section 137 gives the court no authority to base an award on past services. *Dixon v. Dixon*, 216 Cal. 440, 443, 14 P.2d 497; *Loveren v. Loveren*, 100 Cal. 493, 495, 35 P. 87; *Lacey v. Lacey*, 108 Cal. 45, 46, 40 P. 1056; *Stewart v. Stewart*, 32 Cal.App. 2d 148, 150, 89 P.2d 404; 1 Cal.Jur. 989, 995, 998; 27 C.J.S., Divorce, § 216, p. 912.

[4,5] In making its award the trial court must take into account the extent to which the action may be contested, the size of the marital estate, and the difficulties attending a determination of the value of the property and its classification as separate and community. Its award is based upon the value of the services that can thus be anticipated. *Sharon v. Sharon*, 75 Cal. 1, 39, 16 P. 345; *Schammel v. Schammel*, 74 Cal. 36, 38, 15 P. 364; *Brockmiller v. Brockmiller*, 57 Cal.App.2d 623, 626, 135 P.2d 184; *Stewart v. Stewart*, 32 Cal.App.2d 148, 150, 89 P.2d 404; see also, *Stillman v. Stillman*, 115 Misc. 106, 187 N.Y.S. 383, 389-390. It is not a retainer, which is a payment for undertaking the responsibility of the representation bearing no relation to the value of the services that can be anticipated and payable even though no services are actually rendered. *Knight v. Russ*, 77 Cal. 410, 412, 413, 19 P. 698. The trial court performed its statutory duty in fixing the award according to the value of the services to be anticipated.

[6,7] Defendant relies upon a dictum of the District Court of Appeal in *Shopiro v. Shopiro*, Cal.App., 153 P.2d 62, 68, that supports his contention. This court granted a petition for hearing in that case, but the appeal was subsequently dismissed by stipulation of the parties. Defendant recognizes that the case is therefore of no value as precedent, but urges that its reasoning is persuasive. We cannot agree. The possibility that contingencies might occur that would make the anticipated services unnecessary does not preclude the court from making the allowance in the first instance. After a pendente lite

award has been made, the trial court retains jurisdiction to modify the award at any time during the pendency of the action when a change of circumstances occurs that alters the extent of the services required. "We entertain no doubt of the power of the court in divorce actions to modify its orders for the payment to the wife of money necessary to enable her to support herself during the pendency of the action, or to enable her to prosecute or defend the action, as the circumstances with regard to necessity change." *Nightingale v. Superior Court*, 184 Cal. 583, 194 P. 1002. Should any of the contingencies occur that would preclude rendition of the anticipated services, the trial court could reduce the award to an amount necessary to compensate the attorney for services actually rendered. *Glesby v. Glesby*, 73 Cal.App.2d 301, 307, 166 P.2d 347; *De Sylva v. Ballentine*, 87 Cal.App.2d 643, 645, 197 P.2d 359; *Chester v. Chester*, 76 Cal. App.2d 265, 272, 172 P.2d 924. *St. Laurent v. St. Laurent*, 35 Cal.App.2d 345, 346, 95 P.2d 475, is not inconsistent with this conclusion. The motion for modification in that case was not based on a change of circumstances but on a ground existing, at the time the award was made that should have been raised on appeal from the order. The case is not authority for the proposition that a trial court cannot modify its award to conform to a change of circumstances occurring during the pendency of the action but after the time for appeal from the order has expired.

[8] There is ample evidence to support the determination of the trial court that plaintiff's attorneys would be required to render services of the value of \$10,000 in the course of the pending action. Plaintiff testified that defendant had threatened to inflict bodily harm on her, had taken her automobile after she filed the action for separate maintenance, and had several times informed her that she would never get anything from him if she sued for divorce because his attorney was "too smart for her" and had hidden his assets so that she would never be able to locate them. Plaintiff's and defendant's estimates of his annual income varied widely,

but his income tax returns sustained her substantially higher estimate. Plaintiff testified that her husband was worth several million dollars. He denied this, but a financial statement that he submitted to the bank supported her estimate. There was ample evidence that defendant had interests of disputed value in several business firms, both in California and Mexico. She valued their family home at \$225,000; he contended that it was worth only \$85,000. There was a dispute over defendant's ownership of stocks and bonds and of a manufacturing company. Plaintiff testified that her husband had substantial property and business interests in Mexico; he denied that he had more than a few frozen assets of little value.

The trial court was justified in concluding that defendant's assets were extensive and valuable, that plaintiff's attorneys would find it exceptionally difficult to locate and appraise those assets, and that defendant would do his utmost to hinder their search. There was every indication that the trial of plaintiff's action would be long and bitterly contested. In view of these facts, we cannot say that the trial court abused its discretion in making the award. *Busch v. Busch*, 99 Cal.App. 198, 201-202, 278 P. 456; *Schammel v. Schammel*, 74 Cal. 36, 38, 15 P. 364. *Estate of Lundell*, 95 Cal.App.2d 352, 212 P.2d 914, is not in point. In that case, an order awarding \$12,000 extraordinary attorney's fees was reversed for the reason that the trial court abused its discretion in making the award without competent evidence to justify its conclusion that services of that value had been rendered.

The order is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, and SPENCE, JJ., concur.

CARTER, Justice.

I concur in the judgment of affirmance and generally in the reasoning of the majority, but I think it proper to call attention to the recent decision of the District Court of Appeal, Second Appellate District, Division One, in the *Estate of Lundell*, 95 Cal. App.2d 352, 214 P.2d 23, a hearing in which

case was denied by this court on February 23, 1950, as I think it is clear that the decision in the last mentioned case is in clear conflict with the holding of this court in the case at bar as well as the settled rule in cases of this character.

It has long been the rule in this state that in the allowance of attorneys' fees, or the determination of the value of legal services rendered by an attorney, the experience of the trial judge furnishes every element necessary to fix the value of services rendered by an attorney in handling a legal problem, *Elconin v. Yalen*, 208 Cal. 546, 282 P. 791; *City of Los Angeles v. Los Angeles-Inyo Farms Co.*, 134 Cal.App. 268, 25 P.2d 224; *Theisen v. Keough*, 115 Cal.App. 353, 1 P. 2d 1015; *Moore v. Maryland Casualty Co.*, 100 Cal.App. 658, 280 P. 1008; *Estate of Schnell*, 82 Cal.App.2d 170, 185 P.2d 854, and it is not necessary that expert evidence as to the value of such services be introduced. *Estate of Straus*, 144 Cal. 553, 77 P. 1122; *Kendrick v. Gould*, 51 Cal.App. 712, 197 P. 681; *Reid v. Warren Improvement Co.*, 17 Cal.App. 746, 121 P. 694; *Bowman v. Maryland Casualty Co.*, 88 Cal. App. 481, 263 P. 826; *Liebenguth v. Priester*, 64 Cal.App.2d 343, 148 P.2d 893; *Peebler v. Olds*, 71 Cal.App.2d 382, 162 P.2d 953. It also appears to be the settled rule that even if expert evidence is offered in such a case, it is not conclusive on the trial court. *Zimmer v. Kilborn*, 165 Cal. 523, 132 P. 1026, Ann.Cas.1914D, 368; *Spencer v. Collins*, 156 Cal. 298, 104 P. 320, 20 Ann.Cas. 49; *Lady v. Ruppe*, 113 Cal. App. 606, 298 P. 859; *Cullinan v. McColgan*, 87 Cal.App. 684, 263 P. 353; *Kirk v. Culley*, 202 Cal. 501, 261 P. 994; *Nylund v. Madsen*, 94 Cal.App. 441, 271 P. 374; *Libby v. Kipp*, 87 Cal.App. 538, 262 P. 68; *Estate of Schnell*, 82 Cal.App.2d 170, 185 P.2d 854; *Flynn v. Young*, 25 Cal.App.2d 614, 78 P.2d 245; *Mitchell v. Towne*, 31 Cal.App.2d 259, 87 P.2d 908.

In view of the rules of law announced in the authorities above cited, the decision of the District Court of Appeal in the *Estate of Lundell*, supra, is clearly unsound, and this court should have granted a hearing in that case in order to maintain uniformity in the decisions on this subject.

In my opinion, the respondent's position in the Estate of Lundell, *supra*, is much stronger and more in harmony with the authorities on the subject than the position of respondent in the case at bar, and it is impossible for me to reconcile the position of the majority of this court in voting to deny respondent's petition for a hearing in that case with their position in joining in the opinion which affirms the order of the trial court in the case at bar. The two positions are wholly irreconcilable and the attempt in the majority opinion to distinguish the Estate of Lundell from the case at bar greatly weakens the position of the majority and adds confusion to the law in this field.

SCHAUER, Justice.

I dissent. The complaint alleges that the parties were married on January 14, 1946; that they separated on July 28, 1948; and that there are no children of the marriage; the complaint was filed July 30, 1948; it further alleges that the extent of the community property is unknown but that "Plaintiff is informed and believes, and on such information and belief, alleges that the total value of Defendant's separate property is in excess of \$2,000,000.00." There was a stipulation that "upon the trial of the case on the merits the balance, if any, of counsel fees might be fixed."

Upon the above state of facts I am of the view that as a matter of law it was an abuse of judicial discretion to order \$10,000 to be paid on account of attorneys' fees before trial on the merits and largely in advance of the rendition of services of that value. There is no suggestion that there was any necessity, nor do the facts of the present record reveal any reasonable justification, for ordering payment of so large a sum in advance of trial on the merits. At the trial it may develop that under all the facts such a sum is grossly exorbitant, or fair, or quite inadequate; but requiring its payment in advance and on the record as it now stands is essentially speculative. As was well said by the District Court of Appeal in its unanimous opinion (speaking through Mr. Justice Drapeau) modifying the order appealed from: "If death or seri-

ous injury should happen to counsel involved, the defendant may be called upon to pay additional fees for preparation of plaintiff's case. There is the possibility of reconciliation between the spouses. This frequently happens, and the law is always hopeful that it may come to pass. In the event of an early reconciliation, obviously the fee named would be too much. Then, too, there is the possibility of death of one of the parties. Fees for legal services can be fixed by the trial court which finally hears the case with better regard for the rights of all parties concerned." (*Warner v. Warner* [1949], Cal.App., 207 P.2d 622, 624.)

I would either modify the order by reducing the advance payment, as did the District Court of Appeal, or reverse and remand for further proceedings *pendente lite*.



34 Cal.2d 793

**MARTIN SHIP SERVICE CO. v. CITY OF
LOS ANGELES et al.**

**HUTCHINSON v. CITY OF LOS
ANGELES et al.**

L. A. 20774, 20775.

Supreme Court of California, in Bank.
Feb. 28, 1950.

The Martin Ship Service Co., a California corporation, and William H. Hutchinson, doing business as California Ship Service, brought actions against the City of Los Angeles, a municipal corporation, and others for declaratory relief adjudging that license tax under city ordinance as applied to plaintiffs was unconstitutional because it unduly burdened interstate and foreign commerce.

The Superior Court of Los Angeles County, Ingall W. Bull, J., rendered judgments declaring the tax as applied to plaintiffs unconstitutional and enjoining its collection, and the defendants appealed.

The Supreme Court, Traynor, J., held that tax as applied to plaintiffs was not unconstitutional.

Judgments reversed.

Prior opinion 208 P.2d 389.

1. Commerce ⇨21

Activities of independent contractors engaged in furnishing maintenance and repair services to ships employed in interstate and foreign commerce were subject to regulation by Congress under the Commerce Clause. U.S.C.A. Const. art. 1, § 8.

2. Commerce ⇨10

In absence of contrary congressional action, state could regulate or tax activities of independent contractors engaged in furnishing maintenance and repair services to ships employed in interstate and foreign commerce, so long as regulation or tax did not unduly burden that commerce. U.S. C.A.Const. art. 1, § 8.

3. Commerce ⇨63

City ordinance imposing license fee on every person engaged in any occupation as an independent contractor, did not violate the commerce clause of the federal constitution as applied to independent contractors engaged exclusively in furnishing maintenance and repair services to ships employed only in interstate and foreign commerce while such ships were tied to docks or anchored in harbors within the state. U.S.C.A.Const. art. 1, § 8.

Ray L. Chesebro, City Attorney, Bourke Jones, Assistant City Attorney, and Lester L. Lev, Deputy City Attorney, Los Angeles, for appellants.

Ball, Hunt and Hart and Joseph A. Ball, Long Beach, for respondents.

TRAYNOR, Justice.

Section 21.190 of the Municipal Code of the City of Los Angeles provides that "Every person engaged in any trade, calling, occupation, vocation, profession or other means of livelihood, as an independent

contractor and not as an employee of another, and not specifically licensed by other provisions of this Article, shall pay a license fee in the sum of \$12.00 per calendar year or fractional part thereof for the first \$12,000 or less of gross receipts, and in addition thereto, the sum of \$1.00 per year for each \$1,000 or fractional part thereof, of gross receipts in excess of \$12,000." Payment of the license tax is a condition precedent to engaging in the enumerated occupations.¹ It is therefore exacted for the privilege of carrying on an occupation, and is measured by the gross receipts derived therefrom. *Union Pacific R. R. Co. v. City of Los Angeles*, 53 Cal.App.2d 825, 830, 128 P.2d 408.

Plaintiffs are independent contractors engaged exclusively in furnishing maintenance and repair services to ships employed only in interstate and foreign commerce while those ships are tied to docks or anchored in the harbors of Los Angeles, Newport-Balboa, Long Beach, San Diego, and Port Hueneme. The services consist of painting the ships, removing scale, cleaning tanks, chain lockers, and boilers, removing ballast, sandblasting ships' sides, and handling ships' stores by taking them from trucks of provision merchants at the dock, trucking them from the dock onto the ships and placing them in storerooms on board. Only gross receipts from these services on ships anchored or docked in Los Angeles harbor are included in the measure of the tax.

Plaintiffs brought these actions for declaratory relief, contending that the license tax as applied to them is unconstitutional on the ground that it unduly burdens interstate and foreign commerce and is therefore prohibited by the commerce clause of the United States Constitution. Art. 1, § 8. From a judgment declaring the tax as applied to plaintiffs unconstitutional and permanently enjoining its collection, defendant city appeals.

[1-3] It is undisputed that plaintiffs are engaged in local activities essential to in-

1. "§ 21.10. No person shall engage in any business, profession, trade or occupation, or perform any act, required to be li-

censed under the provisions of this Article until such license is first obtained."

terstate commerce. These activities are subject to regulation by Congress under the power granted to it by the commerce clause of the United States Constitution. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37-41, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352; *United States v. Darby*, 312 U.S. 100, 113, 657, 61 S.Ct. 451, 85 L.Ed. 609, 132 A.L.R. 1430; *Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.)*, 223 U.S. 1, 51, 32 S.Ct. 169, 56 L.Ed. 327, 38 L.R.A., N.S., 44; *Southern Pacific Co. v. Pillsbury*, 170 Cal. 782, 790, 151 P. 277, L.R.A.1916E, 916. In the absence of contrary Congressional action, however, the state may regulate or tax such activities so long as the regulation or tax does not unduly burden that commerce. *South Carolina State Highway Department v. Barnwell Bros.*, 303 U.S. 177, 184-185, 625, 58 S.Ct. 510, 82 L.Ed. 734; *Aero Mayflower Transit Co. v. Board of Railroad Com'rs*, 332 U.S. 495, 502-503, 68 S.Ct. 167, 92 L.Ed. 99; *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28, 37-39, 68 S.Ct. 358, 92 L.Ed. 455. The validity of the tax therefore does not depend solely on whether plaintiffs' activities are interstate or intrastate commerce. "In a case like this nothing is gained, and clarity is lost, by not starting with recognition of the fact that it is interstate commerce which the State is seeking to reach and candidly facing the real question whether what the State is exacting is a constitutionally fair demand by the State for that aspect of the interstate commerce to which the State bears a special relation." *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 661, 68 S.Ct. 1260, 1265, 92 L.Ed. 1633; *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 87, 68 S.Ct. 1475, 92 L.Ed.

1832; *Aero Mayflower Transit Co. v. Board of Railroad Commissioners*, 332 U.S. 495, 502, 68 S.Ct. 167, 92 L.Ed. 99; *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 256, 58 S.Ct. 546, 82 L.Ed. 823, 115 A.L.R. 944; *McGoldrick v. Berwind-White Co.*, 309 U.S. 33, 47, 60 S.Ct. 388, 84 L.Ed. 565, 128 A.L.R. 876; *Chicago Bridge & Iron Co. v. Johnson*, 19 Cal.2d 162, 172-173, 119 P.2d 945; *Barker Bros., Inc. v. City of Los Angeles*, 10 Cal.2d 603, 609, 76 P.2d 97. "Interstate business must pay its way", *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254, 58 S.Ct. 546, 548, provided it does not pay too much or too often. Since the tax imposed by the defendant does not make it do either, we are of the opinion that the judgments must be reversed.

In view of the recent decisions of the United States Supreme Court in *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 68 S.Ct. 1475, and *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 68 S.Ct. 1260, the city may clearly tax plaintiffs' local activities and the gross receipts therefrom. In *Memphis Natural Gas Co. v. Stone*, supra, the court sustained a state tax on a foreign corporation engaged exclusively in interstate commerce in operating gas lines through the state.² The tax was imposed on "the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system" and was measured by a proportion of the capital employed within the state. 335 U.S. at pages 82-83, 68 S.Ct. at page 1476. "Such local incidents form a sound basis for taxation by a state of foreign corporations doing interstate business. For example, we have upheld state taxes on sales after completion of the interstate transit,

2. Miss.Code § 9314: "For the year 1940 and annually thereafter, there shall be and is hereby imposed, levied and assessed upon every corporation, association or joint stock company, as hereinbefore defined, organized and existing under and by virtue of the laws of some other state, territory or country, or organized and existing without any specific statutory authority, now, or hereafter doing business within this state, as hereinbefore defined, a franchise or excise tax equal

to \$1.50 of each \$1,000.00 or fraction thereof of the value of capital used, invested or employed within this state, except as hereinafter provided. It being the purpose of this section to require the payment of a tax by all organizations not organized under the laws of this state, measured by the amount of capital or its equivalent, for which such organization receives the benefit and protection of the government and laws of the state."

McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 60 S.Ct. 388, 84 L.Ed. 565, 128 A.L.R. 876; on production of electricity for interstate commerce, Utah Power & Light Co. v. Pfof, 286 U.S. 165, 52 S.Ct. 548, 76 L.Ed. 1038, compare Fisher's Blend Station, Inc. v. Tax Comm., 297 U.S. 650, 655, 56 S.Ct. 608, 80 L.Ed. 956; a privilege tax on the operation of machines for the production of electricity to drive gas in interstate commerce, Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U.S. 604, 58 S.Ct. 736, 82 L.Ed. 1043; a use tax on rails shipped interstate for immediate incorporation into an interstate transportation system, Southern Pacific Co. v. Gallagher, 306 U.S. 167, 59 S.Ct. 389, 83 L.Ed. 586.

"We have upheld a franchise tax on a foreign corporation authorized to do business and making sales in a state other than its actual or business domicile, Ford Motor Co. v. Beauchamp, 308 U.S. 331, 60 S.Ct. 273, 84 L.Ed. 304; a privilege tax on a foreign corporation doing business in the state upon a proportion of property in the taxing state that was computed by using interstate commerce as an element, Hump Hairpin Co. v. Emmerson, 258 U.S. 290, 42 S.Ct. 305, 66 L.Ed. 622; Western Cartridge Co. v. Emmerson, 281 U.S. 511, 50 S.Ct. 383, 74 L.Ed. 1004; an excise on intrastate manufacturing, added to an ad valorem tax and measured by sales, including out of state, American Mfg. Co. v. St. Louis, 250 U.S. 459, 39 S.Ct. 522, 63 L.Ed. 1084, and see Powell, 60 Harv.L.Rev. 508, and 727, Freeman v. Hewit, 329 U.S. 249, 255, 67 S.Ct. 274, 91 L.Ed. 265; a license for

storing goods at rest in the state under a transit privilege, Independent Warehouses, Inc. v. Scheele, 331 U.S. 70, 67 S.Ct. 1062, 91 L.Ed. 1346." 335 U.S. 86, 68 S.Ct. 1478. In upholding the tax the prevailing opinion recognized that "This transportation by pipe line with deliveries within the state at wholesale only is interstate business", 335 U.S. at page 85, 68 S.Ct. at page 1477, but held that, notwithstanding this fact, "where the corporations carry on a local activity sufficiently separate from the interstate commerce state taxes may be validly laid, even though the exaction from the business of the taxpayer is precisely the same as though the tax had been levied upon the interstate business itself." 335 U.S. at page 87, 68 S.Ct. at page 1478. It is clear that it was not intended by this language to imply that the taxpayer was not engaged in interstate commerce in carrying on such an activity³ for the opinion goes on to say "But the choice of a local incident for the tax, without more, is not enough. There are always convenient local incidents in every interstate operation. Nippert v. City of Richmond, supra, 327 U.S. [416], at page 423, 66 S.Ct. 589, 90 L.Ed. 760, [162 A.L.R. 844]. The incident selected should be one that does not lend itself to repeated exactions in other states. Otherwise intrastate commerce may be preferred over interstate commerce" [citing Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 255, 58 S.Ct. 546, 82 L.Ed. 823, 115 A.L.R. 944]. Since the risk of repeated exactions in other states attends interstate, not intrastate commerce, it is obvious that the court regarded the

3. "To call commerce in fact interstate 'local commerce' because under a given set of circumstances, as in the Lehigh Valley case (Lehigh Valley R. Co. v. Pennsylvania), [145 U.S. 192, 12 S.Ct. 806, 36 L. Ed. 672], a particular exertion of State power is not rendered invalid by the Commerce Clause is to indulge in a fiction. Especially in the disposition of constitutional issues are legal fictions hazardous, because of the risk of confounding users and not merely readers. The kind of confusion to which the Lehigh Valley opinion has given rise results from employing a needless fiction—calling commerce local which in fact is interstate—as a manner

of stating that a particular exercise of State power is not invalid even though it affects interstate commerce. The difficult task of determining whether a phase of commerce, concededly interstate, is subject to a particular incidence of State regulation, through taxation or otherwise, is not lessened by calling interstate commerce local commerce in order to sustain its local control. To state this persistent and protean problem of our federalism in the form of a question-begging fiction, is not to answer it." Central Greyhound Lines v. Mealey, 334 U.S. 653, 659-660, 68 S.Ct. 1260, 1264.

activities in question, maintaining and keeping the pipe line system in repair, as interstate commerce and the tax as a legitimate one because it was apportioned.⁴

The local activities of the taxpayers in maintaining and keeping in repair ships that deliver cargo interstate are no more immune from state and local taxation than local activities in maintaining and keeping in repair pipe lines that deliver gas interstate. See, *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 69 S.Ct. 432. These local incidents of interstate commerce are separate and distinct from the "very process of interstate commerce", such as interstate transportation of commodities. They are carried on entirely within the harbor of Los Angeles. They are not free from local taxation merely because "interstate commerce could not be conducted without [them] * * *. These are events apart from the flow of commerce. This is a tax on activities for which the state, not the United States, gives protection and the state is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business." *Memphis Natural Gas Co. v. Stone*, supra, 335 U.S. at page 96, 68 S.Ct. at page 1483.

The present case cannot be distinguished on the ground that the tax is measured by gross receipts rather than by capital employed in the state, as in the *Memphis Natural Gas* case, for the United States Supreme Court has recently held that a state tax may be imposed on gross receipts from interstate transportation when apportioned to mileage within the taxing state. *Central*

Greyhound Lines, Inc. v. Mealey, 334 U.S. 653, 663, 68 S.Ct. 1260.

"All of these taxes in one way or another add to the expense of carrying on interstate commerce, and in that sense burden it; but they are not for that reason prohibited. On the other hand, local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional. The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable in point of substance, of being imposed [citations] or added to [citations] with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce * * *

"* * * Taxation measured by gross receipts from interstate commerce has been sustained when fairly apportioned to the commerce carried on within the taxing state. [citations] and in other cases has been rejected only because the apportionment was found to be inadequate or unfair * * * it is a practical way of laying upon the commerce its share of the local tax burden without subjecting it to multiple taxation not borne by local commerce and to which it would be subject if gross receipts, unapportioned, could be made the measure of a tax laid in every state where the commerce is carried on * * *. In the one case the tax reaches only that part of the commerce carried

4. The quotation later in the opinion from *Ozark Pipe Line Corp. v. Monier*, 266 U.S. 555, 565, 45 S.Ct. 184, 69 L.Ed. 439, also makes it clear that "the aforementioned activities of maintenance, repair and manning by a corporation engaged exclusively in interstate commerce", 335 U.S. at page 93, 68 S.Ct. at page 1482, are activities in interstate commerce. "In *Ozark Pipe Line Corp. v. Monier*, supra, this Court, 266 U.S. at page 565, 45 S.Ct. 186, 69 L.Ed. 439, spoke of such activities as set out below." The note below, 335 U.S. at page 94, 68 S.Ct. at page 1482 reads: "This court said, 266 U.S. at 565, 45 S.Ct. 186, 69 L.Ed. 439:

"The business actually carried on by appellant was exclusively in interstate commerce. The maintenance of an office, the purchase of supplies, employment of labor, maintenance and operation of telephone and telegraph lines and automobiles, and appellant's other acts within the state, were all exclusively in furtherance of its interstate business, and the property itself, however extensive or of whatever character, was likewise devoted only to that end. They were the means and instrumentalities by which that business was done and in no proper sense constituted, or contributed to, the doing of a local business."

on within the taxing state; in the other it extends to the commerce carried on without the state boundaries, and, if valid, could be similarly laid in every other state in which the business is conducted." *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 255-257, 58 S.Ct. 546, 548; *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 439, 59 S.Ct. 325, 83 L.Ed. 272; *Adams Mfg. Co. v. Storen*, 304 U.S. 307, 311, 313, 58 S.Ct. 913, 82 L.Ed. 1365, 117 A.L.R. 429; *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 56-58, 60 S.Ct. 388, 84 L.Ed. 565, 128 A.L.R. 876; *Department of Treasury v. Wood Preserving Corp.*, 313 U.S. 62, 67, 61 S.Ct. 885, 85 L.Ed. 1188; *Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 177, 59 S.Ct. 389; *International Harvester Co. v. Department of Treasury*, 322 U.S. 340, 349, 64 S.Ct. 1030, 88 L.Ed. 1313. When there is no danger that several states will impose cumulative tax burdens on the same subject, a tax upon an activity that is a local incident of interstate commerce may be measured by gross receipts from that activity.

Freeman v. Hewit, 329 U.S. 249, 67 S.Ct. 274, 91 L.Ed. 265, does not represent a departure from the cumulative burdens test. That case involved the validity of the Indiana Gross Income Tax as applied to proceeds from the sale of securities by an Indiana domiciliary on the New York stock exchange to a New York buyer, delivered in New York. The tax was held to be on the interstate sale, and, since it was not apportioned and could be imposed with equal right by every state that the commerce touched, it was invalid under the rule of *Adams Mfg. Co. v. Storen*, supra. The court has interpreted it as authority for the invalidation of an unapportioned tax as a "direct burden" on interstate commerce. *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 663, 68 S.Ct. 1260.

The vice of the tax in *Freeman v. Hewit* was not the taxation of interstate commerce, but the danger that such commerce might be doubly taxed. The state of the purchaser could properly impose a tax upon the sale, *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 47, 60 S.Ct.

388; *Freeman v. Hewit*, 329 U.S. 249, 257, 67 S.Ct. 274, and an Indiana tax upon the same sale would create the risk of a multiple tax burden that the sale would not have borne had it been made solely intrastate. The case therefore represents, not a repudiation of the cumulative burdens test as plaintiffs imply, but a recognition of that test.

The activities in the present case "are events apart from the flow of commerce." *Memphis Natural Gas Co. v. Stone*, supra, 335 U.S. at page 96, 68 S.Ct. at page 1483. They are carried on entirely within the harbor of Los Angeles, and a tax thereon is therefore self-apportioning. The fact that the ships might require similar service in the harbors of Seattle, Honolulu or New Orleans does not make taxation by each jurisdiction a multiple tax burden. "Like a property tax on the pipes or equipment in different states, [each tax] would be a different tax, on a different and wholly separate subjectmatter, with no cumulative effect caused by the interstate character of the business." *Coverdale v. Arkansas-Louisiana Pipe Line Co.*, 303 U.S. 604, 613, 58 S.Ct. 736, 741. Interstate commerce is not unduly burdened because plaintiffs are required to bear a fair share of the cost of the local government whose protection they enjoy.

The cases of *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90, 58 S.Ct. 72, 82 L.Ed. 68, and *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 67 S.Ct. 815, 91 L.Ed. 993, upon which plaintiffs rely, do not compel a contrary result. The court in those cases invalidated gross receipts taxes on the business of loading and unloading cargo shipped in interstate commerce, for the reason that these activities were inseparable from the interstate transportation of the cargo. Since that transportation was held not to be complete until the cargo was unloaded at the final port of call, a tax on "a continuation of the transportation" was held to be a tax prohibited by the commerce clause for the reason that it was imposed on "the very process of interstate commerce" as distinguished from a tax upon a local activity

related to interstate commerce. *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 89, 68 S.Ct. 1475; *Freeman v. Hewit*, 329 U.S. 249, 253, 67 S.Ct. 274, 277.

That part of plaintiffs' service that consists of loading ships' stores aboard the vessels serviced cannot be likened to the stevedoring business held immune from state taxation in the *Puget Sound and Carter & Weekes* cases. There is a clear distinction between the loading and transportation of commodities for shipment in interstate commerce and the loading of food and supplies to be consumed in the course of the journey. The loading of ships' stores, of food, fuel, and supplies, is comparable to the business of a ships' chandler, *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90, 94, 58 S.Ct. 72, or the sale and delivery of gasoline to be consumed in flight by an interstate air carrier. *Eastern Air Transport v. South Carolina Tax Comm.*, 285 U.S. 147, 153, 52 S.Ct. 340, 76 L.Ed. 673. Whatever immunity might attach to the interstate carriage of cargo does not extend to the delivery of food and fuel for consumption on the carrier. *Eastern Air Transport v. South Carolina Tax Comm.*, *supra*.

The decisions of the court since the *Carter & Weekes* case indicate no intention to extend its application. Indeed, insofar as the *Carter & Weekes* decision invalidates a tax on interstate transportation even though it is fairly apportioned to activity within the taxing state, its authority is questionable in view of the subsequent decision in *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 663, 68 S.Ct. 1260. That case involved the validity of a New York tax on the gross receipts of the taxpayer from its transportation service, 43% of which was conducted outside New York. Since the tax was admittedly imposed on gross receipts from interstate transportation, the reasoning of the *Carter & Weekes* case would indicate that it was wholly invalid. The court, however, held the tax invalid only to the extent that it was imposed on the entire gross receipts of the taxpayer, including those attributable to that portion of the total mileage that was

outside New York. It was expressly held that even though the tax was imposed on gross receipts from interstate transportation, it would be upheld if apportioned to mileage within the taxing state. It is reasonable to assume that this decision indicates an intention to apply the cumulative burdens test to taxation even of "the very processes of interstate commerce" and that a different result would be reached if the *Carter & Weekes* case were reconsidered in the light of that decision.

It is clear, however, that whatever vitality the immunity of interstate transportation from state taxation may still retain, it is not the intention of the court to extend it to local activities and services in aid of that transportation, in view of the decision in the *Memphis Natural Gas case*, *supra*.

Even under the broadest interpretation, plaintiffs' business is not interstate transportation. Their service does not begin until that transportation has ended and the transported cargo has been removed from the ships. Their aid to the instrumentalities of that transportation is no more a part of the interstate flow of commerce than the cab service held taxable in *Pennsylvania R. Co. v. Knight*, 192 U.S. 21, 26-27, 24 S.Ct. 202, 48 L.Ed. 325, cited with approval in the *Puget Sound case*, 302 U.S. 90, 93, 58 S.Ct. 72, or the local activities in maintaining and keeping in repair pipe lines that deliver gas interstate held taxable in *Memphis Natural Gas Co. v. Stone*, *supra*, 335 U.S. 80, 68 S.Ct. 1475.

If plaintiffs' activities or the gross receipts therefrom were the subject of the tax rather than its measure, there could be no doubt as to the validity of the tax, in view of *Memphis Natural Gas Co. v. Stone*, *supra*, 335 U.S. 80, 68 S.Ct. 1475, and *Central Greyhound Lines, Inc. v. Mealey*, *supra*, 334 U.S. 653, 68 S.Ct. 1260. Since the subject of the tax is the privilege of engaging in business activities, and since plaintiffs' activities were interstate commerce, even though local incidents thereof, the question is raised whether the tax is void on the ground that the privilege of engaging in interstate commerce is not a

proper subject of state and local taxation. The validity of the tax would thus turn, not on its practical operation, but on the descriptive label given it. (See Powell, *Business Taxes and The Federal Constitution*, Proceedings of the Eighteenth Annual Conference of the National Tax Association (1925) 164, 170-172.) A recent decision of the United States Supreme Court, however, indicates that the court is "concerned with the practical operation of challenged state tax statutes, not with their descriptive labels." *Interstate Oil Pipe Line Co. v. Stone*, 337 U.S. 662, 69 S.Ct. 1264, 1266. That case involved the imposition by the state of Mississippi of a business privilege tax of 2% of the annual gross receipts of "every person engaging or continuing within this state in the business of operating a pipe line for transporting for compensation or hire from one point to another in this state oil or natural gas or artificial gas through pipes or conduits in this state". Miss.Code, § 10109. *Interstate Oil Pipe Line Co.*, a foreign corporation qualified to do business in Mississippi, owned and operated pipe lines for the transmission of oil from Mississippi oil fields to loading racks within the state for immediate rail transportation interstate. The imposition of the tax was sustained by the Mississippi Supreme Court as a tax "for the privilege of operating the pumping machinery and other pipe line equipment in the transportation of oil in the manner hereinbefore set forth". *Interstate Oil Pipe Line Co. v. Stone*, 203 Miss. 715, 35 So.2d 73, 75, 36 So.2d 142. The corporation appealed, contending that the tax was invalid as an imposition on the privilege of carrying on an interstate business and that the *Memphis Natural Gas* case could therefore be distinguished on that ground. Four justices, speaking through Mr. Justice Rutledge, were willing to assume that the tax was upon the privilege of carrying on an interstate business, holding that "The statute is not invalidated by the commerce clause of the Federal Constitution merely because, unlike the statute attacked in *Memphis Natural Gas Co. v. Stone*, supra,

it imposes a 'direct' tax on the 'privilege' of engaging in interstate commerce. * * * Since all the activities upon which the tax is imposed are carried on in Mississippi, there is no due process objection to the tax. The tax does not discriminate against interstate commerce in favor of competing intrastate commerce of like character. The nature of the subject of taxation makes apportionment unnecessary; there is no attempt to tax interstate activity carried on outside Mississippi's borders. No other state can repeat the tax. For these reasons the commerce clause does not invalidate this tax." 69 S.Ct. at pages 1266-1267. Mr. Justice Burton concurred in the judgment sustaining the tax, but on the ground that the activities were intrastate commerce. Four dissenting justices were of the opinion that the tax was on the privilege of engaging in interstate transportation of oil and gas and was invalid solely for that reason.

The disposition of the present case does not require a resolution of these conflicting views. Even if the proposition stated by the dissenting justices in the *Interstate Oil* case still has any vitality, it is not controlling here. The United States Supreme Court has long distinguished between a tax imposed on "the very process of interstate commerce", *Freeman v. Hewit*, 329 U.S. 249, 253, 67 S.Ct. 274, 277, such as transportation, *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90, 58 S.Ct. 72; *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 67 S.Ct. 815, and a tax imposed on local "incidents of the commerce." The force of this distinction is not diminished by the fact that the challenged tax is imposed on the privilege of conducting the local activities. In sustaining the tax in the *Memphis Natural Gas* case, supra, the court expressly recognized that "The facts of this case present again the perennial problem of the validity of a state tax for the privilege of carrying on, within a state, certain activities admittedly necessary to maintain or operate the interstate business of the taxpayer." 335 U.S. 80, 85, 68 S.Ct. 1475, 1447. There

would probably have been no disagreement in the Interstate Oil case had the challenged tax been imposed on the privilege of engaging in the local activities in aid of the interstate transportation of oil rather than on the privilege of engaging in the "very process" of that transportation. The dissenting justices made it clear at the outset that the tax was not "for the privilege of operating pumping machinery or other equipment as incidents apart from the flow of the interstate commerce. Cf. *Coverdale v. Arkansas-Louisiana Pipe Line Co.*, 303 U.S. 604, 58 S.Ct. 736, 82 L.Ed. 1043." 69 S.Ct. 1264, 1268. When a tax is imposed on the privilege of conducting a local activity separable from the very processes of interstate commerce, "it is idle to suggest that the tax is on 'the privilege of engaging in interstate business.'" *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 85, 68 S.Ct. 1475, 1477; *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 661, 68 S.Ct. 1260. A state may properly impose a tax on the privilege of carrying on a local activity, and the fact that the activity is essential to interstate commerce does not "prevent a State from giving [it] detached relevance for purposes of local taxation." *Freeman v. Hewitt*, 329 U.S. 249, 255, 67 S.Ct. 274, 278; *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 257, 58 S.Ct. 546; *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 47, 60 S.Ct. 388; *Barker Bros., Inc. v. City of Los Angeles*, 10 Cal.2d 603, 609, 76 P.2d 97. It is undisputed that plaintiffs' activities are conducted wholly within the jurisdiction of the taxing authority and that plaintiffs are required to pay only their share of the cost of the local government whose protection they enjoy. For the privilege of carrying on those activities, the city of Los Angeles can constitutionally impose the challenged tax.

The judgments are reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.

34 Cal.2d 811

CODORNIZ v. CODORNIZ.

Sac. 5935.

Supreme Court of California, in Bank.

Feb. 28, 1950.

Rehearing Denied March 27, 1950.

Divorce action by Alice D. Codorniz against Joseph M. Codorniz. Plaintiff was granted a divorce on ground of extreme cruelty, and thereafter defendant applied for modification of the final decree by eliminating provisions of the support of plaintiff and a married daughter.

The Superior Court for Colusa County, Ben R. Ragain, J., rendered an order modifying the decree, and plaintiff appealed.

The Supreme Court, Schauer, J., held that the trial court was warranted in finding that the previous decree provided alimony and child support rather than a property settlement and hence was subject to modification. The Court also held that the husband was relieved of his obligation to pay alimony upon remarriage of the wife, and was not under obligation to support children upon their emancipation.

Traynor, J., dissented.

Prior opinion, see 202 P.2d 861.

1. Divorce ⇨245(1)

Provision for payment of alimony to wife in a divorce decree granted to wife for offense of husband may be modified by the court under appropriate circumstances, although a decree adjusting property rights of the parties is not subject to modification regardless of whether it is based upon agreement of the parties.

2. Divorce ⇨245(1), 309

In proceeding to modify divorce decree, trial court has jurisdiction to determine whether decree was based upon a property settlement agreement with payments provided as a phase of property adjustment and therefore not subject to modification, or was based upon alimony or support allowance covenants and therefore subject to modification.

3. Divorce ⇨286, 312.6(8)

A divorce court's findings that payments ordered under a previous decree were

not based upon a property settlement agreement but were meant wholly or partially as alimony and child support and were therefore subject to modification, when based upon ample evidence, are binding upon an appellate court.

4. Divorce ⇨245(3), 309

In divorce action, evidence justified a finding that payments ordered in divorce decree were intended as alimony and child support rather than as a property settlement and consequently were subject to modification upon showing of changed circumstances of the parties.

5. Divorce ⇨252

Where court granted wife a divorce on ground of extreme cruelty, and divided equally all community property except an equity in an undivided one-third interest in a dairy business which court determined was practically valueless, and court awarded it to husband to enable him to earn money with which to pay alimony and support money for children, wife could not assert a right to the dairy business on ground that she was entitled to more than half the community property. Civ.Code, §§ 146, 148.

6. Divorce ⇨247

On remarriage of wife, divorced husband is relieved of obligation to pay alimony. Civ.Code, § 139.

7. Divorce ⇨310

Obligation of divorced husband to support children of the marriage ceases upon their emancipation or reaching majority. Civ.Code, § 206.

8. Appeal and error ⇨1058(2)

Where wife was subsequently permitted to give testimony on certain phase of case, any error in earlier ruling of court denying her permission to testify as to such phase was not prejudicial.

Brown, Ford & Cooney, Colusa, for appellant.

Rutledge & Rutledge and Ralph W. Rutledge, Colusa, for respondent.

SCHAUER, Justice.

Plaintiff appeals from an order made by the trial court upon application of defendant, reducing the monthly payments ordered to be paid by defendant to plaintiff under the terms of an interlocutory and a final decree of divorce. Plaintiff contends that the payments were ordered as "a part of the division of the community property by the Court," and hence were not subject to modification. We have concluded that the trial court was justified in determining that such payments were in the nature of alimony and child support and could and should be reduced, and that the order appealed from must be affirmed.

In May, 1944, plaintiff sued defendant for divorce on the ground of extreme cruelty. She alleged, among other things, that she was then earning \$65 a month and in addition was receiving \$140 a month from defendant for her support and that of the three minor children of the parties, and that as community property the parties were possessed of a one-third interest in a dairy business having a value of approximately \$30,000. Plaintiff prayed for a decree of divorce, for custody of the three children, that defendant be ordered to pay her attorney's fees and court costs, that he also "be ordered to pay the sum of \$75.00 a month to plaintiff as alimony, and the sum of \$105.00 a month for the support and maintenance of said minor children," and for other "fit and proper" orders. In his answer defendant denied "that the parties are possessed of a one-third interest in the dairy * * * and * * * alleges that he is buying said interest on installment payments, most of which are yet unpaid."

In June, 1944, plaintiff was granted an interlocutory decree of divorce on the ground of cruelty, and was also awarded custody of the three children. The testimony was not reported, and findings were waived. In June, 1945, the final decree was entered. Each of the decrees contains a provision adjudging "That the community property of the parties hereto consisting of an equity in an undivided one-third (1/3) interest in and to * * * a dairy business [and the land upon which

such business is operated^{1]} * * * be awarded to the Defendant, subject, however, to the following charges, restrictions and conditions:

"1. Defendant herein shall pay to Plaintiff herein the sum of One Hundred Forty Dollars (\$140.00) per month, as and for the support and maintenance of Plaintiff and the minor children of the parties hereto, on the first day of each and every calendar month.

"2. Defendant herein shall furnish Plaintiff and the minor children of the parties hereto, until further order of the Court, milk and cream at Defendant's sole cost and expense."

Defendant paid the \$140 a month to plaintiff through August, 1946. He then learned that plaintiff had remarried in July, 1946, and he reduced the payments to \$70 a month for September and October, 1946. In the latter month the oldest of the three children, a daughter, also married, and defendant thereafter paid only \$50 a month. In November, 1947, plaintiff sought a contempt order against defendant by reason of the reduced payments, and defendant on the ground of changed circumstances applied to the court for a modification of the final decree by eliminating therefrom provisions for the support of plaintiff and of the married daughter. A consolidated hearing on the two matters was held before the same judge who had rendered the divorce decrees. At the hearing the court, over plaintiff's objection that the court was without jurisdiction to change the property and support provisions of the final decree, heard evidence concerning those issues and rendered its order modifying the divorce decrees by relieving the defendant from payments for plaintiff's support as of the date she remarried, reducing the support payments for the three children to the sum of \$105 a month to the date of the marriage of the elder daughter (October 15, 1945) and to the sum of \$70 a month thereafter, and releasing defendant's one-third interest in the dairy property (including the land) from "all of the charges, restrictions and conditions" im-

posed thereon by the interlocutory and final decrees of divorce. This appeal by plaintiff followed.

[1] As declared in *Puckett v. Puckett* (1943), 21 Cal.2d 833, 840, 136 P.2d 1, 5, "a provision for the payment of alimony to the wife in a divorce decree, granted to the wife for the offense of the husband, may be modified by the court under appropriate circumstances. Civ.Code, sec. 139. * * * A divorce decree adjusting the property rights of the parties is not subject to modification regardless of whether or not it is based upon the agreement of the parties." (See also *Leupe v. Leupe* (1942), 21 Cal.2d 145, 148, 130 P.2d 697; *Adams v. Adams* (1947), 29 Cal.2d 621, 625, 177 P.2d 265; *Dupont v. Dupont* (1935), 4 Cal.2d 227, 228, 48 P.2d 677; *Ettlinger v. Ettlinger* (1935), 3 Cal.2d 172, 178, 44 P.2d 540; *Fields v. Fields* (1949), 94 Cal.App.2d 56, 209 P.2d 977.

[2, 3] It has also been held that in modification proceedings the trial court has jurisdiction to determine whether the decree was based upon a property settlement agreement with payments provided as a phase of property adjustment and therefore not subject to modification or was based upon alimony or support allowance covenants and therefore subject to modification. (See *Hough v. Hough* (1945), 26 Cal.2d 605, 615, 160 P.2d 15, and cases there cited; *Alexander v. Alexander* (1948), 88 Cal. App.2d 724, 727, 199 P.2d 348. In the *Hough* case this court pointed out that "In various cases it has been assumed that the court may pass upon that issue or similar issues in such proceedings." [26 Cal.2d 605, 160 P.2d 20.] In the same case we quoted with approval the following statement from *Wallace v. Wallace* (1934), 136 Cal.App. 488, 493, 29 P.2d 314, made on appeal from an order denying a motion for modification: "Furthermore, this agreement was before the court upon the order for modification, and upon that hearing the court made the findings given above, to the effect that the payments directed to be made were not in the nature of alimony but was the balance of the

1. The clause including the land appears in the final decree only.

sums due plaintiff under said contract of property settlement. That being a definite finding upon the issue before the court, we are bound thereby. As the court said in *Atlass v. Atlass* [1931], 112 Cal.App. 514, 297 P. 53, 54: 'Had the court found the provisions for support to have been in fact by way of property settlement then the said provisions could not have been disturbed * * *' There was ample evidence to support the finding in the instant case, and we must therefore accept the same as true." (See also *Weedon v. Weedon* (1949), 92 Cal.App.2d 367, 369, 207 P. 2d 78; *Fields v. Fields* (1949) *supra*, 94 Cal.App.2d 56, 209 P.2d 977. It follows from the rules just stated that the trial court likewise has jurisdiction, in a proceeding such as this, to determine whether payments ordered under a decree concededly not based (at least not directly or wholly) upon a property settlement agreement were intended to be in lieu of property rights and not subject to modification, or were meant wholly or partially as alimony and child support provisions and were therefore subject to modification, and that that court's findings based upon "ample evidence to support" such findings are likewise binding upon an appellate court.

At the hearing on the modification application here, the trial judge declared it to be his "definite recollection that the testimony [at the divorce trial] showed that at that time the community interest in the contract of purchase of the dairy business * * * was very, very slight * * * [T]he Court remembers very distinctly that the defendant testified * * * that as far as he was concerned he was willing—and did consider the equity of the community in the contract as being of practically no value—and he made the offer in court that he'd be very willing to step down and out and forget about it, and if she wanted the interest in the dairy property she could have it. * * * He was willing to turn it over to her if she wanted it." The judge further stated that "the Court, in keeping with that proof introduced at the trial of this case, made a ruling awarding all of the interest in the community property to the defendant so as to enable

him to properly comply with the Court's order for the support of the children and of the widow. * * * The testimony at the time was that the community value in the contract of the purchase * * * was practically valueless, and that was the reason the Court made the order. The proof was very very definite on that; there is no question about that."

[4] Both plaintiff and defendant testified at the modification hearing that at the time of the divorce "around \$3,000" had been paid toward purchase of the interest in the dairy. Defendant further stated that the full purchase price of the one-third share was \$7,500, "not a cent down. I was paying it so much a month," and that his average income from operation of the dairy, to which he devoted his own services, was \$267 monthly. Concerning testimony by plaintiff that the valuation of such share "was said to be \$10,000.00," the court stated, "if there had been any testimony at the time of the interlocutory decree that there was a community interest in that property of \$10,000.00, the Court certainly would not have made an order awarding all of the community property to the defendant; because that was not the testimony." At the modification hearing the parties testified further that certain other community property had been divided between them outside of the divorce suit: plaintiff had received furniture and a savings account and defendant received an automobile. In addition to the evidence summarized above is the fact that in her complaint for divorce plaintiff asked for the payment of monthly *alimony* and support for the children, and did not seek any interest in the community property. With the recited facts in mind it is apparent that the trial court was warranted in its holding that the payments ordered in the divorce decrees were intended as alimony and child support, and were consequently subject to modification upon the showing of the changed circumstances of the parties.

[5] Plaintiff relies upon the rule stated in *Treece v. Treece* (1932), 125 Cal.App. 726, 728, 14 P.2d 95, that "Judgments are to have a reasonable intentment [citation],

and where it admits of two constructions that one will be adopted which is consonant with the judgment which should have been rendered on the facts and law of the case [citation]," and urges that inasmuch as the divorce was granted to her upon the ground of extreme cruelty she was entitled to more than half the community property and therefore the divorce decrees, under which the dairy interest was awarded to defendant subject to the payments ordered to be made to plaintiff, must be construed as an adjustment of the property rights of the parties. Although it was held in *Tipton v. Tipton* (1930), 209 Cal.443, 444, 288 P. 65, 66, that "the plain inference to be derived" from the code sections (Civ.Code, §§ 146, 148) having to do with the assignment of community property by the court "is that when the divorce is granted on the ground of extreme cruelty the nonoffending party is entitled to more than that awarded to one who is at fault," that holding was announced on appeal from an interlocutory decree granted on the ground of extreme cruelty, in which "all of the community property, consisting of real estate of the value of \$2,500 and an automobile" was awarded to defendant husband. By contrast, the community property involved in the instant divorce suit (being only the equity in the undivided one-third interest in the dairy business and land, all other community property having been previously divided otherwise than by court order in this divorce action) was stated by the court to be "practically valueless" and to have been awarded to defendant to enable him *to earn through his own services* the money with which to pay the *alimony and support money* for the children, which was sought by plaintiff in her complaint for divorce. Since we do not have here an appeal from the basic judgment in the divorce suit, and have no means of knowing what evidence was before the court at the trial of that action, we have no legitimate basis for assuming that the court erred in such basic decision or that on the motion its construction of its own judgment was inaccurate. Indeed, such evidence as is disclosed suggests that the trial court was

quite right in concluding that the dairy equity was "practically valueless"; defendant, by devoting his services to the dairy, was able to draw from it only \$267 monthly. Obviously, the rule of the *Tipton* case is not controlling on this appeal.

[6,7] It is, of course, established that upon the remarriage of the wife the husband is relieved of the obligation to pay alimony to her (Civ.Code, § 139; see *Hale v. Hale* (1935), 6 Cal.App.2d 661, 663, 45 P.2d 246), and that his obligation to support children of the marriage (other than under the conditions contemplated by section 206 of the Civil Code, not involved here) ceases upon their emancipation or reaching majority (*Hale v. Hale* (1935), supra; *Meek v. Meek* (1942), 51 Cal.App.2d 492, 125 P.2d 117; *Putnam v. Putnam* (1942), 51 Cal.App.2d 696, 699, 125 P.2d 525; see also *Hough v. Hough* (1945), supra, 26 Cal.2d 605, 608, 160 P.2d 15. In both the *Meek* and the *Putnam* cases it was held that in modification proceedings the trial court could, and in the *Putnam* case correctly did, interpret an agreement between the parties for payment by the husband of money for child support, as terminating when the children reached majority.

[8] Plaintiff also complains of refusal by the court at one stage in the modification proceedings to permit her to testify as to whether she received "any of the community property outside of" the divorce decree. However, as appears hereinabove, she was later allowed to give her testimony on this phase of the case, and consequently any error in the earlier ruling of the court was not prejudicial to her.

For the reasons stated hereinabove, the order appealed from is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, and SPENCE, JJ., concur.

TRAYNOR, Justice.

I dissent.

In my opinion the order affirmed herein deprives plaintiff of the share of the community property to which she is entitled under section 146 of the Civil Code.

When the divorce decree awards some property to each party and also provides for monthly payments, without specifying whether they are part of a property settlement or alimony, it may be difficult to determine what they are. See *Puckett v. Puckett*, 21 Cal.2d 833, 841, 136 P.2d 1; *Hough v. Hough*, 26 Cal.2d 605, 615, 160 P.2d 15; *Adams v. Adams*, 29 Cal.2d 621, 625, 177 P.2d 265. When, as in this case, however, the court awards all the community property to the husband, the monthly payments clearly constitute part of a settlement of property rights.

It is undisputed that when the interlocutory decree of divorce was entered approximately \$3,000 had been paid for the community interest in the dairy. Plaintiff was granted a divorce on the ground of extreme cruelty and was therefore entitled to at least half the community property. (Civ.Code, § 146.) The court awarded all the community property to defendant and ordered him to pay plaintiff \$140 per month for the support and maintenance of herself and the three minor children. These payments were made a charge against the community property awarded to defendant. Since Civil Code section 146 guarantees plaintiff at least half the community property, the decree ordering payments to her must be interpreted as a decree adjusting the property rights of the parties to protect her interest in the community property. The holding that the payments were alimony and subject to modification is in fact a holding that the trial court entered a decree it could not validly enter. It is settled that if a judgment is susceptible of two interpretations, one of which would make it invalid and the other valid, it must be given the interpretation that renders it valid. *Treece v. Treece*, 125 Cal.App. 726, 728, 14 P.2d 95; *Watson v. Lawson*, 166 Cal. 235, 242, 135 P. 961; *Webster v. Webster*, 216 Cal. 485, 488, 14 P.2d 522; *Hogarty v. Hogarty*, 188 Cal. 625, 627, 206 P. 79.

In *Tipton v. Tipton*, 209 Cal. 443, 288 P. 65, a decree awarding the defendant all the community property, consisting of real estate worth \$2,500 and an automobile, was reversed on the ground that Civil Code

section 146 guarantees the plaintiff at least half the community property when the divorce is granted on the ground of extreme cruelty. The majority opinion attempts to distinguish the *Tipton* case on the ground that the trial judge considered the \$3,000 equity in the dairy business to be "practically valueless." A \$3,000 equity in a dairy business worth \$30,000 is not "practically valueless."

At the very least, the equity in the dairy had the value of a right to complete the purchase of the one-third interest. Whatever the court thought of the value of the property, there can be no doubt that had there been no award of monthly payments plaintiff would have been deprived of her share thereof. She is just as much deprived of that share when the court terminates the payments on the ground that they were alimony.

Community property is often a going business managed by the husband. It may then be to the best interests of both parties to avoid liquidation of the business by awarding the wife her share of the property in the form of monthly payments. Such a division will be equitable, however, only if those payments are treated, not as alimony, but as part of a property settlement not subject to modification. If, for example, the community property is worth \$200,000 and the decree provides that the husband receive all of it and that the wife on the basis of her life expectancy receive \$500 per month, and one year after her divorce the wife remarries, it would be manifestly inequitable to hold that the payments were alimony and therefore terminated, for she would then receive only \$6,000 in lieu of community property worth at least \$100,000. The inequity is just as real if the amount involved is small.

There can be no stability to such property settlements if the court, as in this case, uses defendant's earnings some three years after the decree was entered as a basis for a determination that all the community property was properly awarded to him. A business of great value may still not make a profit. It may be profitable at the time a divorce decree is entered but unprofitable thereafter. When the husband

agrees to make monthly payments in lieu of liquidating the business, he assumes the risk that it may not be so profitable or of such value as he supposed. If the trial court erred in making that choice for him in the divorce decree, his remedy is by appeal. "A divorce decree adjusting the property rights of the parties is not subject to modification regardless of whether or not it is based upon the agreement of the parties." *Puckett v. Puckett*, 21 Cal.2d 833, 840, 136 P.2d 1, 5.

It is clear from the record that the trial judge concluded that he had erred in awarding plaintiff monthly payments in lieu of her share of the community property and that he sought to correct his error in the modification proceedings. If he made an error, however, it was judicial and not clerical in character. "The judgment in this case was the identical judgment which the trial court intended to render. There was no mistake in its entry, and it expressed in apt and definite terms the conclusion at which the trial court arrived during the trial of the action. If the court misconstrued the evidence before it, or misapplied the law applicable to the facts disclosed by the evidence, or was even misled by counsel, such an error was in no sense a clerical error which could thereafter be corrected by the court upon its own motion or in any proceeding except on motion for a new trial." *Lankton v. Superior Court*, 5 Cal.2d 694, 696, 55 P.2d 1170; *Stevens v. Superior Court*, 7 Cal.2d 110, 112, 59 P.2d 988; *In re Estate of Burnett*, 11 Cal.2d 259, 262, 79 P.2d 89; *Bastajian v. Brown*, 19 Cal.2d 209, 214, 120 P.2d 9; *Barlow v. City Council of City of Inglewood*, 32 Cal.2d 688, 692-693, 197 P.2d 721; see, 2 *McBaine*, California Trial and Appellate Practice, pp. 204-214; 9 *Wigmore on Evidence*, 3d Ed., § 2450. Once the divorce decree became final, the trial judge was powerless to change the amount awarded to plaintiff in lieu of community property, even if he concluded that the amount awarded was excessive. He cannot lawfully do so indirectly by disregarding the community property award and holding the monthly payments to be alimony.

In any event, the award cannot be made to appear excessive unless the dual function of the monthly payments is disregarded. The decree provided, not only for a settlement of property rights, but for the support of the minor children. The amount to be allotted for this support was not specified as it should have been, cf. *Puckett v. Puckett*, 21 Cal.2d 833, 841, 136 P.2d 1; *Hough v. Hough*, 26 Cal.2d 605, 615, 160 P.2d 15; *Adams v. Adams*, 29 Cal.2d 621, 625, 177 P.2d 265, but given the division adopted by the trial court in the modification proceedings, it appears that only one fourth of the \$140, or \$35 per month, can be attributed to the wife's share of the community property. Had the decree provided that defendant was to receive all the community property and plaintiff was to receive \$35 per month for her support and maintenance and \$105 per month for the support and maintenance of the minor children, there would be no question that the provision for the payment of \$35 per month was part of a settlement of the property rights and therefore not subject to modification. *Hogarty v. Hogarty*, 188 Cal. 625, 627, 206 P. 79; *Webster v. Webster*, 216 Cal. 485, 488, 14 P.2d 522; *Puckett v. Puckett*, 21 Cal.2d 833, 842, 136 P.2d 1. It is only when the amounts properly attributable to child support are treated as relevant to the division of the community property that the total award is made to appear too large to be reasonably attributable in part to a division of the community property.

The payments were ordered "as and for the support and maintenance of Plaintiff and the minor children of the parties hereto." In view of the disparity between the total award and an amount appropriate solely for a division of the community property, it would be unreasonable to conclude that it was intended that the total amount continue to be payable after the parental duty of support had terminated. *Putnam v. Putnam*, 51 Cal.App.2d 696, 699, 125 P.2d 525; *Meek v. Meek*, 51 Cal.App. 2d 492, 495, 125 P.2d 117. Had the decree properly segregated the amounts attributable to child support, there would be no problem in determining what reduction

should be made. When the decree is silent on the question of allocation, however, it has been held proper for the trial court to determine the reasonable allocation in subsequent proceedings. *Putnam v. Putnam*, supra; *Meek v. Meek*, supra. In this case the trial court has determined that \$35 per month is the amount attributable to the support of each child. Accordingly, the order should be affirmed to the extent that it reduces the payments attributable to the support of the children by \$35 per month in view of the marriage of the eldest child. The unqualified affirmance of the order, which terminates plaintiff's right to receive \$35 per month, deprives her of her share of the community property in violation of section 146 of the Civil Code.

Rehearing denied; TRAYNOR, J., dissenting.

defendant was agent of other or that they were joint adventurers.

Judgment reversed.

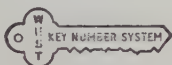
1. Joint adventures ⇨1.15

Principal and agent ⇨23(4)

In action to recover contract price for certain doors allegedly sold and delivered by plaintiffs to defendants, or in lieu of payment, for return of doors, evidence was insufficient to sustain judgment for plaintiffs on theory that one defendant was agent of other or that they were joint adventurers.

2. Appeal and error ⇨840(1), 1078(1)

In action for recovery of contract price of doors, issue as to whether title to doors passed from plaintiff to third party under theory of cash sale, which was neither embraced by pleadings or findings nor argued, would not be considered on appeal.



Mancuso & Herron, San Francisco, for appellant.

Lindsay P. Marshall, Lodi, for respondents.

PEEK, Justice.

By their complaint plaintiffs sought to recover the contract price for certain doors allegedly sold and delivered by them to the defendants, or in lieu of payment, for the return of the doors. The cause was heard by the court sitting without a jury, and judgment was entered for plaintiffs. Defendant Van Winkle alone appeals.

The complaint is in three counts. The first count alleges that on February 24, 1947, plaintiffs sold and delivered to defendants 627 doors for an alleged agreed price of \$6,136.25; that payment for the doors was made by a check executed by Gerald M. Goldstein payable to defendant Collins and endorsed in blank by Collins; that Collins was the agent of defendant W. S. Van Winkle individually, and doing business as Chicago Lumber Company; that when the check was presented for payment the account upon which it was drawn was closed; and that plaintiffs' demand for payment or

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GRIFFIN et al. v. VAN WINKLE et al.

Civ. 7678.

Sac. 6025.

District Court of Appeal, Third District, California.

Feb. 27, 1950.

Hearing Denied April 27, 1950.

Action by R. L. Griffin and M. E. Miller, individually, and doing business as R. L. Griffin and M. E. Miller Lumber Company, against W. S. Van Winkle, individually and doing business as Chicago Lumber Company, Bobbie Collins, and others, to recover contract price for certain doors allegedly sold and delivered by them to defendants, or in lieu of payment, for return of the doors.

The Superior Court, San Joaquin County, Thomas B. Quinn, J., entered judgment for plaintiffs and defendant Van Winkle appealed.

The District Court of Appeal, Peek, J., held that evidence was insufficient to sustain judgment for plaintiffs on theory that one

a return of the doors was refused by the defendants, excepting 300 of the doors which were returned. The second count incorporates by reference the allegations of the first cause and in addition charges that Van Winkle and Collins were engaged as partners in the business of buying doors. The third is a common count for goods sold and delivered. No appearance was made by Collins. Van Winkle by his answer denied that Collins was his agent; that he and Collins were partners in the business of buying doors or that plaintiffs sold any doors to him. The return of the 300 doors was admitted but he alleged they were returned pursuant to an agreement with plaintiffs that they would assert no claim for the balance of said doors.

The findings of the court were that defendant Collins was the agent of, and joint adventurer with, defendant Van Winkle, individually and doing business as Chicago Lumber Company; that the doors were sold and delivered and payment was made as alleged in the complaint; that plaintiffs' demand for payment or return of the doors was refused, and that the said 300 doors were not turned over to plaintiffs by defendants pursuant to an understanding that plaintiffs would not assert a claim for the balance.

The evidence shows that appellant is engaged in the lumber and construction business at Port Chicago. Approximately six weeks prior to the transaction which forms the basis for the present action he and defendant Collins, who was a carpenter foreman joined in a business venture which was described by them as being substantially in the nature of a partnership or joint venture. It appears that Collins, because of certain connections, knew where sash and doors could be obtained. Appellant, who was a builder, needed large quantities of such materials, hence they associated together, appellant furnishing the finances and Collins obtaining the materials and selling all in excess of appellant's needs. The profits, if any, were to be divided equally. Pursuant to their agreement Collins arranged for the purchase of a carload of doors from one Goldstein. One-third of the total cost was advanced by appellant to

Goldstein as a down payment. Goldstein failed to deliver the doors and after considerable delay appellant and Collins decided, as appellant testified, to "call it all off"; Collins, however, stating that in "the meantime [he would] keep on looking for Goldstein and the doors." Some time thereafter plaintiffs, who were lumber dealers in Lodi, contacted Goldstein concerning the sale of some doors which they had. Goldstein in turn communicated with Collins who informed appellant that Goldstein was to obtain some doors from plaintiffs. Collins also informed appellant that Goldstein was to pay him, Collins, for trucking the doors to appellant at Port Chicago.

On the morning of February 24, 1947, Collins arrived in Lodi, inspected the doors and loaded them upon his truck. Goldstein did not arrive until late in the afternoon and did not have with him a cashier's check for the purchase price of the doors as he had promised. Because of his failure to have a cashier's check as agreed, Griffin would not allow the doors to be taken from the premises. However, Collins testified that immediately after loading the doors, or approximately at 11:00 o'clock a. m. he started for Port Chicago but that a flat tire delayed him; that while he was having lunch it was suggested that he not leave until after Goldstein arrived with a check. Following Goldstein's arrival and after some discussion, an agreement was reached whereby Goldstein issued his personal check to Collins, who in turn endorsed the same and handed it to plaintiffs. The sales slip made out by plaintiffs' bookkeeper, showed the sale as made to the Builders Brokerage Company, which was the fictitious name under which Goldstein operated. During the time the parties were waiting Goldstein's arrival Collins sold approximately 150 of the doors. Payment for the doors so sold was made by check to Collins, who testified that this was a sale by the Chicago Lumber Company, appellant's concern, and that he, Collins, gave the buyer a receipt showing payment to that concern. On cross-examination he testified that his acts in this regard were pursuant to a prior sale by appellant. The remainder of the doors were delivered by Collins to appel-

lant at Port Chicago. Immediately following this transaction Collins and Goldstein left for Portland, Oregon, in search of additional doors. During the course of their trip Collins located a carload of doors which was purchased by appellant.

Approximately ten days after the transaction in Lodi appellant was informed by plaintiff Griffin that the Goldstein check had been dishonored upon presentment at the bank. It appears that Griffin had previously telephoned to the Chicago Lumber Company inquiring for Collins but at that time he did not inform appellant concerning the Goldstein check. It further appears that in the interim Goldstein had disappeared and at the time of trial his whereabouts were still unknown. Following the conversation between Griffin and appellant the latter retained 327 of the doors, representing the amount of his down payment in his first transaction with Goldstein and returned the remaining 300 doors to plaintiffs.

Collins' testimony concerning his relationship with appellant at the time of the sale in Lodi was that while he was informed that Goldstein had some doors he did not tell appellant that he was buying the doors for the Chicago Lumber Company; that he would never assume to buy doors without first obtaining consent from appellant; that at all times he considered the sale was made to Goldstein's Builders Brokerage Exchange, and that he only went to Lodi as a truck driver to pick up and deliver the doors.

It is appellant's contention that such evidence does not support the findings, all of which he challenges, except the findings with respect to the execution of the check and the nonpayment thereof. In particular he emphasizes the lack of evidence to show that Collins was his agent or that they were joint adventurers. Appellant further argues that the transaction in Lodi was a sale by plaintiffs to Goldstein and that the delivery by Goldstein of the doors to appellant was pursuant to the pre-existing obligation incurred in their first transaction.

[1] Since the uncontradicted evidence shows that the doors were sold by Griffin to Goldstein and not to Collins as the agent

of or the coadventurer with Van Winkle, it necessarily follows that the question of the sufficiency of the evidence raised by the parties on these issues is wholly immaterial.

While there may be a question, as the trial judge observed in his memorandum opinion, as to whether or not title to the doors passed from Griffin to Goldstein under the theory of a cash sale, such issue is neither embraced by the pleadings or findings nor has it been argued in the briefs of the parties and hence we do not purport to consider it in this appeal. See *Clark v. Hamilton Diamond Co.*, 209 Cal. 1, 284 P. 915; *South San Francisco Packing & Provision Co. v. Jacobsen*, 183 Cal. 131, 190 P. 628, and 17 Southern California Law Review, 340.

For the foregoing reasons the judgment is reversed.

ADAMS, P. J., concurs.

Hearing denied; CARTER, J., dissenting.



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ORANGE COUNTY v. COLE et al.

Civ. 4112.

District Court of Appeal, Fourth District,
California.

Feb. 20, 1950.

Hearing Denied April 20, 1950.

Action by the County of Orange, a body politic of the State of California against Rüssel George Cole and others to quiet title to an easement for a public highway over a strip allegedly dedicated by owners of lots who claimed that the dedication had been validly revoked.

Judgment for plaintiff in the Superior Court of Orange County, Raymond Thompson, J., and the defendants appealed.

The District Court of Appeal, Griffin, J., held that the revocation of the dedication was ineffective in view that the legislature by enactment of the Subdivision Map Act in-

tended to abrogate the right to expressly revoke an offer of dedication in any other manner than that prescribed by the act.

Judgment affirmed.

1. Dedication ⇨29

Under common law, an offer of dedication is subject to revocation until accepted.

2. Dedication ⇨1, 29, 38

Under common law, dedication could be either express or implied, and there might be either an implied or express revocation of such dedication in the absence of a statute precluding it.

3. Dedication ⇨19(5)

Where an owner makes his sale of land with reference to a map or plat, in the absence of a manifestation of a contrary intention he thereby manifests an intention to dedicate streets and alleys shown thereon to the public use.

4. Dedication ⇨29

Under the statute, the former rules pertaining to the revocation of an offer of statutory dedication have been definitely changed, and under the statute the revocation of an offer of dedication does not require that a new offer be made by the proposer but the offer remains open. Business and Professions Code, § 11616.

5. Statutes ⇨195

Affirmative expressions in a statute introducing a new rule imply a negative of all not within their purview.

6. Dedication ⇨29, 38

A dedication which is revocable can be revoked by applying the property to an inconsistent use, changing the offer of dedication or conveying the property and the dedicator's death may also effect a revocation.

7. Dedication ⇨29, 38

As to statutory dedications, the right to revocation by means of implied revocations is abrogated by statute. Business and Professions Code, § 11616; Civ.Code, §§ 1586, 1587.

8. Dedication ⇨29

Where a legislative intent by enactment of section 20 of the Subdivision Map

Act was to abrogate the common-law rule whereby an offer to dedicate might be impliedly revoked by a conveyance without reservation, in absence of any exceptions noted in the act itself, the legislature intended to abrogate the right to expressly revoke the offer in any other manner than that prescribed by the act which provided for termination of offers of dedication by a resubdivision or reversion to acreage with the approval of a public body. Business and Professions Code, § 11616; Civ. Code, §§ 1586, 1587.

9. Dedication ⇨29

Where final map of tract as recorded dedicated a strip for a future street and board of supervisors, rejected the offer of the strip for a future street, and seven years after such rejection owners of property attempted to revoke the dedication without complying with requirements of the statute, purported revocation did not preclude the board from thereafter accepting the offer of dedication. Business and Professions Code, §§ 11500 et seq., 11616; Civ.Code, §§ 1586, 1587.

R. C. Mize and Roy V. Shafer, Santa Ana, for appellants.

Joel E. Ogle, County Counsel, George F. Holden, Deputy County Counsel, Stephen K. Tamura, Deputy County Counsel, Santa Ana, for respondent.

GRIFFIN, Justice.

Plaintiff brought this action to quiet title to an easement for a public highway over a 30-foot strip approximately 1275 feet long running in a northerly and southerly direction and being the easterly 30 feet of 17 lots numbered 18 to 34 inclusive, of a recorded subdivision map of tract No. 1052, in Orange County. The lots are contiguous and each is 75 feet wide, facing west on a public street (Lorna Street). The strip in question is the rear 30 feet of each of said lots. The respective defendants herein own one or more of these lots. There are also contained in this subdivision lots 1 to 17 inclusive. All defendants, except four, answered, denied the easement, and alleged

ownership in fee respectively of those portions of the strip within their respective lot boundaries. The remaining four defendants defaulted but were represented at the trial by the same attorneys, appointed by the court for that purpose, pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940, c. 888, 54 Stat. 1178, sec. 200, 50 U.S.C.A. Appendix, § 520.

The case was tried on stipulated facts. They may be summarized as follows: On February 15, 1940, the Farmers & Merchants Trust Company of Long Beach recorded a final map of tract No. 1052, pursuant to sec. 20 of the Subdivision Map Act, Stats. 1937, p. 1863, chap. 670, now section 11500 et seq. of the Business and Professions Code. The easterly 30 feet of lots 18 to 34 is the area involved in this litigation and on the map of the subdivision, as recorded, the strip is labeled: "Dedicated for future street". The writing endorsed on the map also offered for dedication that portion of Lorna Street running through the tract. The Board of Supervisors, on February 13, 1940, accepted the offer of "Lorna Street" for dedication, but the offer of the 30-foot strip of land above mentioned for a future street was, on said date, rejected by it. On June 24, 1947, seven years after such rejection, there was served upon said Board and duly recorded a document signed by the owners of all of lots 18 to 34 inclusive, reciting that the signers "do by these presents declare that said offer of dedication heretofore made by reason of said endorsement has been and is hereby revoked, insofar as said lots 18 to 34 * * * are concerned, and said lots hereinbefore mentioned have been freed and are free from public easement therein." On February 17, 1948, the Board adopted a resolution accepting the offer of dedication of the 30-foot strip by the Farmers & Merchants Trust Company of Long Beach, predecessors in interest of defendants. Defendants are the owners of said lots through deeds containing lot descriptions by reference to the map of tract No. 1052. Upon this evidence the trial court found in favor of plaintiff. Defendants appealed.

[1] The sole issue is whether the purported revocation served and recorded by

the lot owners precluded the Board from thereafter accepting the offer of dedication. It is respondent's position that when the trust company recorded the final map, it made an irrevocable offer of dedication of the 30-foot strip, which could be accepted by the County at any time in the future, and that it was beyond the power of the defendants to revoke the offer, either expressly or by implication. Respondent concedes that under the common-law rule an offer of dedication is subject to revocation until accepted. It contends, however, that a statutory offer is now, under the laws of this state, subject to the terms and conditions of the statute and that in ascertaining the rights of the parties the extent to which the common-law rules have been modified by the adoption of the Subdivision Map Act must be considered in determining the rules respecting revocation of offers of dedication, citing *Stump v. Cornell Construction Co.*, 29 Cal.2d 448, 450, 175 P.2d 510.

The relevant portion of section 20 of the Subdivision Map Act, as then in force, provides: "If at the time the final map is approved any streets are rejected the offer of dedication shall be deemed to remain open and the governing body may by resolution at any later date, and without further action by the subdivider, rescind its action and accept and open said streets for public use, which acceptance shall be recorded in the office of the county recorder. If a resubdivision or reversion to acreage of the tract is subsequently filed for approval, any offer of dedication previously rejected shall be deemed to be terminated upon the approval of the map by the governing body."

Defendants cite many of the earlier cases holding that the recording of a subdivision map is merely an offer of dedication of streets shown thereon and that such offer can be withdrawn before its acceptance. Among these cases are *People v. Reed*, 1889, 81 Cal. 70, 77, 22 P. 474, 15 Am.St. Rep. 22; *Eltinge v. Santos*, 1915, 171 Cal. 278, 152 P. 915, Ann.Cas.1917A, 1143; and *Rice v. Boyd*, 2 Cal.Unrep. 196. In this connection it is argued that it must not be presumed that the legislature in the enactment of statutes intends to overthrow long

established principles of law unless such intention is made clearly to appear by expressed intention or by necessary implication, citing such cases as *County of Los Angeles v. Frisbie*, 19 Cal.2d 634, 644, 122 P.2d 526; *Armstrong v. Smith*, 49 Cal.App.2d 528, 536, 122 P.2d 115; *People v. Pacific Guano Co.*, 55 Cal.App.2d 845, 848, 132 P.2d 254; and *Pacific Coast Joint Stock Land Bank v. Roberts*, 16 Cal.2d 800, 805, 108 P.2d 439. Defendants also point out that before the enactment of the Subdivision Map Act, the rejection by the governing body of an offer of dedication put an end to and nullified such offer and that under a well-settled rule of law then existing the rejection of a proposal or offer completely nullified such offer, and argues that the legislature, by the enactment of this new act, apparently intended to change that feature of the law and provided that "If * * * any streets are rejected the offer of dedication shall * * * remain open and the governing body may by resolution at any later date, and without further action by the subdivider, rescind its action and accept and open said streets for public use"; that this is the only change in the existing law made by the section and that notwithstanding the rejection, the offer shall remain open and the rejection may be rescinded; that no place in said section are there any words prohibiting the withdrawal of that continuing offer; that therefore the right to revoke an offer remains in the offerer; and that the governing body may "rescind its action and accept" the offer "*if there then be one*"; that under section 11616 of the Business and Professions Code the principle of law that an offer may be revoked or withdrawn at any time before its acceptance has not been changed or affected by that section and that before plaintiff can prevail it must show that this section takes away an offerer's right to revoke an unaccepted offer. In support of this contention they cite section 1586 of the Civil Code, which reads: "A proposal may be revoked at any time before its acceptance is communicated to the proposer, but not afterwards"; and they contend that under section 1587 of the Civil Code a proposal is revoked by the communication of notice of

revocation by the proposer to the other party before acceptance; that therefore the subdivider may withdraw his offer of dedication after its rejection and before its acceptance. It is then argued that to cancel the long-existing principle of law that a proposal may be revoked by the proposer before acceptance, the intent to cancel it would have to be clearly set forth in the statute revoking such right; that by the words of the statute itself, "the offer of dedication shall * * * remain open", the legislature clearly indicated that an offer may still be revoked before acceptance, but if the offer remains open the board may accept the offer "without further action by the subdivider", i. e., without a new offer by the subdivider; that the legislature was presumed to have known the law that an offerer has a right to revoke his offer, and if it intended to change that law it would have added words to that effect, and since there were no such words in the section the courts may not add such intent to the legislative enactment.

It is then argued that provision is made in the act itself providing that the subdivider still has the right to withdraw his offer by the approval of a resubdivision or a reversion to acreage, and therefore the legislature intended to declare that this was only one method evidencing withdrawal of an offer, and that the right of withdrawal by all other methods was not affected.

A somewhat similar argument was presented in *Stump v. Cornell Construction Co.*, supra, and rejected. The lot there under discussion was a part of a subdivided tract. The filed map offered for dedication for "future street" and "future alley" certain strips of land in the subdivision, the same as in the instant case. The city council accepted the map and excepted one of the strips thus marked. Shortly after the approval of the map the lot there involved was conveyed by a deed, without reservation. Later, the city council adopted a resolution accepting the strip, crossing that lot and others, as a public alley. The Supreme Court held that the words of dedication on the map were regarded as an offer to dedicate and that the older cases holding that a conveyance without reserva-

tion amounted to a revocation of an offer for dedication were no longer applicable; that those cases [29 Cal.2d 448, 175 P. 20512] "were decided before the adoption of the Subdivision Map Act in 1937, and the provisions of that act clearly indicate an intention to abrogate the common law rule whereby an offer to dedicate might be *impliedly* revoked by a conveyance without reservation." It is interesting to note, however, that the court reserved its opinion as to whether the statute here under discussion intended to permit a termination of the offer by "express revocation", such as is evidenced in the instant case.

[2,3] Under the common-law rule, a dedication may be either express or implied. *Diamond Match Co. v. Savercool*, 218 Cal. 665, 24 P.2d 783; 26 C.J.S. Dedication, § 13, page 65. It is equally true that under such rule there may be either an implied or express revocation of such dedication, in the absence of a statute precluding it. *Stump v. Cornell Construction Co.*, supra. When the *Stump* case was decided sections 1586-1587 of the Civil Code were in effect and those sections make no distinction between an "implied" and an "express" revocation. Likewise, section 11616 of the Business and Professions Code is silent as to any distinction being made between an implied revocation and an express revocation. Dedications made in conformity with a statutory method of dedicating lands to the public are called "statutory dedications" and under the laws of some of the states, a statutory dedication is an express dedication which operates by way of a grant. Under the statutes thereof, where an owner has had his land surveyed, platted and acknowledged, and has recorded the plat, such parts as the plat shows he intended to dedicate as streets, parks, etc., are as fully beyond his control as if he had deeded them to a legal person for the uses mentioned, and where such statutes exist, the filing of the plat has the same effect as if it contained a certificate in express language dedicating the streets and alleys designated thereon to the public and such dedication is irrevocable. These statutes merely provide a new mode by which the dedicator's intention to grant or convey his

land may be carried into effect. 26 C.J.S., Dedication, § 3, page 51. Where an owner makes a sale of land with reference to a map or plat, in the absence of a manifestation of a contrary intention, he thereby manifests an intention to dedicate the streets and alleys shown thereon to the public use. *Berton v. All Persons, etc.*, 176 Cal. 610, 170 P. 151; *Wheeler v. City of Oakland*, 35 Cal.App. 671, 170 P. 864; 26 C.J.S., Dedication, § 23, page 78.

In Illinois it was provided by statute that the making out, acknowledging and recording of a map or plat, as required by the act, constituted a conveyance vesting the fee simple title of the streets, alleys, etc. in the town or city and, that the making and recording of a map was to be regarded as a mere offer to dedicate until accepted by the municipality or the public, and that an acceptance must be made within a reasonable time by the public authorities, subject to the exception that the dedicator would be estopped to deny the dedication when private rights were shown to have intervened. *Ann.Cas.1917A*, 1119-1120.

In *Kimball v. Chicago*, 253 Ill. 105, 97 N. E. 257, in construing that statute, it was held that if the plat was a statutory one, the offer could only be withdrawn by a vacation of the plat under the statute.

In *Ramstad v. Carr*, 31 N.D. 504, 154 N. W. 195, 203, L.R.A.1916B, 1160, where the nature of a statutory offer of dedication in that state was concerned, the court said:

"The recording of the plat, and sale of lots by the owner with reference thereto was a grant by the owner to the public of the public places marked on the plat. This grant, it is true, was not binding upon, or effective against, the municipality until accepted by it; but the tender of conveyance on the part of the owner continued until withdrawn by the owner, or until it was rejected by the municipality. The statutes of this state fix, not only the method in which a dedication may be effected by the filing of a plat, but they also prescribe the manner in, and conditions under, which the plat may be vacated and the dedication revoked. Sections 3959-3966 Compiles Laws. * * *

"As the dedication was made by the statutory method of filing a plat, and the sale

of lots by the owner with reference thereto, it could be withdrawn only by a vacation of the plat under the statute."

In *Burroughs v. City of Cherokee*, 134 Iowa 429, 109 N.W. 876, 878, in expressing the reason for a similar construction of a statutory dedication, the court said: "Ordinarily tracts which are platted are at some distance from the populous portions of the town or city and the proprietor, in offering to change his property from rural to urban, must be presumed to anticipate some delay in the acceptance and improvement of the streets and alleys separating the lots and blocks. When sparsely settled, years may elapse before the necessity will arise for grading or otherwise improving the streets, and until then the public ought not to be deprived of the right to accept them."

In 4 *McQuillin on Municipal Corporations*, 2d Ed. Rev. 1943, Sec. 1717, p. 813, it is said: "If a plat is a statutory one, and an acceptance is necessary, the offer can only be withdrawn before acceptance by a vacation of the plat under the statute, but if it is a common-law plat the offer of dedication may be withdrawn in other ways." See, also, 26 C.J.S., *Dedication*, § 60b, page 149.

[4] That which is involved here is a statutory offer of dedication. Section 11616 of the Business and Professions Code has definitely changed the former rules pertaining to the revocation of an offer of such a dedication. Under this section the rejection of an offer of dedication does not require that a new offer be made by the proposer. That section now provides that such rejection no longer terminates the offer, but it "shall remain open". The only provision in that section for termination or revocation of the offer is the approval of a map of a resubdivision or reversion of the tract to acreage.

Respondent argues that therefore it is apparent that the legislature, by enacting section 20 of the Subdivision Map Act, intended to achieve for California the results obtained in the above-mentioned jurisdictions. The question resolves itself to this: "By affirmatively providing for the termination of offers of dedication by a resub-

division or a reversion to acreage with the approval of a public body, did the legislature intend to exclude the method of directly withdrawing such offer?" The statute, as enacted, is broad enough to cover both express and implied revocations for it definitely recites that the offer *remains* open notwithstanding the rejection, and the governing body, *at any later date*, may accept the streets thus offered for dedication.

[5] In *Johnston v. Baker*, 167 Cal. 260, 264, 139 P. 86, 89, the rule is stated to be "* * *" that affirmative expressions in a statute introducing a new rule imply a negative of all not within their purview." See, also, *Shelby v. Southern Pacific Co.*, 68 Cal.App.2d 594, 599, 157 P.2d 442; 23 Cal.Jur. p. 740, sec. 118.

[6-8] A dedication which is revocable, can be revoked by several different methods, such as applying the property to an inconsistent use, changing the offer of dedication, or conveying the property. The dedicator's death may also effect a revocation. 26 C.J.S. *Dedication*, § 60, page 148. As to statutory dedications, the right to revocation by means of the *implied* revocations thus indicated is, in this state, abrogated by statute, under the ruling in the *Stump* case. It would be incongruous to hold that the statute abrogated the common-law rule to this extent and that no longer could a statutory offer to dedicate be "impliedly revoked", but that it, nevertheless, could be "expressly revoked". Since it has been interpreted by the Supreme Court that it was the legislative intent that by the enactment of section 20 of the Subdivision Map Act the legislature intended to abrogate the common-law rule whereby an offer to dedicate might be impliedly revoked by a conveyance without reservation, we must conclude, in the absence of any exceptions noted in the act itself, that it intended to abrogate the right to expressly revoke the offer in any other manner than that prescribed by the act. *Walters v. Bank of America Nat. Trust & Savings Ass'n*, 9 Cal.2d 46, 52, 69 P.2d 839, 110 A.L.R. 1259; *Ayres v. City Council of Los Angeles*, 34 Cal.2d 31, 207 P.2d 1.

[9] Some point is made by defendants that the Board subsequently accepted the map dedicating this strip without rescinding its former action rejecting it. The stipulation of facts does not completely cover this point. The minutes of the Board do show that by resolution the offer of dedication was finally accepted and the trial court found that the Board did rescind its action of rejection and accepted the offer. Even though the procedure adopted may have been irregular we are not prepared to hold that a rescission of the former action was not effected by the action of the Board in ultimately accepting the continuing offer to dedicate.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



96 Cal.App.2d 208

NELSON v. NELSON.

Civ. 17223.

District Court of Appeal, Second District,
Division 2, California.

Feb. 24, 1950.

Adele Marie Nelson sued for a divorce from Norris J. Nelson, who filed a cross-complaint.

From an interlocutory judgment of the Superior Court of Los Angeles County, William J. Palmer, J., granting plaintiff a divorce on the ground of extreme cruelty, ordering division of the parties' community property and awarding specified sums per month for the support of plaintiff and the parties' minor son, plaintiff appealed.

The District Court of Appeal, Wilson, J., held that the judgment awarding substantially more than half of the community property to plaintiff would not be disturbed and that the trial court properly exercised its discretion in reserving jurisdiction to make

a fair and equitable order determining the amount of support money payable after expiration of the period fixed for payment of the sums awarded plaintiff.

Judgment affirmed.

See also 215 P.2d 48.

1. Divorce ⇨252

Generally, spouse granted divorce on ground of extreme cruelty is entitled to award of more than half of spouses' community property.

2. Divorce ⇨286

A judgment awarding more than half of spouses' community property to wife, granted divorce on ground of extreme cruelty, will not be disturbed on her appeal on ground of error in trial court's valuation of contract in which husband owned half interest for commissions on imported newsprint, where contract was subject to cancellation.

3. Divorce ⇨240(2)

In awarding support money to divorced wife, court must consider not only parties' present financial and other circumstances, but future possibilities.

4. Divorce ⇨243, 308

The Superior Court properly exercised its discretion in reserving jurisdiction by interlocutory judgment, granting wife divorce and support money, to make fair and equitable order determining amount of support money payable after expiration of period fixed by judgment for divorced husband's payment of monthly sums awarded for support of wife and parties' minor son.

N. E. Youngblood, Los Angeles, for appellant.

Guthrie, Darling & Shattuck, Milo V. Olson, Los Angeles, for respondent.

WILSON, Justice.

Plaintiff has appealed from an interlocutory judgment of divorce in her favor, and has purportedly appealed from order denying her motion for a new trial. As nearly as can be ascertained from her

brief¹ she raises three objections to the findings and judgment: (1) that the court failed to find that defendant had committed adultery, (2) that she did not receive a proper division of the community property, (3) that the judgment did not expressly provide for her permanent support.

1. While there is evidence that on numerous occasions extending over a considerable period of time defendant had been in the company of the woman named in the case, the evidence is insufficient to sustain a finding of adultery.

[1,2] 2. Plaintiff's principal objection to the division of community property is with reference to the valuation placed by the court on a contract, in which defendant owned a half interest, for commissions on newsprint imported from Norway. It is a general rule that when a divorce is granted on the ground of extreme cruelty the innocent party is entitled to an award of more than one half of the community property. *Arnold v. Arnold*, 76 Cal.App. 2d 877, 883, 174 P.2d 674. There was evidence that the contract was subject to cancellation. In his written opinion the trial judge gave consideration to the provisions of the contract, the uncertainty as to its duration and the possibility of its cancellation, and to the value of all other items of community property, both real and personal. Substantially more than half of the community property, as valued by the court, was awarded to plaintiff, therefore we find no reason to disturb the judgment. In the record now before us in companion appeals the uncertainty of the value of the newsprint contract has been verified. In affidavits filed in connection with motions made in the case after judgment, which are the subject of appeals this day decided in another opinion, it is shown that the contract was cancelled after the judgment was entered.

[3,4] 3. In awarding support money the court must take into consideration not

only the present financial and other circumstances of the parties but must look to future possibilities. The court awarded plaintiff the sum of \$600 a month to be paid until the minor son of the parties should reach the age of 21 years or should die before reaching that age, and thereafter the sum of \$500 a month until three years after December 1, 1948. The judgment directed that the support to be paid after December 1, 1951, should be determined by the court after due notice and hearing in order that the conditions then prevailing might be ascertained, the court reserving jurisdiction for that purpose. Since the needs of plaintiff may become greater or less and the ability of defendant to pay may not remain constant (in fact his income has been substantially reduced by the cancellation of the newsprint contract), the court properly exercised its discretion in reserving jurisdiction to make a fair and equitable order in the future.

Judgment affirmed. Appeal from order denying new trial dismissed.

MOORE, P. J., and McCOMB, J., concur.



96 Cal.App.2d 210

NELSON v. NELSON.

Civ. 17443.

District Court of Appeal, Second District,
Division 2, California.

Feb. 24, 1950.

Adele Marie Nelson sued for divorce from Norris J. Nelson, who filed a cross-complaint.

From orders of the Superior Court of Los Angeles County, William B. McKesson and Alfred L. Bartlett, JJ., for defendant's payment to plaintiff of costs on plaintiff's appeal

1. Plaintiff's brief does not conform to Rule 15(a) of Rules on Appeal, 22 Cal. 2d 12, in that the headings are inadequate to set forth in proper form the points raised and are not sufficiently

descriptive of the subject matter covered. Furthermore, in much of the narrative portion of the brief appropriate references to the record are not supplied.

from an interlocutory judgment granting her a divorce, ordering division of community property and awarding her support money, and denying defendant's motion to modify such order, defendant appealed, and from an order modifying the original order, plaintiff appealed.

The District Court of Appeal, Wilson, J., held that the original order, based on the reporter's excessive estimate of his statutory fee for preparation of the transcript, should have been modified, and that reversal of the order denying defendant's motion to modify the original order rendered moot the subsequent order modifying the original order and plaintiff's appeal from such modifying order.

Appeal from original order dismissed, order denying motion to modify it reversed with directions, and plaintiff's appeal dismissed.

1. Divorce ☞181

An appeal from Superior Court's order requiring divorced husband to pay wife's costs on her appeal from interlocutory judgment granting her divorce, ordering division of community property, and awarding her support money will be dismissed where taken over 60 days after entry of order.

2. Divorce ☞194

A Superior Court order requiring divorced husband to pay amount, based on shorthand reporter's excessive estimate of his statutory fee for preparation of transcript, on account of costs incurred by wife on her appeal from interlocutory judgment granting her divorce, ordering division of community property and awarding her support money should have been modified by reducing amount awarded on husband's motion.

3. Appeal and error ☞790(3)

The District Court of Appeal's reversal of Superior Court's order denying divorced husband's motion to modify order requiring him to pay excessive amount as wife's costs on her appeal from interlocutory judgment granting her divorce, ordering division of community property and awarding her support money, rendered moot Superior Court's subsequent order modifying previous order by reducing amount payable, and wife's appeal therefrom.

N. E. Youngblood, Los Angeles, for appellant.

Guthrie, Darling & Shattuck, Milo V. Olson, Los Angeles, for respondent.

WILSON, Justice.

Appeals from three separate orders made after entry of the interlocutory judgment of divorce, which is the subject of an appeal in this action this day decided, Cal. App., 215 P.2d 47, grew out of an order requiring defendant to pay the costs of plaintiff's appeal from the judgment.

[1] After she had perfected her appeal she made a motion for an order requiring defendant to pay counsel fees and costs to be incurred in connection therewith. The motion came on for hearing before Judge Bartlett who made an order for the payment of \$1,800 on account of such costs. The minute order was entered on February 15, 1949, notice of which was served on defendant's counsel on February 16. A written order to the same effect was signed by Judge Bartlett and filed on February 28, 1949. The order was based in part upon the estimate of the shorthand reporter that the cost of his transcript would amount to \$1,500. When the transcript had been completed it was found that the cost was \$843.75. Defendant then made a motion which came on for hearing on April 29, 1949, before Judge McKesson for a modification of the previous order so as to provide for the payment of the actual cost of the transcript instead of the amount previously estimated. This motion was denied. Thereupon defendant filed a notice of appeal from the minute order of February 15 (signed order of February 28) and from Judge McKesson's order denying the motion to modify. Since the appeal from the February order was taken more than 60 days after its entry the appeal will be dismissed.

On June 29, 1949, defendant presented another motion, which came before Judge Bartlett for hearing, to modify the February order upon the same grounds which formed the basis of the motion of April 29. Upon the showing of the actual cost of the transcript Judge Bartlett modified his previous order, reducing by \$650 the

amount previously ordered to be paid. Plaintiff appealed from the latter order.

[2] In such a case as this the wife, upon proper showing, is entitled to have her costs of appeal paid by the husband, but she is not entitled to profit through an order made upon an erroneous estimate for an amount much greater than her actual costs. Since the original order was made upon the reporter's estimate of his statutory fee for the preparation of the transcript and his actual fee was less than his estimate, the original order should have been modified. Hence the court erred in refusing on April 29 to amend the original order.

[3] The reversal of the order of April 29 renders moot Judge Bartlett's order of June 29 and plaintiff's appeal therefrom.

Defendant's appeal from the minute order of February 15, 1949 (written order February 28), is dismissed. The order of April 29, 1949, refusing to modify the original order for costs is reversed with directions to grant the motion and to reduce by the sum of \$656.25 the amount required to be paid by defendant to plaintiff for her costs on appeal. Plaintiff's appeal from the order of June 29, 1949, is dismissed.

MOORE, P. J., and McCOMB, J., concur.



96 Cal.App.2d 212

KING v. WILSON et al.
Civ. 17356.

District Court of Appeal, Second District,
Division 2, California.

Feb. 24, 1950.

Hearing Denied April 24, 1950.

Gladys G. King sued Griffin Walter Wilson, as executor of the estate of George W. King, deceased and another, to have defendants decreed to be holding title to property

in trust for benefit of estate of deceased and to require defendants to reconvey the property to the estate.

The Superior Court of Los Angeles County, Jesse J. Frampton, J., sustained a demurrer to complaint without leave to amend and plaintiff appealed.

The District Court of Appeal, Wilson, J., held that demurrer was properly sustained on grounds that complaint did not state facts sufficient to constitute a cause of action, and that plaintiff lacked legal capacity to sue.

Judgment affirmed.

1. Executors and administrators ⇨85(1)

An action for recovery or possession of property belonging to an estate may be maintained by executor or administrator of estate. Probate Code, § 573.

2. Descent and distribution ⇨89

An heir cannot maintain an action for recovery or possession of property belonging to an estate because an heir lacks capacity to sue and cannot state a cause of action.

3. Descent and distribution ⇨89

Widow of a deceased lacked capacity to maintain action to require property held by defendant executor and by another, to be conveyed to estate, and to have defendants decreed to hold title to property in trust for estate.

4. Courts ⇨200½

The Superior Court sitting in probate can determine title to property when interest of executor as such is adverse to his interest as individual, but cannot try a question of title as between estate and strangers thereto.

5. Executors and administrators ⇨35(1, 3)

If an executor or administrator has wasted, embezzled or mismanaged estate, or has committed a fraud upon estate or neglected to perform any act required of him, one of the requirements being to recover property belonging to estate, his letters may be revoked. Probate Code, § 521.

6. Executors and administrators ⇨35(1), 70

An executor or administrator may be required to include in his inventory all

property not previously included therein and his failure so to do is cause for his removal. Probate Code, § 611.

7. Pleading $\Rightarrow$ 225(1)

Where plaintiff lacked legal capacity to sue and would be unable to amend complaint so as to state a cause of action, demurrer to complaint was properly sustained without leave to amend.

John J. McMahon and Richard H. Hall, Los Angeles, for appellant.

Walter G. Danielson, H. Spencer St. Clair, Los Angeles, for respondents.

WILSON, Justice.

This is an appeal from a judgment following the sustaining of a demurrer to plaintiff's second amended complaint without leave to amend.

The defendants are Wilson, as executor and individually, together with one Brewer and wife. Plaintiff alleges that she was the lawful wife of decedent King at the time of his death; he left no relatives or heirs in California other than plaintiff; he left real and personal property valued at approximately \$150,000; during his lifetime he conveyed property to Wilson and Brewer upon their agreement to reconvey it upon demand; the property is an asset of the estate and Wilson and Brewer held title thereto as trustees; Wilson as executor filed an inventory in the proceeding to probate decedent's will showing the value of the estate to be \$200. The prayer of the pleading is that it be decreed that defendants Wilson and Brewer hold title to the property in trust for the benefit of, and that they be compelled to reconvey it to, the estate.

The only grounds of the demurrer argued upon the appeal are (1) that the second amended complaint does not state facts sufficient to constitute a cause of action, (2) that plaintiff has not legal capacity to sue. The demurrer was properly sustained on both grounds.

[1-4] An action for the recovery or possession of property belonging to an estate may be maintained by the executor or ad-

ministrator. Prob.Code, sec. 573. An heir cannot maintain such an action for want of capacity to sue and for inability to state a cause of action. *Holland v. McCarthy*, 177 Cal. 507, 509, 171 P. 421. The superior court sitting in probate has jurisdiction to determine title to property when the interest of the executor as such is adverse to his interest as an individual, but is without power to try a question of title as between the estate and strangers thereto. *Stratton v. Superior Court*, 87 Cal.App. 2d 809, 811, 197 P.2d 821; *Bauer v. Bauer*, 201 Cal. 267, 271, 256 P. 820.

[5] If an executor or administrator has wasted, embezzled or mismanaged the estate or has committed a fraud upon the estate or neglected to perform any act required of him, one of the requirements being to recover property belonging to the estate, his letters may be revoked. Prob.Code, sec. 521.

[6] An executor or administrator may be required to include in his inventory all property not previously included therein and his failure so to do is cause for his removal. Prob.Code, sec. 611.

Since Wilson as executor cannot sue himself as an individual, if, upon proper proceedings, the court should determine that an action ought to be brought to recover the property the executor may be removed and another person substituted for the purpose of prosecuting such action.

Plaintiff alleges in her pleading that in January, 1946, she filed a petition in the probate proceeding asking that defendants be required to transfer the properties mentioned in the complaint, or the equivalent thereof, to the estate; that the order to show cause issued upon her petition went off calendar in March, 1946, and has never been reheard or decided. Since plaintiff was the moving party in that proceeding any neglect or delay in the determination of her petition rests upon her. It is possible that the pursuit of the remedy which she abandoned might be productive of a result that cannot be attained in the instant action.

Cases cited by plaintiff in which heirs or persons having claims against an estate

have been permitted to maintain actions such as those to establish a trust based upon mutual wills or contracts to make a will, actions by creditors against an estate or by a person claiming property adversely to the estate, or actions involving the rights of heirs or devisees in relation to the estate, need not be cited or discussed since plaintiff is not within any of the categories mentioned.

Plaintiff has discussed in her brief the questions of the statute of frauds and her failure to file a claim against the estate in the probate proceedings. These points were not presented to the trial court and do not arise under the proceedings in this action. Defendants state in their brief that those questions have arisen in one of several other actions prosecuted by plaintiff against these defendants involving the same property but they do not arise in this action.

[7] Since plaintiff has not legal capacity to sue and would be unable to amend her pleading so as to state a cause of action, the demurrer was properly sustained without leave to amend.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.



96 Cal.App.2d 225

COX v. WESTLING et al.
Civ. 7675.

District Court of Appeal, Third District
California.

Feb. 27, 1950.

Hearing Denied April 27, 1950.

Action by W. J. Cox against Swen E. Westling and Clarence A. Silva for rescission of a contract of sale of a strip and resaw mill and to recover amount expended by plaintiff to place mill in working condition, in which defendants filed cross-complaint for balance due on purchase price.

The Superior Court, Tuolumne County, J. T. B. Warne, J., entered judgment for plaintiff and defendants appealed.

The District Court of Appeal, Peek, J., held that the evidence failed to sustain plaintiff's allegations of defendants' intentional fraud in representing the cost and market value of the mill and machinery, its condition and capacity and availability of materials for processing.

Judgment reversed and cause remanded with instructions to enter judgment for defendants on their cross-complaint.

1. Fraud ☞11(2)

Where a statement as to value of property is understood to be a mere statement of opinion it will not be regarded as a representation of fact.

2. Vendor and purchaser ☞33

In action for rescission of contract of sale of mill for alleged false representations of defendant sellers, plaintiff's disbelief of defendants' representations concerning mill's capacity and availability of material precluded reliance thereon.

3. Fraud ☞50

In an action for alleged false representation, plaintiff must ordinarily show that the representation was as to a material fact, that such fact was false and known to be false by the party making it, or else recklessly made, or without reasonable grounds for believing its truth, that the representation was made with intent to induce the other party to do or refrain from doing some act and that it was relied upon by the other party and the absence of any one of such elements is generally fatal to a recovery.

4. Vendor and purchaser ☞123

In action for rescission of contract of sale of mill on ground of alleged intentional fraud of defendant sellers in representing cost and market value of mill and machinery, its condition and capacity, and availability of processing materials, evidence was insufficient to sustain judgment for plaintiff.

Milo Ayer, Oakland, T. R. Vilas, Sonora, Stanley C. Smallwood, Oakland, for appellants.

Brunswig Sholars, San Francisco, A. L. Crawford, San Francisco, Bruce McMullen, San Francisco, for respondent.

PEEK, Justice.

This is an action by plaintiff for rescission of a contract of sale of a strip and re-saw mill, and to recover the amount expended by him to place the mill in working condition. The basis of the action is the alleged intentional fraud of the defendant sellers in representing the cost and market value of the mill and the machinery, the condition and capacity of the mill, and the availability of materials for processing. The defendants' answer denied the allegations of fraud and by cross-complaint prayed for judgment in the amount of the balance due on the purchase price of the mill evidenced by a promissory note executed by plaintiff to defendants. The findings of fact were favorable to the plaintiff and judgment was entered in his favor from which defendants prosecute this appeal.

Defendants' attack upon the judgment, which appears to be well founded, is essentially twofold, (1) that the evidence is insufficient to sustain the finding that plaintiff relied upon the alleged representations and (2) that said representations were not representations of fact but were nothing more than mere statements of opinion and therefore were not fraudulent.

The evidence shows that while plaintiff, who is a farmer with no experience in the lumber or milling business, was at a lumber mill in Tuolumne county he expressed an interest in acquiring a mill and was introduced to defendant Silva who informed plaintiff he had one for sale. Thereafter plaintiff and Silva met at the latter's mill at which time Silva quoted a price of \$16,000.00 for the mill. Plaintiff stated that he had no personal experience in the operation of such a business but that he had talked to one Hodgson who would operate the mill for him, and that he was willing to take Hodgson's word that he could do so. Plaintiff further told Silva that he desired first to discuss the purchase with Hodgson before making any decision. Shortly thereafter plaintiff and Silva again met, at which time defendant Westling was also in attend-

ance. It was there represented to plaintiff, in regard to the question of available material for processing, that there were two mills in the vicinity which would furnish materials sufficient to pay the overhead; that one or two new mills were to be built in that area and as soon as the weather permitted an additional mill would commence operations and that material would be available from that mill as well. On this occasion plaintiff was informed that seven men were required to operate the mill, that seven thousand laths per day would pay the operating expenses and that sufficient additional material to turn out twenty thousand laths per day would be available if and when the other mills mentioned were able to operate. Also at this meeting plaintiff was told that the machinery was in good working order, that the mill would process twenty thousand laths per day. A list was then given him which showed the price of the machines then in the mill, their cost of installation and the cost of setting up the entire mill, the total of which was in excess of \$16,000.00. At the conclusion of that meeting plaintiff informed defendants that because of his lack of knowledge concerning the business he would decide nothing then but would suggest a subsequent meeting at his ranch at which time his friend Hodgson could be in attendance. Such a meeting was held at which the parties again discussed price, the machinery, capacity of the mill, and availability of material. At this final meeting plaintiff decided to purchase the mill for \$14,180.00, and all of the parties present went to Sonora where the transaction was completed. Although plaintiff was not sure whether or not Hodgson had seen the mill prior to plaintiff's decision to purchase, Hodgson himself testified he inspected the mill before the contract was signed in Sonora. Neither party had seen the mill in operation. However, subsequently thereto plaintiff, together with Hodgson and a third party, whom the plaintiff met on the road and whom he referred to as an expert but whose name he could not recall, did inspect the mill. While the date of such inspection was not definitely established, the testimony, in view of certain questions which were asked the plaintiff

concerning whether or not he followed the expert's advice, would seem to indicate that this inspection trip was made prior to the purchase of the mill. Plaintiff stated that the unidentified expert informed him that the machinery would have to be rearranged before the mill could operate efficiently but that Hodgson believed he could make out if material were available.

On cross-examination plaintiff, in response to a question relative to the capacity of the mill and the availability of materials, replied that he considered Silva's statements to be sales talk, that he knew the mill was not producing twenty thousand laths a day, that he did not believe that it ever had but that Silva had represented that it would produce that amount. Additionally he testified that Silva did not represent that the defendants had any contracts for material and he knew that if the other mills did not go into operation that materials would not be available. He further stated that the reason he wanted Hodgson to participate in his discussions with the defendants was because he desired Hodgson to know all about the prospective purchase, in order that he could discuss it with Hodgson, and Hodgson in turn "could see if he thought we could make it." His testimony in regard to the price of the mill was that Silva had told him that in his opinion the mill was worth \$16,000.00, and that he felt that defendants were trying to get as high a price for it as they could and that he was trying to get it as low as he could.

Hodgson's testimony shows that he had neither owned nor operated such a business and knew nothing about operating the same; that he had no experience in acquiring the necessary materials, the hiring of men or the selling of the finished product; that he agreed to operate the mill before plaintiff had purchased the same and before he had seen it. Hodgson further testified that the highest production made after Cox acquired the mill was approximately six thousand laths during an eight hour period and that on the day following the purchase he discovered that material sufficient to produce twenty thousand laths was not available.

Lastly an expert called as a witness by plaintiff testified that the mill was not capable of producing twenty thousand laths a day, that the machinery was protected by no safety devices, and that in his opinion the mill was worth nothing.

[1] While the evidence establishes that the defendants represented that the mill cost \$16,000.00 there is nothing in the record that such representation was false. There is no evidence that the defendants represented the actual market value of the mill to be \$16,000.00, the only evidence being that defendants represented that it was worth \$16,000.00 and that plaintiff considered such representation to be "sales talk". While it is true that a statement as to the value of property may under some circumstances be regarded as a representation of fact, *Stallman v. Schwartz*, 76 Cal.App. 2d 406, 407, 173 P.2d 388, it will not be so regarded where the representation is understood to be a mere statement of opinion, *Alberda v. Smith*, 2 Cal.App. 2d 74, 37 P.2d 509; 12 Cal.Jur. 729, 730. That plaintiff so considered defendants' statement is established by his own testimony that he understood it to be a part of defendants' sales talk.

[2] In regard to the representations as to the capacity of the mill and availability of material therefor, the foregoing evidence establishes that they were not believed by plaintiff. Such lack of belief precludes reliance. *Smith v. Brown*, 59 Cal.App.2d 836, 140 P.2d 86. As to the condition of the machinery, the evidence does establish that it was not properly arranged for efficient production and lacked safety devices. However, the evidence shows no representation was made that the machinery was efficiently arranged or that it was equipped with safety devices but only that the machinery was in "top working order".

[3] The elements of actionable fraud frequently have been summarized as follows: "When a cause arises out of an alleged false representation, the plaintiff, in order to prevail, must ordinarily show that the representation was as to a material fact; that such fact was false and known to be false by the party making it, or else reck-

lessly made, or without reasonable grounds for believing its truth; that the representation was made with intent to induce the other party to do or refrain from doing some act; that it was relied upon by the other party—in other words, that such other party was actually misled and deceived and induced by it to act or refrain from acting; that in so acting or refraining from acting he was ignorant of the falsity of the representation and reasonably believed it to be true; and that he thereby suffered damage or injury. The absence of any one of the elements is generally fatal to a recovery.” 12 Cal.Jur. 724-725. *Wheat v. McNeill*, 111 Cal.App. 72, 78, 295 P. 102; *Andrew v. Bankers & Shippers Ins. Co.*, 101 Cal.App. 566, 575, 281 P. 1091; See also 37 C.J.S., *Fraud*, p. 215, § 3.

[4] Applying the rule as stated to the evidence disclosed by the record herein, it is readily apparent that since one or more of the aforementioned elements is lacking with regard to each of the alleged representations made by defendants to plaintiff, the judgment must be reversed.

The judgment is reversed, and the cause is remanded with instructions to enter judgment for the defendants on their cross-complaint.

ADAMS, P. J., concurs.

Hearing denied; SHENK and CARTER, JJ., dissenting.



96 Cal.App.2d 191

**LEWIS v. CONSTITUTION LIFE CO.
OF AMERICA et al.**
Civ. 14147.

District Court of Appeal, First District,
Division 2, California.
Feb. 23, 1950.

Glennie Lewis sued the Constitution Life Company of America and others for personal

injuries arising out of an automobile accident.

The Superior Court, City and County of San Francisco, James G. Conlan, J., rendered judgment for plaintiff upon verdict of jury and denied defendants a new trial and defendants appealed.

The District Court of Appeal, Goodell, J., held that the evidence was sufficient for the jury to infer that driver of automobile injuring plaintiff was an employee of defendant at time of accident.

Affirmed.

1. Master and servant ⇨332(3)

If terms of contract are precise and explicit and evidence is reasonably susceptible of but a single inference, the question of whether one is a servant or an independent contractor becomes one of law for court.

2. Automobiles ⇨245(28)

Evidence that at time of automobile accident driver was making a business call at request of defendant made out of prima facie case for plaintiff sufficient to support a finding of employer-employee relationship between driver and defendant.

3. Master and servant ⇨330(1)

After plaintiff establishes a prima facie case of employer-employee relationship, the burden shifts to defendant who may then prove that defendant was an independent contractor.

4. Automobiles ⇨242(6)

Where rules of defendant regarding freedom of action of driver of auto injuring plaintiff were part of employment contract, proof of contents of rules was not incumbent on plaintiff, where he had made out a prima facie case of employer-employee relationship between driver and defendant.

5. Principal and agent ⇨159(1)

A principal can not avoid liability to others for injuries caused them as a result of the agent's negligence merely by entering into an agreement with agent that relationship of principal and agent shall not exist between them.

6. Evidence ⇨75

Where plaintiff produced evidence that driver of automobile causing injuries to

plaintiff worked for defendant under a sales manual and a general set of instructions, the failure of defendant to produce contents of manual or the instructions caused a presumption to arise that such evidence, if produced, would operate to defendant's prejudice and help case of plaintiff.

7. Evidence ⚡75

When evidence tends to prove a material fact which imposes a liability on a party, and he has it in his power to produce evidence which, from its very nature, must overthrow case made against him, and he refuses to produce such evidence, a presumption arises that evidence, if produced, would operate to his prejudice, and support case of his adversary.

8. Master and servant ⚡301(1)

The doctrine of "respondeat superior" applies only where relation of master and servant is shown to exist between wrongdoer and person sought to be charged with result of wrong, at time and in respect to the very transaction out of which the injury arises, and the right of control by master over servant is the principal test.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Respondeat Superior".

9. Automobiles ⚡244(26)

Evidence of unquestioned control of driver of automobile injuring plaintiff by defendant on one occasion authorized jury to infer that defendant so acted at other times and that potential power of control over driver by defendant existed at time of accident.

10. Appeal and error ⚡989, 996

The power of appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support a conclusion reached by jury, and when two or more inferences can reasonably be deducted from facts, the reviewing court cannot substitute its deductions for those of trial court.

11. Automobiles ⚡244(26)

Evidence was sufficient for jury to infer that driver of automobile injuring plain-

tiff was in an employer-employee relationship with defendant at time of accident so as to impose liability on employer.

Parker, Stanbury & Reese, Raymond G. Stanbury, Los Angeles, for appellants.

Marcel E. Cerf, Robinson & Leland, Emmet B. Hayes, San Francisco, for respondent.

GOODELL, Justice.

The plaintiff sued for \$9200 damages for personal injuries. A default was entered against defendant Frederick G. Law. The case went to trial against the other defendants, resulting in a verdict of \$7000. A new trial was denied and this appeal was taken from the judgment.

On a Sunday morning plaintiff's car was parked at the curb in front of his home on Carolina Street between 18th and 19th in San Francisco. Plaintiff was kneeling on the sidewalk reaching over the right front tire attempting to locate a minor mechanical defect when his car was struck by Law's car coming down the hill from 19th Street toward 18th with nobody at the wheel. The impact drove plaintiff's car onto him, pinning him under it and causing the injuries for which he sued.

Defendant Law was a representative of Mal K. Pillsbury Agency, the general agent in Northern California of Constitution Life Company (formerly called Postal Life). Law as such representative had solicited and obtained from a Mrs. Sylvester her application for insurance by the Company and had received and turned in a premium payment of \$30. She had failed to take the required medical examination and had finally written to the Company her decision not to go forward with the policy.

The day before the accident the Agency requested Law to call on Mrs. Sylvester to get back the receipt which he had given her for the \$30, and to give her in return the company's check for the \$30. He testified "I had special instructions to pick up that receipt before giving her the check." She lived on Carolina Street and he parked his car on that street at the curb near the

corner of 19th. After completing the transaction he walked down the hill to call on another prospect and on returning found his car at the foot of the hill where it had run into a pole.

Pillsbury and the insurance company were joined as defendants on the theory that Law was their employee, acting within the scope of his employment at the time of the accident.

[1] At the conclusion of the evidence appellants moved for a directed verdict on the ground, among others, "that it appears from the uncontradicted evidence that * * * Law occupied the status of an independent contractor," and the only question to be decided now is whether that motion should have been granted. If "the terms of the contract are precise and explicit and the evidence is reasonably susceptible of but a single inference, the question of whether one is a servant or an independent contractor becomes one of law for the court." *Robinson v. George*, 16 Cal. 2d 238, 242-243, 105 P.2d 914, 916; see also, *Perguica v. Industrial Acc. Com.*, 29 Cal. 2d 857, 859, 179 P.2d 812 and *Mantonya v. Bratlie*, 33 Cal.2d 120, 128-129, 199 P.2d 677.

[2, 3] The plaintiff proved without dispute that Law's call upon Mrs. Sylvester was at the request of the Agency, which made out a *prima facie* case "sufficient to support a finding of an employer-employee relationship." *Robinson v. George*, supra, 16 Cal.2d 238, 244, 105 P.2d 917. In the case just cited it is said: "Of course, after plaintiff establishes a *prima facie* case, the burden shifts to the defendant corporation which then may prove, if it can, that defendant * * * was an independent contractor. [Citations]." See, also, *Isenberg v. California etc. Com.*, 30 Cal.2d 34, 38, 180 P.2d 11.

Appellants introduced a contract between the company and Law which they contend shows beyond dispute that Law was an independent contractor.

Section 1 thereof provides that "Nothing contained herein shall be construed to create the relationship of employer and employee between the First Party and the

Agent. The Agent may exercise his own judgment as to the time and the manner in which he may perform the services required to be performed by him under this Agreement, but the *First Party may*, from time to time, *prescribe rules and regulations respecting the conduct of the business covered hereby*, not interfering with such freedom of action of the Agent." Section 9 provides that "*The Agent shall conform to the rules and regulations of the First Party now or hereafter to become in force, which rules and regulations shall constitute a part of this Agreement.*" This provision shall not be construed to alter the relationship of the parties as provided in Section 1 hereof." (Emphasis added.)

Section 10 gives the company the right to cancel in case the agent breaches any "material provision, condition or obligation of this contract * * *." This is the equivalent of saying that the agent can be discharged, see *Burlingham v. Gray*, 22 Cal. 2d 87, 102, 137 P.2d 9, for a failure to obey the rules and regulations (a part of the contract).

[4] Although the rules and regulations were part of the contract there was no proof of their contents. Had there been, the court or jury could have told whether they in fact interfered or not with the "freedom of action of the Agent." If such rules and regulations existed (and the record is silent on the subject) their production would have removed all doubt as to the extent of control which they provided. Their absence was not accounted for. It was not incumbent on plaintiff to prove them since his *prima facie* case of an employer-employee relation had been made out.

[5] With respect to the contract, the jury was correctly instructed that "The principal can not avoid liability to others for injuries caused them as a result of the agent's negligence * * * merely by entering into an agreement with the agent that the relationship of principal and agent shall not exist between them."

While the record is unsatisfactory and inconclusive respecting rules and regulations, it is by no means lacking in affirma-

tive evidence, introduced as part of plaintiff's case, that instructions in the form of a sales manual and letters had been issued to the solicitors.

Law testified:

"Q. Did you have any general set of instructions or anything of that kind from the Constitution Life Company * * * then known as the Postal Union Life Insurance Company? A. Well, we had a sales manual and we received letters now and then as to changes to be made in applications for the insurance.

"Q. That manual is issued by whom? A. At that time it was issued by the Postal Union Life Insurance Company.

"Q. And turned over to you by Mr. Pillsbury? A. Yes."

[6,7] In their closing brief under the heading "The sales manual" appellants touch this subject very lightly and somewhat evasively by saying: "It is obvious that the furnishing of order and application forms, and of a price list, does not transform an independent solicitor into an employee." Law was not asked anything about *forms or price lists*; he was asked whether they had "any general set of instructions or anything of that kind" and gave the responsive answer that he had received *a sales manual and letters*. Appellants, however, with every opportunity to do so, did not prove the contents of the manual. It is well within the possibilities that it contained the rules and regulations, as it certainly was an appropriate place for them. Law's testimony that they had a manual certainly invited proof of whatever *instructions* it contained, and the absence of such proof left the case wide open for the conclusion that the manual (with or without the rules and regulations) instead of showing the "freedom of action" so conspicuously avowed by the contract, showed the very opposite. The burden, it must be remembered, had shifted to the defense to show that no right of control over means or methods had been reserved, and the manual was the company's handbook of instructions to its agents and within its power to produce. "When the evi-

dence tends to prove a material fact which imposes a liability on a party, and he has it in his power to produce evidence which, from its very nature, must overthrow the case made against him if it is not founded on fact, and he refuses to produce such evidence, a presumption arises that the evidence, if produced, would operate to his prejudice, and support the case of his adversary." 10 Cal.Jur. p. 779. *Breland v. Traylor*, 52 Cal.App.2d 415, 425-426, 126 P.2d 455, discusses this question comprehensively and to the point.

Appellants argue that an independent contractor is entitled to some control over the party working for him. Nobody will question this, but such an argument—with nothing specific about it—loses most, if not all, of its force in the light of the failure, just discussed, to let the court and jury know anything about the instructions to the solicitors.

[8] This brings us to the inquiry into control at the time in question. The "doctrine of *respondeat superior* applies only where the relation of master and servant is shown to exist between the wrong doer and the person sought to be charged with the result of the wrong, at the time and in respect to the very transaction out of which the injury arises." *Luckie v. Diamond Coal Co.*, 41 Cal.App. 468, 483, 183 P. 178, 184. All the cases hold that the *right of control* is the principal test in cases such as this. Actual control, however, is evidence of right of control. *Casselman v. Hartford etc. Co.*, 36 Cal.App.2d 700, 712, 713, 98 P.2d 539. There is clear and uncontradicted testimony that Law had precise instructions from the Agency when he was sent upon his mission.

When Law was requested to call on Mrs. Sylvester the Agency left him no "freedom of action" in his dealings with her. It left him no discretion as to the method of exchanging the receipt for the \$30 check. The order in which this exchange was to be effected and the precise manner of doing it was laid out to him by the Agency. Law testified "I had special instructions to pick up that receipt before giving her the check." True he admitted on cross-

GRIFFOUL v. SEEMAN.

Civ. 14220.

District Court of Appeal, First District,
Division 2, California.

March 2, 1950.

Henry M. Griffoul brought action against Albert Max Seeman to recover for injuries and damage to automobile.

The Superior Court in and for the County of Alameda, James R. Agee, J., rendered a judgment for plaintiff on a jury verdict for \$770, and the plaintiff appealed, on ground that verdict was insufficient.

The District Court of Appeal, Nourse, P. J., held that evidence sustained a verdict for only \$770.

Judgment affirmed.

1. Appeal and error ⇐1002

Where a verdict is based on competent and sufficient evidence, it will not be disturbed solely because there may be conflicting evidence.

2. Appeal and error ⇐930(1)

On appeal by plaintiff on ground that verdict for plaintiff was insufficient, the District Court of Appeal was required to take the evidence in light favorable to defendant.

3. Damages ⇐130(4)

Verdict of \$770 for neck injury and damage to automobile, was not insufficient, where there was evidence that pain in neck was caused by misplaced vertebra of many year's standing, that accident did not add to previous injury or cause additional pain, that plaintiff sometimes worked for three or four days a week without wearing neck brace, that plaintiff was working nine hours a day, and that repairs to automobile covered worn out parts not affected by collision.

James F. Boccardo, San Jose, for appellant.

Appelbaum & Mitchell, Oakland, for respondent.

examination that he would always do that, but the fact remains that he had "special instructions" from the Agency to do it that way.

[9] In addition to the force of this as an independent piece of evidence of unquestioned control on the occasion involved herein the jury could readily have drawn from it the inference that if the Agency so acted at that time it so acted at other times "and that the *potential* power of control existed because it had been actually exercised". *Casselman v. Hartford*, supra, 36 Cal.App.2d at pages 712-713, 98 P.2d at page 547. The case at bar is particularly susceptible to this and other inferences because of appellants' failure to lay before the jury the rules and regulations or the manual and letters which might have shown that Law indeed had "freedom of action".

[10, 11] As indicated earlier, "* * * the power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." *Estate of Bristol*, 23 Cal.2d 221, 223, 143 P.2d 689, 690. That being so, there is no necessity to discuss the several factors, shown by the contract and the other evidence, on which appellants rely to show an independent contractor relationship. It may be conceded that such other factors are present in this case and that a judgment the other way might well have been affirmed. See *Lee v. Nanny*, 38 Cal.App.2d 90, 94, 95, 100 P.2d 832. However, we are satisfied that under the rules we have cited the case was properly given to the jury and it was its function—under instructions which are not attacked—to draw its own inferences.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J.,
concur.

NOURSE, Presiding Justice.

Plaintiff sued for damages for personal injuries and injuries to his car. The jury returned a general verdict for \$770.00. Plaintiff appeals on the ground that the verdict is insufficient.

[1,2] The appeal presents no question of law. It rests squarely on the settled rule that when a verdict is based on competent and sufficient evidence it will not be disturbed solely because there may be conflicting evidence. Taking the evidence in the light of that which is favorable to respondent, as we are required to do under this rule, it appears that when plaintiff stopped in obedience to an intersectional traffic signal in the city of Oakland his car was struck from the rear by the car driven by defendant. Plaintiff drove his car to two hospitals in Hayward and East Oakland, but the hospital records do not show any entry. He then drove to his home in San Jose and the next day consulted a physician.

Plaintiff claimed injury to his neck requiring the use of a neck brace, injury to his car, and loss in his business. The evidence showed that the pain in the neck was caused by a misplaced vertebra of many year's standing, that the accident did not add to the previous injury or cause additional pain. Since the jury was able to observe the plaintiff during the trial and, since he testified that sometimes for three or four days a week he did his work without the neck brace, the jury may have drawn the inference that the neck brace was worn merely to create an impression that plaintiff was seriously injured. The evidence showed that repairs made to the car covered worn out parts which were not affected by the collision. The evidence showed that instead of suffering a loss in his business following the accident plaintiff's business increased from a \$3,500 a month gross to \$9,500 a month gross, and that he had plenty of work—was working nine hours a day.

[3] On the whole the evidence was such that the jury could well have drawn the inference that plaintiff's physical injuries

were slight and that the special damages claimed were grossly exaggerated.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.



96 Cal.App.2d 386

DEARING v. FESSLER et al.

Civ. 17079.

District Court of Appeal, Second District,
Division 3, California.

March 8, 1950.

Action by Bessie M. Dearing against Arthur H. Fessler, Ina M. Fessler, his wife, and Ralph C. Puckett, doing business as California Tree Service.

An order denying a motion to tax costs and to strike memorandum of costs and disbursements filed by Ralph C. Puckett, doing business as California Tree Service, from the record was entered by the Superior Court of Los Angeles, Stanley N. Barnes, J., and the plaintiff appealed.

The District Court of Appeal, Vallée, J., held that the memorandum of costs and disbursements would not be stricken from record because they had been served upon plaintiff's attorney by mail without showing that attempt at personal service had failed.

Order affirmed.

See also 210 P.2d 535.

1. Costs ⇐203

Under statute, service of memorandum of costs and disbursements upon appellant or his attorney is not required to be by personal delivery but may be made by mail. Code Civ.Proc. §§ 1010-1012.

2. Costs ⇐203

Respondent's service of memorandum of costs and disbursements would not be stricken from record because shown that service was made upon appellant's attor-

ney by mail without showing that an attempt at personal service had failed. Code Civ.Proc. §§ 1010-1012.

Joseph L. Fainer and Ludwig H. Gerber, Los Angeles, for appellant.

Tripp & Callaway, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal from an order denying a motion to tax costs and to strike respondent's memorandum of costs and disbursements from the record.

Judgment for costs was entered in favor of respondent and against appellant on August 14, 1948. On August 16, 1948, respondent served his memorandum of costs and disbursements by mail on appellant's attorney, who had his office in Los Angeles. Thereafter appellant moved the court to tax the costs and to strike the memorandum from the record. The motion was denied.

The sole assignment of error is that the memorandum of costs and disbursements was not served as provided by law. Appellant asserts that service of a memorandum of costs and disbursements "cannot be made by mail unless attempts at personal service have failed." There is no question but that appellant's attorney received the memorandum within three days after the entry of judgment.

A memorandum of costs and disbursements may be served upon a party or his attorney. Code Civ.Proc. sec. 1010. The service may be personal, by delivery to the party or attorney. Code Civ.Proc. sec. 1011.

[1,2] Since the amendment in 1931 of section 1012, Code of Civil Procedure, service may be made by mail where there is delivery by mail at the place where the party to be served resides or has his office. *Leplat v. Raley Wiles Auto Sales*, 62 Cal. App.2d 628, 635, 145 P.2d 350. When *Holmes v. Anderson*, 90 Cal.App. 276, 265 P. 1010, relied upon by appellant, was de-

cided, section 1012 allowed service by mail only where the parties resided or had their offices at different places.

Affirmed.

SHINN, P. J., and WOOD, J., concur.



96 Cal.App.2d 221

LUNDY v. LAKIN et al.
Civ. 7557.

District Court of Appeal, Third District,
California.

Feb. 27, 1950.

C. A. Lundy brought action against James T. Lakin, also known as James Thompson Lakin, and others, to quiet title to certain mining land, and the named defendant filed a cross-complaint to quiet title.

The Superior Court of Plumas County, J. O. Moncur, J., rendered a judgment for the plaintiff, and the defendants appealed.

The District Court of Appeal, Peek, J., held that evidence was sufficient to sustain the finding that plaintiff acquired title to the land by adverse possession.

Judgment affirmed.

See also 89 Cal.App.2d 849, 202 P.2d 369.

1. Appeal and error ⇐1011(1)

Appellants' contentions which were essentially attacks on sufficiency of evidence to sustain judgment, were without merit, where review of record revealed substantial, though conflicting, evidence in support of judgment.

2. Appeal and error ⇐1010(1)

Trial court's findings of fact which were supported by evidence contained in the record were binding on District Court of Appeal.

3. Mines and minerals ⇐49

Grantee under a deed quitclaiming to him all rights, title and interest of corpora-

tion in mining land, acquired at least color of title which could ripen into actual title through adverse possession.

4. Mines and minerals ⚡49

Where plaintiff acquired color of title to mining land by quitclaim deed, plaintiff leased the land, plaintiff's lessees carried on mining activities which constituted possession hostile to that of the true owner, and such activities continued for prescribed statutory period during which taxes on land were assessed to and paid by plaintiff, plaintiff acquired title by adverse possession.

5. Mines and minerals ⚡49

Occupation of entire parcel of mining land by plaintiff or his lessees was not required, in order to give plaintiff title to entire parcel by adverse possession. Code Civ.Proc. § 322.

6. Trusts ⚡138

Fact that decree designated plaintiff's predecessor in interest as trustee to hold title to a one-tenth interest in mining land, did not prevent plaintiff from acquiring title to mining land by adverse possession, where decree made no provision for successor trustees, since right to administer a trust is not descendible, divisible, or alienable.

7. Appeal and error ⚡981

New trial ⚡99

A motion for new trial on ground of newly discovered evidence is addressed to discretion of trial court, and exercise of trial court's discretion in denying a motion will not be disturbed on appeal except in a case of an abuse of discretion.

Hardin Barry, Susanville, for appellants.

Wm. M. Macmillan, Quincy, and Downey, Brand, Seymour & Rohwer, Sacramento, for respondent.

PEEK, Justice.

This action was instituted by plaintiff C. A. Lundy to quiet title to certain mining land located in Plumas county described in the original patent thereof as the Mammoth

Quartz Mine, embracing approximately 252 acres. The complaint contained the usual allegations to quiet title by adverse possession. Defendant James T. Lakin filed his answer denying the material allegations of the complaint, and by a cross-complaint alleged that he was the owner in fee of the land in question and sought a decree quieting his title. Upon the issues so raised the cause proceeded to trial before the court sitting without a jury. Judgment was rendered in favor of plaintiff and defendants have appealed.

[1] The contentions of appellants as set forth in their 226 page opening brief and their 45 page reply brief are essentially attacks upon the sufficiency of the evidence to sustain the judgment, and are without merit since a review of the record reveals substantial, though conflicting, evidence in support of the judgment.

A summary of the evidence discloses that the original patent, which was issued in 1877, referred to the property as the "Mammoth Quartz Mine" and embraced some 252 acres, more or less. A consent decree in the Federal Circuit Court for the District of California entered on November 19, 1888, determined the rights of plaintiff's and defendants' predecessors in interest to the entire patent and divided the property into two separate parcels. One parcel consisting of about 43 acres was awarded to plaintiff's predecessor in interest and is not in dispute. This parcel is shown in yellow on the map of the property introduced in evidence and is referred to by the parties as the "yellow" parcel. The parcel in dispute is shown in pink on the aforementioned map. An undivided nine-tenths interest to this parcel was given to defendants' predecessors in interest and the remaining one-tenth interest was given to plaintiff's predecessor in trust to hold upon terms and conditions hereafter considered. Plaintiff's claim of title to said parcel is, of necessity, based upon adverse possession since it is conceded that the record title thereto is in defendants.

His claim of title in this respect is based in part on a deed received on December 31, 1931 from his predecessor in interest which quitclaimed "All the right, title and inter-

est of Plumas Eureka Corporation in and to the Mammoth Quartz Mine designated as Lot No. 44 in Township 22 North, Range 11 East, M.D.B.&M.”.

[2] Plaintiff's contention is that he thereupon acquired color of title to the pink parcel which ripened into actual title through adverse possession. The acts relied upon by plaintiff are those of various lessees under leases executed by plaintiff over a period of time, and which referred to the property as the “Mammoth Quartz Mine”. The leases did not attempt to segregate the yellow from the pink parcel and the evidence is sufficient to establish that the leases did not confine their operations to any particular parcel but rather that operations were performed upon both the yellow and pink parcels. Defendants contend that the leases of the “Mammoth Quartz Mine” referred only to the yellow parcel and did not include the pink which defendant claims was referred to as the “Mammoth Extension”. Such contention merely presents a question of fact which has been resolved against defendants by the trial court and is binding upon this court under well-established rules of appellate procedure in view of the evidence contained in the record to support such determination. Furthermore the phrase “Mammoth Quartz Mine” was used in the original patent to refer to the area included within both the yellow and pink parcels.

[3-5] Plaintiff acquired at least color of title to the pink parcel by his deed of 1931 to the “Mammoth Quartz Mine”. The leasing of that area together with the activities of the lessees constituted possession hostile to that of the true owner and continued for the prescribed statutory period during which the taxes upon said parcel were assessed to and paid by plaintiff. Since the foregoing elements are substantiated by the record herein the plaintiff acquired title by adverse possession. *West v. Evans*, 29 Cal.2d 414, 175 P.2d 219. Although the entire parcel was not wholly occupied by plaintiff or his lessees such occupation was not required since plaintiff and his lessees occupied portions thereof under color of title and thus partial occupation was sufficient to establish adverse posses-

sion of the whole. Code Civ.Proc. section 322.

[6] Defendants' further contention that plaintiff's possession was not hostile is predicated upon the trust created by the aforementioned consent decree with respect to a one-tenth interest in the pink parcel. The decree designated the Sierra Buttes Gold Mining Company, plaintiff's predecessor in interest, as trustee, to hold the legal title to such one-tenth interest for certain designated purposes which are not material to the question involved herein. Defendants contend that a valid trust was thereby created as to such one-tenth interest with the result that plaintiff now holds title to it as mere trustee and therefore plaintiff's possession with respect to it cannot be considered adverse. Assuming there may be a question as to whether said trust violated either the rule against perpetuities or the rule against restraints on alienation, and hence was invalid, consideration of that question is unnecessary to a determination of this appeal. Even if the trust is assumed to be valid it does not follow that plaintiff became trustee thereunder since the decree made no provision for successor trustees and the rule is well established that the right to administer a trust is not descendible, divisible, or alienable. 25 Cal.Jur. 331. Therefore it cannot be said that plaintiff held title to such one-tenth interest as a trustee, and defendants' contention that plaintiff's possession cannot be considered adverse is thus immaterial.

[7] Defendants lastly contend that the trial court erred in denying his motion for a new trial which was made upon grounds already disposed of in this appeal and also upon the ground of newly discovered evidence. The rule is well settled that a motion for new trial on the ground of newly discovered evidence is addressed to the discretion of the trial court and that the exercise of its discretion in denying a motion for new trial on that ground will not be disturbed except in a case of an abuse of discretion. No abuse of discretion has been shown.

The judgment is affirmed.

ADAMS, P. J., concurs.

96 Cal.App.2d 240

FETTERLY v. SALYER et al.

Civ. 3789.

District Court of Appeal, Fourth District,
California.

Feb. 27, 1950.

Action by Steve Fetterly against E. C. Salyer and others, for unlawful entry and conversion of crops. Defendants filed a cross-complaint seeking damages for plaintiff's trespass upon their realty, and for conversion of crops thereon.

The Superior Court of Kings County, Clark Clement, J., entered judgment on a verdict in favor of plaintiff for actual damages, and for exemplary or punitive damages, and defendants appealed.

The District Court of Appeal, Barnard, P. J., held that plaintiff was entitled to actual damages sustained when defendants unlawfully entered upon his realty and removed equal amounts of crops which he had removed from disputed realty, but that in absence of showing of oppression, fraud, or malice, by defendants, plaintiff was not entitled to exemplary damages.

Judgment modified by reducing it in amount awarded as exemplary damages, and as so modified, affirmed.

1. Appeal and error ⌚1050(1)

In action for unlawful entry and damages occasioned by defendants' taking of crops, admission of testimony by plaintiff that when he observed that some of his grain was being harvested by defendants he went to see his attorney and district attorney, and testimony of witness that defendants were farming about 12,000 acres of land that year, was not prejudicial.

2. Trespass ⌚46(2)

In action for unlawful entry and damages for taking of plaintiff's barley crop, evidence that plaintiff was permitted, without objection, to occupy realty in question during growing season, was sufficient to support implied finding of jury upon disputed question of fact that plaintiff occupied and harvested grain only on realty he leased.

3. Trial ⌚252(6)

In action for unlawful entry, and damages occasioned by taking of crops, refusal

of instructions to effect that if each of parties was equally guilty of a trespass and conversion, one should be set off against other, and neither could recover, was proper where evidence showed that defendants took law into their own hands and entered plaintiff's realty for purpose of taking an amount of grain equal to that which they claim plaintiff had taken from them.

4. Trial ⌚261

In action for unlawful entry, and taking of property, where instruction relating to exemplary damages was incomplete, trial court's refusal to give instruction was proper.

5. Trespass ⌚25

Where plaintiff and defendants as lessees sowed barley on adjacent realty which each thought was realty leased by him, to boundary which had been accepted by previous owners and farmers for 25 years, entry by plaintiff, as was his custom, upon strip found by surveyors employed by defendants without plaintiff's knowledge, to belong to defendants, and removal of barley thereon, was not a trespass for which plaintiff was liable.

6. Trespass ⌚56

Where defendants, as lessees of adjacent realty, acted under a mistaken claim of right, and entered upon plaintiff's realty and removed crops equal to amount of crops removed by plaintiff from realty he thought belonged to him, without oppression, fraud or malice, defendants were liable to plaintiff only for actual damages and were not liable for punitive damages. Civ.Code, § 3294.

Sidney J. W. Sharp, Herbert M. Braden, Lawrence W. Clawson, Hanford, for appellants.

Walch & Griswold, Hanford, for respondent.

BARNARD, Presiding Justice.

The defendants had under lease a part of the old Tulare Lake bed, described by quarter sections, and the plaintiff had under lease two parcels, similarly described, which

adjoined the defendants' land. In the fall of 1946, the parties sowed barley on their respective lands. At that time the exact location of the section lines was unknown to either party, and each planted what he thought was the land leased by him. The defendants planted their land first, seeding barley up to an old levee and ditch line. The plaintiff later sowed barley on his land, seeding up to the same line where the defendants had stopped. There is evidence that for some twenty-five years this levee and ditch line had been accepted by previous owners and farmers of these parcels as the boundaries and lines to which they had planted crops. There is evidence, however, that the land in question had been under water for nearly ten years prior to the season in question.

The barley planted by the plaintiff was ready for harvest by June, 1947. Shortly before harvest time the defendants had their land surveyed by two engineers, who set stakes purportedly marking the quarter section lines. Although the plaintiff was not informed of this survey he observed, a few days before harvest and seven months after the barley had been planted, some stakes in his field of barley. He proceeded, according to custom, to cut a strip of barley around each of his parcels to make room for the big harvesters to come in and complete the harvest. The strip thus cut included an area of several acres along the boundary line, which is the area in dispute, and which the defendants claim to be theirs, as shown by their private survey. Thereupon, the defendants went upon the plaintiff's land and harvested and removed the grain from a similar area.

The plaintiff brought this action alleging that the defendants had unlawfully entered upon his land and had harvested, removed and converted to their own use 48.44 tons of barley of the reasonable value of \$2,905.80, to their damage in that amount. It was also alleged that in doing these things the defendants had acted maliciously and oppressively, and by reason thereof \$3,000 was demanded as exemplary and punitive damages. In their answer the defendants admitted that they had gone upon the plaintiff's property and harvested

and taken the barley from about 12½ acres, alleging that they had done so because the plaintiff had previously trespassed upon their property and harvested a similar area of barley. They also filed a cross-complaint alleging that the plaintiff had trespassed upon their land and had harvested and taken therefrom 48.44 tons of barley of the reasonable value of \$4,601.80. They also sought exemplary and punitive damages against the plaintiff in the sum of \$3,000.

A jury brought in a verdict in favor of the plaintiff and cross-defendant and against the defendants and cross-complainants, and awarded the plaintiff \$2,479.68 as actual damages and \$1,500 as exemplary or punitive damages. Judgment for these amounts was entered in favor of the plaintiff and the defendants have appealed.

[1] The appellants first contend that the damages awarded were excessive and were based upon passion or prejudice. The admission of certain evidence is assigned as "inflammatory and prejudicial." In the evidence thus attacked the plaintiff was allowed to testify that when he observed that some of his grain was being harvested by the defendants he went to see his attorney and also the district attorney. Another witness was allowed to testify that the defendants, or some of them, were farming about 12,000 acres of land that year. Conceding that these matters were immaterial, it does not seem reasonable that they could have affected the verdict, and they do not appear sufficiently prejudicial to justify a reversal.

[2] With respect to the actual damages awarded it is contended that the value of the barley taken from respondent's land by the appellants was \$1,779 and not \$2,479.68, as found by the jury. There is no dispute as to the market price of the grain. While the evidence for the appellants was to the effect that a smaller amount of barley was taken by them, there was other evidence, which was accepted by the jury, supporting the implied finding that the larger amount represented by this award was taken. The appellants also argue in this connection that the amount of the actual damages allowed should have been

reduced since they are entitled to a credit for one-third of the crop harvested from their land by the respondent, this being the usual rent for such land. The appellants admitted that they took the barley from the respondent's land, and although there was evidence that the usual rental was one-third of the crop they were not entitled to any rental for the respondent's land. Nor does it appear that they were entitled, as an offset, to the rental value of that part of their land which they claim had been used by the respondent. This matter had not been pleaded, the case was tried upon another theory, and it does not certainly appear that the respondent had occupied any of the appellants' land. The actual boundaries were not known, the respondent had been allowed, without objection, to occupy the land in question during the growing season, and the evidence is sufficient to support the implied finding of the jury, upon the disputed question of fact, that the respondent occupied, and harvested grain on, only the land which he had leased.

[3, 4] It is next contended that the court erred in failing to give several instructions. With one exception, these were upon the theory and were to the effect that if each of the parties was equally guilty of a trespass and conversion the one should be set off against the other, and neither could recover. These instructions were properly refused. The appellants were not justified in taking the law into their own hands and entering the respondent's premises for the purpose of taking an amount of grain equal to that which they claim he had taken from them. Even if the respondent had first entered the appellants' land and taken grain therefrom, and the implied finding of the jury was to the contrary, the appellants had a legal remedy but preferred to adopt arbitrary methods of their own. The ancient law that "he shall take who has the power, and he shall keep who can" is no longer in effect. The other refused instruction related to the matter of exemplary damages but was far from complete.

[5, 6] Finally, it is contended that there is no evidence justifying the award of

\$1,500 for punitive damages. This contention must be sustained. Exemplary damages are allowed only where the defendant has been guilty of oppression, fraud or malice. Civ. Code, § 3294. While there is some evidence of ill-feeling here, as pointed out by the respondent, that evidence relates to a later period and there is no such evidence with respect to the time when this controversy arose or theretofore. The boundary lines were not known and the defendants not only hired surveyors but consulted an attorney before taking the action in question. While they took the wrong course and were liable for their acts, they were liable only for the actual damage done. It clearly appears that they were acting under a mistaken claim of right and there is no evidence to show oppression, fraud or malice. *Wolfsen v. Hathaway*, 32 Cal.2d 632, 198 P.2d 1; *Maher v. Wilson*, 139 Cal. 514, 73 P. 418.

The judgment is modified by reducing it in the sum of \$1,500, being the amount awarded as exemplary damages and, as so modified, the judgment is affirmed. The parties to bear their own costs on appeal.

GRIFFIN and MUSSELL, JJ., concur.



96 Cal.App.2d 336

FOOSHE et al. v. SUNSHINE et al.

Civ. 4001.

District Court of Appeal, Fourth District.
California.

March 3, 1950.

Action by Claude R. Fooshe and Lura D. Fooshe against T. R. Sunshine and others, for rescission of a sale or for damages in connection with the purchase by plaintiffs of certain farming lands. Defendant A. W. Foster filed a cross-complaint against plaintiffs for damages for dissolution of a co-partnership and for an accounting.

From a final judgment in the Superior Court of Fresno County, Arthur C. Shepard, J., defendant A. W. Foster appealed.

The District Court of Appeal, Griffin, J., held that the liability of defendant Foster for alleged misappropriation from the partnership was not dischargeable in bankruptcy and that the referee in making his findings did not act beyond the scope of the order of reference.

Judgment affirmed.

1. Bankruptcy ☞424

Where at time of alleged cash withdrawals by partner of partnership funds to his own personal use, the assets of the partnership which had been dissolved were then being held subject to the order of the court and until an accounting was had, alleged misappropriation by the partner was a "wilful and malicious injury to the property of another" within meaning of the Bankruptcy Act excepting such debts from discharge in bankruptcy of the partners. Bankr.Act, § 17, 11 U.S.C.A. § 35; Corporations Code, § 15031(4, 6).

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Wilful and Malicious Injury".

2. Appeal and error ☞931(1)

Facts found by the trial court must be construed to support its judgment.

3. Partnership ☞273

Under the statute providing that dissolution of a partnership is a change in the relationship of partners caused by any partner ceasing to be associated in the carrying on as distinguished from a winding up of the business, conduct of a partner inconsistent with the continuance of the partnership results in a dissolution thereof in spite of the fact that liquidation is not completed or some appearances of the partnership continue. Corporations Code, § 15029.

4. Partnership ☞332

Where trial court ordered a specified referee to be appointed to take an accounting of copartnership affairs and report his findings to the court and the referee proceeded to act in accordance therewith and when motion to approve the referee's re-

port was made and argued before the court, the defendant tendered no additional evidence the referee's findings became the court's findings and properly supported the judgment.

5. Reference ☞3, 24

Under the statute, the court is authorized to order a referee to try any and all issues, whether of law or fact in the action or proceeding, to report findings and judgment thereon, subject to the power of the court to reject or confirm his report, and a reference may be ordered only upon the agreement of the parties. Code Civ.Proc. § 638, subd. 1.

6. Reference ☞8(1)

Under the statute, the court may direct a reference when a trial of an issue of fact requires examination of a long account on either side, in which case the referee may be directed to hear and determine the whole issue or report upon specified question of fact involved therein. Code Civ.Proc., § 639, subd. 1.

7. Partnership ☞332

Where trial court made a reference to take an accounting of partnership affairs, authority of referee was not limited to taking of an accounting only, but the referee could consider the partnership agreement and the amount of alleged misappropriation by one of the partners after the dissolution and after the date of the order for an accounting, where such fact was material and one of the main issues involved. Code Civ.Proc. § 638, subd. 1, 639, subd. 1.

Laurence B. Myers, Fresno, E. O. Leake and J. J. Leake, San Gabriel, for appellant.

John G. Sobieski, Los Angeles for respondents.

GRIFFIN, Justice.

Plaintiff Claude R. Fooshe and his wife instituted this action against T. R. Sunshine, John Curci, L. A. Turner, A. W. Foster, and Growers Acceptance Association, a copartnership, for rescission of a sale or for damages, in connection with the purchase by plaintiffs from defendants Sunshine, Curci and Turner, of certain

farming lands located in the west side of Fresno County. At the time of the sale to plaintiffs, appellant Foster was a farming superintendent for the sellers. About that time Foster entered into a partnership agreement with plaintiff Fooshe under the partnership name of "Mountain View Farms", for the purpose of farming these lands. That partnership entered into a lease of the lands from Fooshe and his wife.

Appellant Foster, individually and on behalf of the partnership, filed a cross-complaint against Fooshe and his wife for damages, for dissolution of the copartnership and for an accounting.

The trial of the case resulted in judgment in favor of defendants on the complaint of plaintiffs. On the cross-complaint the court denied damages to cross-complainants but ordered a dissolution of the copartnership and an accounting. Judgment was entered in favor of defendants on the original complaint about February 6, 1947. It specifically provided that the Mountain View Farms, a copartnership, "be and the same is hereby dissolved", and left the matter of accounting and subsequent judgment thereon for further action by the court. This judgment also appointed a referee to take an accounting of the partnership affairs up to February 6, 1947. On May 22, 1948, the referee, after examining the accounts, the partnership agreement, the books of the partnership, and after a full hearing in reference thereto, filed with the court his report consisting of findings of fact and conclusions of law. The court subsequently approved and adopted the referee's report as its findings and made certain additional findings respecting Foster's petition to dismiss the proceedings by reason of his claimed discharge in bankruptcy. The judgment based thereon, among other things, provided that the partnership of the two men was indebted to plaintiff Fooshe in a large sum on account of money advanced to the partnership by Fooshe and not repaid. The court also found that Foster's personal liability for any sum over \$3,153.04 should be stayed because of Foster's voluntary bankruptcy. The court then finally gave judgment for plaintiffs against Fos-

ter on January 1, 1949, in the sum of \$3,153.04. This sum was 60 per cent of certain partnership funds which the court found Foster secretly and fraudulently misappropriated to his own use after the partnership had been declared dissolved and after the partnership operations ceased. It is from this final judgment that defendant Foster appeals.

It should be here noted that subsequent to the entry of the original judgment on plaintiff's complaint, which was entered on February 6, 1947, and after the appointment of a referee to take an accounting of the partnership affairs but prior to the entry of the final judgment following the partnership accounting, Foster was adjudicated a bankrupt. On May 21, 1948, he received his discharge in bankruptcy. On July 6, 1948, he filed his petition to stay proceedings in this action on account of said discharge in bankruptcy. The court granted this petition in part and denied it in part, staying the liability except as to the sum of \$3,153.04.

The evidence, according to the findings, may be thus summarized: In March, 1944, Fooshe and Foster entered into the partnership agreement to conduct the farming operations. Fooshe contributed \$57,300 in cash to the partnership and received from the partnership sums totaling \$29,354.79, so that the excess of his cash contribution over repayments was \$27,945.21. Foster contributed no cash or property to the partnership venture. There were no profits. The partnership operated at a loss. It likewise had no assets. In addition to the sums owed Fooshe on account of his capital contributions, the partnership owed \$12,405.39 to Mr. and Mrs. Fooshe for renting their land to the partnership, no part of which rental was paid. The partnership farming operations ceased in May, 1945, which was about a year after the partnership was formed. All of these farming operations were under the direction of Foster who, under the partnership agreement, was entitled to a salary of \$250 per month, plus an advance of \$150 per month against expected profits, on condition that he should render full-time service and devote his full attention to the affairs

of the partnership. It was the obvious arrangement that Fooshe should furnish the capital and that Foster should furnish operating skill and full-time services. On February 15, 1945, the Fooshes served a notice of rescission with respect to the real property they had purchased and later leased to the partnership. On May 31, 1945, they commenced the present action against Foster and the others above mentioned for rescission of the sale or for damages. It was Fooshe's belief that he had been fraudulently misled by Foster and the others in the purchase of the land. The trial court found against plaintiffs on this issue. The referee heard the evidence as to the accounting and found that the partnership ceased operations in May, 1945; that the partners then mutually agreed that the farming operations would immediately cease except for the gathering of the grain harvest; that Foster receive no salary or remuneration subsequent to June, 1945; and found that Foster did not devote any substantial service or attention to partnership affairs after May, 1945. The referee then found that although farming operations had ceased and Foster was devoting no substantial time to partnership affairs, Foster did, commencing in November, 1945, secretly withdraw for his own personal use, partnership funds under his control in the total amount of \$5,255.06, and that these withdrawals were made "without the knowledge or consent of Claude R. Fooshe, and were concealed from him". It is shown that Foster shifted the partnership bank account to a bank unknown to Fooshe; that Foster and his lawyer, who had possession of the partnership records, would not allow Fooshe or his attorney to inspect them and would not permit the referee to see the partnership books until an order was obtained from the court requiring the books to be turned over to the referee; that in March, 1948, for the first time, Fooshe learned that Foster, the defaulting bankrupt, had, after the court had ordered the partnership dissolved, taken for himself and for his attorney, every cent of partnership funds remaining in his hands.

It is appellant's contention that his entire debt, including the claim merged in this judgment, was discharged in bankruptcy; that his motion to stay proceedings should have been granted. Exception is taken to the finding of the referee and the court that Foster's liability for such withdrawals was a liability for obtaining money by false pretenses and false representations, for willful and malicious injury to the property of another, and was a liability created by his fraud, misappropriation and defalcation while acting in a fiduciary capacity, and that *at the time of the misappropriations* Foster owed a fiduciary duty to Fooshe and was therefore liable to him for 60 per cent of said sums or \$3,153.04.

[1] Respondents contend that Foster's cash withdrawals of partnership funds to his own personal use *after partnership operations ceased* were the wrongful and secret taking of funds to which he had no moral or legal right, and that his liability therefore was not dischargeable in bankruptcy under section 17 of the Bankruptcy Act, 11 U.S.C.A. § 35. That section provides in part:

"Debts not affected by a discharge. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except * * * (second) liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, * * * or (fourth) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity; * * *."

Many cases are cited by appellant showing that the general rule is that misappropriation by a partner of partnership funds is not a misappropriation by him while acting in a "fiduciary capacity" within the meaning of the section excepting certain debts from the effect of a discharge in bankruptcy, and that while a partnership contract implies trust and confidence, a partner, *during the existence of the partnership*, does not, by reason of that relation, while managing the funds and the

business of the firm, act in a "fiduciary capacity", as understood in the bankruptcy law. *Martin v. Starrett*, 97 Neb. 653, 151 N.W. 154, 155; *Karger v. Orth*, 116 Minn. 124, 133 N.W. 471; *Chapman v. Forsyth*, 2 How. 202, 11 L.Ed. 236; *Barrett v. Prince*, 7 Cir., 143 F. 302; *In re Camelo*, D.C., 195 F. 632; *Harrington & Goodman v. Herman*, 172 Mo. 344, 72 S.W. 546, 60 L.R.A. 885; *Gee v. Gee*, 84 Minn. 384, 87 N.W. 1116; *Pierce v. Shippee*, 90 Ill. 371; *Inge v. Stillwell*, 88 Kan. 33, 127 P. 527, 42 L.R.A., N.S., 1093; *Stephens v. Milikin*, 35 Ga.App. 287, 133 S.E. 67; 8 C.J.S., *Bankruptcy*, p. 1542, § 578e.

42 L.R.A., N.S., 1093 [Note] recites the generally adopted rule and states:

"There has been considerable diversity of opinion under the various bankruptcy acts as to what relations are fiduciary under the provisions of the acts, excepting debts created while acting in a 'fiduciary capacity' from those discharged, but the principles applicable to a determination of that question are now well settled.

"In the first place, it is the generally accepted rule under all of the acts that the term 'fiduciary capacity' relates to special, technical, or express trusts, and not to those trusts which the law implies from the contract between the parties."

Respondent's argument is that the relationship between partners is fiduciary, citing sec. 2415, subd. 1, Civ. Code; *Nelson v. Abraham*, 29 Cal.2d 745, 750, 177 P.2d 931; *Perelli-Minetti v. Lawson*, 205 Cal. 642, 647, 272 P. 573; *MacIsaac v. Pozzo*, 26 Cal.2d 809, 813, 161 P.2d 449; *Moropoulos v. C. H. & O. B. Fuller Co.*, 186 Cal. 679, 684, 200 P. 601; *Laughlin v. Habersfelde*, 72 Cal.App.2d 780, 788, 165 P.2d 544; and *Universal Sales Corp. v. California Press Mfg. Co.*, 20 Cal.2d 751, 772, 128 P.2d 665. It is then contended that in view of the statutory provision and the cited cases, the general rule above cited by appellant ought not to be followed in California since under section 2415, supra, one partner is accountable as a fiduciary, and that decisions of sister states and the results of those decisions "appear to be counter to the spirit and letter" of section 17, subd. 4 of the Bankruptcy Act.

This question was touched upon in *Marlensee v. Warkentin*, 71 Cal.App.2d 177, 162 P.2d 321. That was an action on a judgment obtained against the defendant who wrongfully appropriated and converted to his own use the interest of plaintiff's deceased husband in a partnership and the property thereof and thereby injured and defrauded his estate and the persons entitled thereto. Appellant there urged that the original action was not based on any alleged tort but was purely one of partnership accounting and it therefore could not support a judgment "for conversion or willful and malicious injuries to the person or property of another". The court there found that the defendant had wrongfully and unlawfully appropriated and converted to his own personal use said decedent's $\frac{1}{10}$ interest in said partnership. This finding was apparently upon the theory that the appropriation was made after the death of the partner and that the partnership was discharged upon the death of one of the partners, Sec. 15031, Corporations Code, subd. 4, and that any wrongful appropriation thereafter made was an appropriation from the estate of the partner. It then held that section 17 was applicable as constituting a "willful and malicious injury" to the property of another. The amount of that appropriation was exempted from the debts claimed to have been discharged by the bankruptcy proceeding.

It appears to us that this case is determinative of the question before us. Here it clearly appears that at the time the first judgment was obtained the court specifically declared in that judgment dated February 6, 1947, which became final, that the Mountain View Farms, a copartnership, "is hereby dissolved". So at the time the appropriation herein mentioned was made the partnership had been dissolved. Sec. 15031, subd. (6), Corporations Code. The assets of the partnership were then being held subject to the order of the court until an accounting was had under its directions. Any misappropriations made of those assets by the appellant Foster subsequent to the time of the dissolution was clearly "a willful and malicious injury to

the property of another", within the meaning of section 17 of the Bankruptcy Act.

In *Lyon v. Prescott*, 103 Vt. 442, 156 A. 679, 680, there was a partnership, between two men, which *had been dissolved*. Lyon collected and appropriated to his own use sums of money which belonged to the firm. Lyon later received a discharge in bankruptcy. On the question of whether the claim was cut off by the discharge in bankruptcy the Vermont Supreme Court held:

"We need not pause to inquire whether this claim would survive as a misappropriation of a fiduciary under section 17 of the Bankruptcy Act * * * for it is plain enough that it is saved by the provision of that section exempting debts which are 'liabilities * * * for wilful and malicious injuries to the * * * property' of another. Within the meaning of this provision, the money which Lyon misappropriated was the property of the firm and not his own. It appears that he converted these funds deliberately. Neither Prescott nor the receiver consented to or ratified the misappropriation. It was willful and malicious, as expressly found."

In *re Frazzetta*, D.C., 1 F.Supp. 122, the District Court in New York held a bankruptcy discharge unavailing to a partner who had converted partnership funds following dissolution. The court said:

"* * * the bankrupt failed to make any satisfactory accounting or give any reasonable explanation to the referee for his acts in handling the partnership moneys that came to him after the dissolution * * *. One cannot escape the conclusion that he deliberately set out to defraud his partners * * *."

"One of the purposes of the Bankruptcy Act * * * is to discharge an honest debtor and not a malicious wrongdoer."

"My conclusion is that the debt is not dischargeable in bankruptcy." See, also, *Van Epps v. Aufdemkamp*, 138 Cal.App. 622, 32 P.2d 1116.

In *Ruppe v. Utter*, 76 Cal.App. 19, 243 P. 715, it was held that the remaining partner, after dissolution, occupies the position of a mere trustee.

[2] The facts found by the court in this case, construed to support the judgment, as under the law they must be, show dissolution of the partnership, in fact, a long time prior to the conversion of the funds by Foster.

[3] Section 2423 of the Civil Code, now sec. 15029 Corporations Code, provides that the dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on, as distinguished from the winding up of the business. In accordance with this section it has been directly held that conduct of a partner inconsistent with the continuance of a partnership results in the dissolution of the partnership in spite of the fact that liquidation is not completed or some appearances of the partnership continue. *Middleton v. Newport*, 6 Cal.2d 57, 62, 56 P.2d 508; *Maryland Casualty Co. v. Little*, 102 Cal.App. 205, 282 P. 968; *Sly v. Abbott*, 89 Cal.App. 209, 264 P. 507; *Beck v. Cagle*, 46 Cal.App.2d 152, 160, 115 P.2d 613.

The evidence, as summarized, shows that there was a dissolution of the partnership, at least by June, 1945, which was at least five or six months before the conversions by Foster commenced and the court specifically found that these unauthorized misappropriations occurred after partnership operations ceased. Consequently, if it can be claimed that there is any distinction between conversions by a partner after dissolution and conversions before dissolution, that distinction will not help appellant in this case. The findings clearly support the judgment in this respect.

The remaining argument is that the referee, in making his findings, acted beyond the scope of the order of reference and beyond his jurisdiction and that therefore his finding is a nullity. In addition thereto it is argued that even if the finding is within the scope of the referee's power and jurisdiction that it finds no support in the evidence and therefore must be disregarded.

[4] This appeal is on the judgment roll. The report of the referee and petition to stay proceedings are all contained within the clerk's transcript on appeal. The court

by its interlocutory judgment ordered that a specified referee be appointed to take an accounting of the affairs of the co-partnership between specified dates and to report his findings to the court for such further proceedings and judgment as may be proper in the premises. Thereafter, the referee, in pursuance of that order, did take the accounting, and according to that report, notice of the time of the hearing was given. All parties appeared, evidence was introduced consisting of the exhibits, books and records of the company and the matter was submitted. Affidavits were filed in opposition to some of the testimony given by the plaintiff before the referee. Objection was made to the hearing of such affidavits and was sustained. The report recites that the referee, "being fully advised in the premises, makes and reports the following findings of fact and conclusions of law". Then follows, in detail, what appears to be a complete accounting of the book entries, a résumé of the evidence produced and the conclusions reached. By a signed order dated June 24, 1948, the referee's findings were approved. The court ordered counsel for plaintiff to prepare a written judgment in accordance with his order and stated that no findings were necessary "except that referee's report is approved". The final judgment of the court recites that the findings of fact and conclusions of law set forth in the referee's report were adopted as the findings of fact and conclusions of law of the court as supplemented by further findings and conclusions set forth. No exhibits or record of the proceedings before the referee were produced in this court. There is nothing in the record showing that any relevant evidence tendered by appellant was excluded by the referee or by the court. When the motion to approve the referee's report was made and argued before the court appellant tendered no additional evidence. The referee's findings became the court's findings and properly support the judgment. *Rodehaver v. Mankel*, 16 Cal.App.2d 597, 605, 61 P.2d 61; *Erwing v. Jones*, 69 Cal. App.2d 97, 99, 158 P.2d 265.

It is claimed that the order of reference was made under sec. 639, subd. 1 of the

Code of Civil Procedure and not under sec. 638, subd. 1 of the Code of Civil Procedure and that therefore the order did not give authority to the referee "to decide the whole issue", but that the referee was limited to the taking of an accounting only. In support of this argument appellant cites 53 C.J. 714, sec. 103; *Williams v. Benton*, 24 Cal. 424; and *National Brass Works v. Weeks*, 92 Cal.App. 318, 268 P. 412.

[5, 6] The holding under those cases is that under sec. 638, subd. 1, the court is authorized to order the referee to try any and all issues whether of law or of fact, in the action or proceeding, to report findings and judgment thereon subject to the power of the court to reject or confirm his report. Under this section a reference may be ordered only upon the agreement of the parties. Under sec. 639, subd. 1, *supra*, the court may direct a reference when the trial of an issue of fact requires the examination of a long account on either side, in which case the referee may be directed to hear and determine the whole issue (pertaining to the account) or report upon any specified question of fact involved therein. *Fredendall v. Shrader*, 45 Cal. App. 719, 188 P. 580; *Williams v. Benton*, *supra*.

[7] While it might appear from a reading of some of the findings of the referee that such findings did not apply strictly to the question of the accounting, it cannot be said, as a matter of fact or law, that the findings made were not necessary to a full "accounting of the partnership affairs". The partnership agreement could not be ignored in the reference. It was an instrument necessary to be considered by the referee in making the necessary computation as to the obligations of each of the parties and of the capital that was furnished or to be furnished by the parties, the amounts withdrawn from the business as wages or salary, as well as the question as to whether the partnership had been operated at a profit or a loss. In the accounting it was necessary to know when the actual operations of the partnership ceased since Foster was only entitled to compensation for full time service. The real purpose of the reference was to deter-

mine these questions as well as the amount of money remaining in the hands of the court for distribution to the former partners. The amount of the misappropriation by appellant, after the dissolution and after the date of the order for an accounting, was material and was one of the main issues involved in this appeal. This fact was properly reported to the court under its general order for an accounting by the referee, and was one of the real questions about which the court was here concerned. We conclude that from the record on this appeal and the showing here made in reference to this issue the findings reported are sufficient and substantially comply with the reference "to take an accounting of the partnership affairs".

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.



96 Cal.App.2d 358

HARABEDIAN et al. v. PARNELL.

Civ. 17260.

District Court of Appeal, Second District,
Division 2, California.

March 7, 1950.

Rehearing Denied March 24, 1950.

Hearing Denied May 4, 1950.

George Harabedian and Arvad Harabedian brought unlawful detainer suit against William Parnell.

Superior Court of Los Angeles County, Charles E. Haas, J., rendered a judgment for plaintiffs, and the defendant appealed.

The District Court of Appeal, McComb, J., held that notice which plaintiffs had given to defendant to pay rent or to quit was not insufficient on ground that it demanded a sum in excess of amount due under lease, that Superior Court did not fail to find on material issues raised by the pleadings, and that Superior Court did not commit prejudicial error in refusing to permit defendant to amend its answer and set up an additional

defense that plaintiffs interfered with defendant's tenants.

Affirmed.

1. Landlord and tenant ⇨202(1)

Generally, in absence of a statute or agreement to the contrary, rent is not apportionable, but is due and payable upon date fixed for payment.

2. Landlord and tenant ⇨202(1), 283

Where a monthly rental for apartment hotel was \$900, and of first month's rent \$600 was paid at time of execution of lease, and additional \$300 was due twenty days after completion of painting of rooms in hotel, and such completion was on August 23, and second month's rent became due by terms of lease on August 23, there was due landlords as rental on September 23 the sum of \$1,200, and therefore notice to tenant to pay rent of \$1,200 or to quit, was not insufficient on ground that it demanded a sum in excess of amount due under lease.

3. Landlord and tenant ⇨291(16)

Where trial court in an unlawful detainer action made specific findings in favor of plaintiffs on essential allegations of their complaint and against defendant's denial thereof, and likewise found that defendant's affirmative defense was untrue, there was no failure by trial court to find all the material issues raised by the pleadings.

4. Appeal and error ⇨1010(1)

Trial court's findings sustained by the evidence were controlling on that District Court of Appeal.

5. Landlord and tenant ⇨291(18)

Refusal to permit defendant in unlawful detainer action to oust defendant from apartment hotel, to amend answer and set up additional defense that plaintiffs interfered with defendant's tenants, was not prejudicial error.

6. Appeal and error ⇨756, 1078(3)

Where defendant neither cited authority nor provided the District Court of Appeal with argument in support of contention that refusal to permit defendant to amend its answer and set up an additional defense, was error, alleged error, would be disregarded.

Lauren M. Handley and Aaron L. Lincoff, Los Angeles, for appellant.

Avery M. Blount and Lloyd F. Dunn, Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of plaintiffs after trial before the court without a jury in an unlawful detainer action, defendant appeals.

On May 14, 1948, plaintiffs, as lessors, leased to defendant the entire second floor of a building located at 341½ South Western Avenue which comprised 3 apartments and 12 guest rooms and was denominated an apartment hotel. At the time the lease was signed the premises were not ready for occupancy. Said lease provided for a total rental of \$54,000 for a five year period commencing May 10, 1948, and ending May 9, 1953. It further provided, "Remodeling is now progressing on the twelve single rooms and as they are completed, one by one, possession will be given to Lessee." The lease also stated that the rental of \$900 per month was to be payable monthly in advance, and acknowledged that \$600 of the first month's rent was received upon execution of the lease. Further provisions read: "However, the beginning date when rental shall start to accrue, shall be the time when the painters have completed painting the 12th single room;" and "Twenty days thereafter the sum of \$300.00 balance on the first months rent shall be due and payable and thirty days or one month after the painters have completed said 12th room, then the 2nd months rent under this lease shall be due and payable."

The completion date was August 23, 1948. On October 1, 1948, plaintiffs served defendant with a written notice to pay rent or quit, since defendant failed to pay, on September 23, 1948, the sum of \$1,200 plaintiffs claim was due as rental for the premises. Defendant having failed to perform either alternative, the present suit was instituted.

Questions: First: Was the notice to pay rent or quit insufficient in that it demanded a sum in excess of the amount due under the lease?

[1] This question must be answered in the negative. It is the general rule in the absence of a statute or agreement to the contrary that rent is not apportionable but is due and payable upon the date fixed for payment. (*Fahrenbraker v. E. Clemens Horst Co.*, 209 Cal. 7, 9, 284 P. 905.) The present case does not fall within either of the exceptions stated in the general rule and therefore the rent was not apportionable.

Applying this rule the facts are as follows:

[2] The monthly rental was \$900. Of the first month's rent \$600 was paid at the time of the execution of the lease. The additional \$300 was due 20 days after completion of painting the 12 single rooms, and it is admitted that such completion was on August 23, 1948. Thirty days after the 23rd of August, the second month's rent became due by the terms of the lease. Hence on September 23rd there was due plaintiffs as rental from defendant the sum of \$1,200. This was the amount specified in the notice to pay rent or quit, and was the correct amount. In view of the quoted provisions of the lease it is immaterial as to when future installments of rental should become due and payable.

Second: *Did the trial court fail to find upon material issues raised by the pleadings?*

[3,4] This question must also be answered in the negative. The trial court made specific findings in favor of plaintiffs on the essential allegations of their complaint and against defendant's denial thereof. It likewise found that defendant's affirmative defense¹ was untrue. Since such findings are sustained by the evidence they are controlling upon this court.

Third: *Did the trial court commit prejudicial error in refusing to permit defend-*

1. The court found: "And by way of a first separate and further affirmative defense, this defendant alleges: I. That the amount of the rent provided in said lease

exceeds the amount which is permissible to be collected under the terms of the Housing and Rent Act of 1948 [50 U.S. C.A. Appendix, § 1881 et seq.]."

ant to amend its answer and set up an additional defense that plaintiffs interfered with defendant's tenants?

[5, 6] This question must be answered in the negative. Defendant neither cites authority nor provides this court with argument in support of his contention. Hence such alleged error will be disregarded. (Todd v. Meserve, 93 Cal.App. 370, 390, 269 P. 710).

Affirmed.

MOORE, P. J., and WILSON, J., concur.



96 Cal.App.2d 327

PEOPLE v. PONCE.

Cr. 4418.

District Court of Appeal, Second District,
Division 3, California.

March 2, 1950.

Hearing Denied March 30, 1950.

Louis D. Ponce was convicted in the Superior Court of Los Angeles County, William M. Byrne, J., of robbery and of kidnapping for the purpose of robbery, and he appealed from judgments of conviction and from order denying defendant's motion for a new trial.

The District Court of Appeal, Shinn, P. J., held inter alia, that evidence sustained convictions.

Judgments and order denying a new trial affirmed, and attempted appeal from the sentences dismissed.

1. Robbery ☞24(1)

Evidence sustained robbery conviction.

2. Kidnapping ☞5

Evidence sustained conviction for kidnapping for purpose of robbery.

3. Criminal law ☞1177

Where sentences for robbery and for kidnapping for purpose of robbery were for life imprisonment and were to run concurrently, and conviction and sentence for robbery were clearly proper, defendant was

not prejudiced and could not urge invalidity of conviction for kidnapping. Pen.Code, §§ 209, 211.

4. Criminal law ☞59(5)

The word "aid" as used in term "aid and abet" does not imply guilty knowledge or felonious intent, and the word "abet" as used in quoted term includes knowledge of wrongful purpose of perpetrator and counsel and encouragement in crime.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Abet" and "Aid".

5. Criminal law ☞800(3)

Whenever instructions are given that one may be convicted if he aids and abets a criminal act, the words "aids" and "abets" should be clearly defined.

6. Criminal law ☞795(3)

In prosecution for robbery and kidnapping for purpose of robbery, jury should not be instructed relative to an aider and abettor in language of statutes declaring a person guilty if he aids "or" abets the act which constitutes kidnapping for purpose of robbery, but should be instructed pursuant to statute declaring those who aid and abet in commission of a crime to be guilty as principals. Pen.Code, §§ 31, 209, 210.

7. Criminal law ☞1173(2)

In prosecution for robbery and kidnapping for purpose of robbery, where defense was that defendant was not present when charged crimes were committed, and if defendant participated, defendant committed charged unlawful acts directly, failure to define words "aided and abetted" as used in instruction that defendant was not chargeable with acts of others unless defendant aided or abetted in the acts, was not prejudicial to defendant. Pen.Code, § 31.

Morris Lavine, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Gilbert Harelson, Deputy Attorney General, for respondent.

SHINN, Presiding Justice.

By information in three counts appellant Ponce was charged with robbery of Louis

D. Pitzel, robbery of J. S. Addis, and kidnapping of Louis D. Pitzel for the purpose of robbery. Two prior convictions were alleged. Appellant admitted the two prior convictions and that he had served terms of imprisonment therefor. Following a trial by jury he was found guilty on all three counts; his motion for a new trial and application for probation were denied; judgment was pronounced, defendant was found to be an habitual criminal within the meaning of section 644(a) of the Penal Code, and was sentenced to prison for the term prescribed by law (for life) on each of the robbery convictions, and for the term of his natural life with possibility of parole upon the kidnapping conviction. The sentences on the first two counts were ordered to run concurrently with the sentence on the third count. The appeal is from the judgments of conviction on all three counts and from an order denying a motion for new trial.

Appellant was identified by Louis D. Pitzel as one of three men who held up his cafe on the morning of December 3, 1948, the other two being one Valencia, and one Burrer. Pitzel testified that at the point of a gun Burrer ordered him to the front of the bar where he took his wallet containing several hundred dollars; Pitzel saw Ponce back off from the stool where he had been sitting at the bar and start tugging at something in his trousers, and then start clearing the customers down to the end of the bar and ushering them into the men's room; Pitzel refused to open the front cash register drawers and Burrer opened them himself, finding nothing; Burrer ordered Pitzel back to the central cash register which they opened and Burrer gathered what bills he could; Pitzel was then ordered from the bar to an office some 60 feet away, where Burrer then ordered Pitzel out of the office toward the men's room, some 40 feet from the office; defendant Ponce dashed through an archway and motioned to Burrer whereupon the latter forced Pitzel, still at the point of a gun, to enter the men's room in which the other guests and employees had already been placed. While Pitzel was still behind the bar a waitress came to the front door and

finding it to be locked walked to the rear door and entered through the kitchen. She was met by defendant Ponce, who escorted her into the restaurant at the point of a gun which Pitzel described as a long barrel revolver type made of blue steel. James S. Addis testified that he was in the cafe at the time of the robbery; as he finished ordering his breakfast he noticed defendant Ponce sliding off his stool at the bar and reaching for something in his trousers; Ponce drew a large gun, pointed it at him and said "This is a holdup, get over there in the dark"; Addis went and stood outside the men's restroom while Ponce went to the front and forced the other customers toward the back; they were then ordered into the men's restroom and after a few minutes Ponce came in with the revolver in his hand and forced Addis to give him some \$20 which he had in his pocket. John W. Powers, a Los Angeles policeman, testified that he went to Denver, Colorado, to apprehend defendant Ponce; in the presence of Powers and his partner, Ruiz, and Captain Pitt of the Denver Police, Ponce admitted that he had participated in the robbery and had received about \$500 from it; Burrer had provided the car which they had used; he went on the job because he thought it would be easy but that he did not want to have anything more to do with Burrer; after leaving the cafe Valencia had gotten out of the car at the end of Macy Street and he, Ponce, had gotten out on Soto Street and had gone to Mexico. Powers testified that all of these statements were free and voluntary.

[1,2] The foregoing evidence is clearly sufficient to support the conviction of robbery. It is also sufficient to support the conviction of kidnapping. *People v. Tanner*, 3 Cal.2d 279, 295, 44 P.2d 324; *People v. Johnston*, 140 Cal.App. 729, 35 P.2d 1074; *People v. Melendrez*, 25 Cal.App.2d 490, 77 P.2d 870.

[3] Appellant's chief contention is that section 209 of the Penal Code, which defines the crime of kidnapping for the purpose of robbery, was not intended to repeal or replace section 211 which defines the crime of robbery, and that section 209 both inherently and as applied in the pres-

ent case is unconstitutional in that it makes every robbery a kidnaping and thus provides double punishment for a single offense. We find it unnecessary to pass upon the merits of this contention (see *People v. Tanner*, 3 Cal.2d 279, 44 P.2d 324; *People v. Tanner*, 77 Cal.App.2d 181, 186, 175 P.2d 26; *People v. Simpson*, 66 Cal. App.2d 319, 152 P.2d 339; *People v. Bruno*, 140 Cal.App. 460, 35 P.2d 391), in view of the fact that the sentences in the present case, which were all for life imprisonment, were ordered to run concurrently. Since his conviction and sentence were in any event clearly proper on the robbery counts, appellant is in no way prejudiced and may not urge the invalidity of his conviction for kidnaping. *People v. McWilliams*, 87 Cal. App.2d 550, 553, 197 P.2d 216, and cases there cited; *People v. Bean*, 88 Cal.App.2d 34, 41, 198 P.2d 379; *People v. Benenato*, 77 Cal.App.2d 350, 367, 175 P.2d 296.

[4-6] It is argued that the court erroneously failed to define for the jury the words "aided and abetted" as contained in an instruction that "the defendant is not chargeable with the acts of other persons unless he committed the act himself or aided and abetted in its commission." This instruction was requested by appellant, but there was no request for any instruction defining who is an aider and abettor. It has been held that "aid" and "abet" are commonplace words which jurors must be deemed to have understood and that the court is not required to define them of its own motion. *People v. Wong Hing*, 176 Cal. 699, 706, 169 P. 357. We are unable to agree with this holding. The term "aid and abet" is not one in everyday use by laymen although it is commonly used in law. It would be unrealistic to assume that jurors will invariably understand that the word "aid" does not imply guilty knowledge or felonious intent whereas the word "abet" includes knowledge of the wrongful purpose of the perpetrator and counsel and encouragement in the crime. *People v. Dole*, 122 Cal. 486, 55 P. 581, 68 Am.St. Rep. 50. Whenever instructions are given to the effect that one may be convicted if he aids and abets the criminal act the two words should be clearly defined. There is

substantial evidence that the two words are not always understood even by courts and lawmakers. A few of the numerous cases in which the words were improperly used in the disjunctive are *People v. Morine*, 138 Cal. 626, 72 P. 166; *People v. Terman*, 4 Cal.App.2d 345, 40 P.2d 915; *Lassen v. Board of Dental Examiners*, 24 Cal.App. 767, 142 P. 505. The same mistake is found in sections 209 and 210 of the Penal Code which declare that one is guilty if he aids *or* abets the act which constitutes kidnaping. The court in the present case gave an instruction in the language of section 209 but also gave instructions stating clearly that defendant could not be convicted unless he was shown to have aided *and* abetted in the commission of the acts charged. The mistake in sections 209 and 210 should be corrected. The jury should not be instructed in the language of these sections as they now stand but in accordance with the provisions of section 31 of the Penal Code which declares that those who aid and abet are guilty as principals. There is, however, no foundation for the claim in the present case that defendant suffered prejudice by reason of the instructions that were given or the failure of the court to define the word "abet." Defendant's part in the crimes was shown to have consisted of herding several people into a small room at the point of a gun and detaining them there while he robbed one of them. His defense was that he was not present when the offenses were committed. There was no need for a definition of "abet." If defendant participated at all in the offenses he committed the unlawful acts directly. There was nothing in the evidence whatsoever to suggest that he gave aid or assistance to his codefendants except for the purpose of accomplishing the offenses charged.

[7] Appellant's final contention is that the court erred in denying his motion for a new trial on the ground of newly discovered evidence. In connection with the motion defendant filed an affidavit of one Arthur Villegas, averring that he was present in the cafe in the company of Julia Ruiz at the time of the robbery; that he saw the three men who participated

therein and that defendant Ponce left the cafe prior to the robbery and was not one of the three men who committed it. It was also averred that Villegas did not learn of the trial of Ponce until after its conclusion when, by chance, he met Julia Ruiz on the street. At the hearing on the motion Julia Ruiz testified that Villegas was with her in the cafe at the time of the robbery, but that she did not know his address or how to find him and only chanced to meet him after the trial was concluded. Ponce also testified that he did not know Villegas or how to find him. In view of the fact that the testimony of Villegas would clearly be merely cumulative to that presented at the trial by Julia Ruiz and appellant, and was squarely contradicted by the testimony of Pitzel and Addis, it cannot be said that the denial of a new trial was an abuse of discretion.

The attempted appeal from the sentences is dismissed. The judgments and the order denying a new trial are affirmed.

WOOD and VALLÉE, JJ., concur.

Hearing denied; CARTER, J., dissenting.



96 Cal.App.2d 333

In re BILY'S ESTATE.
CURRY v. SOBEL et al.
Civ. 17123.

District Court of Appeal, Second District,
Division 3, California.

March 2, 1950.

Proceeding in the matter of the estate of Charles Bily, deceased, in which Gene G. Curry petitioned for probate of foreign will which was contested by Max Sobel and Fannie Sobel against whom deceased had cause of action on contract.

The Superior Court of Los Angeles County, Alfred E. Paonessa, J., ordered will admitted to probate and contestants appealed.

The District Court of Appeal, Vallée, J., held that since contestants were neither absolutely nor contingently entitled to share in estate, they were not "persons interested" within statute providing for contests of wills before probate and had no right to oppose probate of will.

Appeal dismissed.

1. Wills ⚡229

Whether contestants to probate of will are "persons interested" within statute authorizing contest of wills before probate by any person interested, is a question of law. Probate Code, §§ 370, 442.

2. Wills ⚡229

One opposing probate of will has only such right as given by statute providing for contest of wills before probate by any person interested, and where it appears that contestant is not a "person interested", the contest should be dismissed. Probate Code, §§ 370, 442.

3. Wills ⚡229

Where deceased died testate in Florida and sole property owned by him in California was cause of action on contract against two residents of California, such residents, being neither absolutely nor contingently entitled to share in the estate, were not "persons interested" within statute providing for contest of wills before probate by any person interested, and had no right to oppose probate of will in California or to appeal from order with respect thereto. Probate Code, §§ 370, 442.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Person Interested".

Metz & Metz, Bent & Clapp, Los Angeles, for appellants.

Mark L. Herron, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal from an order admitting a foreign will to probate and directing that letters of administration with the will annexed shall issue.

Charles Bily died testate October 1, 1937, in Florida, a resident and domiciled therein. On the date of his death he had no property in California. On that date he was the owner of a contract between himself and Max Sobel and Fannie Sobel. Fannie Sobel became a resident of California in 1945. Max Sobel became a resident of California in February, 1946.

The petition for probate of the will alleged that the property of the estate in California consists of a cause of action against the Sobels for about \$8000 with interest, based upon a contract in writing executed July 5, 1924. The Sobels filed objections to the admission of the will to probate upon the ground that the probate court did not have jurisdiction by reason of the fact that the deceased did not have any property in California on the date of his death. The court overruled the objections, made findings of fact and conclusions of law, and ordered that the will be admitted to probate and that letters of administration with the will annexed issue. The Sobels appeal.

Respondent contends that the appeal should be dismissed for the reason that neither appellant is a person interested and therefore not entitled to oppose the petition for admission of the will to probate or to appeal. The point is well taken.

[1,2] Probate Code section 370, providing for contests of wills before probate, says that "Any person interested may contest the will." Probate Code section 442, providing for contests of petitions for letters of administration, says that "Any person interested may contest the petition." One who opposes the probate of a will must be a person interested *in the estate*. Estate of Flood, 55 Cal.App.2d 410, 412, 130 P.2d 811; Estate of Webster, 59 Cal.App.2d 1, 4, 137 P.2d 751. Whether appellants are persons interested, is a question of law. In re Estate of Hampton, 55 Cal.App.2d 543, 548, 131 P.2d 565. One who seeks to oppose the probate of a will has such rights, and only such rights, as the statute gives him. In re Estate of Anthony, 127 Cal.App. 186, 190, 15 P.2d 531. Where it appears that the contestant is not a person interested, the contest should be dismissed. In re Estate of Webster, 59 Cal.App.2d 1, 4, 137

P.2d 751. For the purpose of this proceeding, appellants must be treated as persons who are, or who may become, liable to the estate. We understand they so concede.

If it is made "to appear that a person has such an interest as may be impaired or defeated by the probate of the will, or benefited by setting it aside, he is a person interested." In re Estate of Land, 166 Cal. 538, 543, 137 P. 246, 248. "Any person interested" means any person "having a direct pecuniary interest affected by the probate of the will." Selden v. Illinois Trust & Savings Bank, 239 Ill. 67, 87 N.E. 860, 862, 130 Am.St.Rep. 180, quoted with approval in In re Estate of Land, *supra*. The phrase means a person having such a "pecuniary interest in the devolution of the testator's estate as would be impaired or defeated by the probate of the will, or be benefited by setting aside the will." Bloor v. Platt, 78 Ohio St. 46, 84 N.E. 604, 605, 14 Ann.Cas. 332, quoted with approval in Re Estate of Land, *supra*. The interest must be one in the estate that may be impaired or defeated by the will assailed. In re Estate of Plaut, 27 Cal.2d 424, 425, 164 P.2d 765, 162 A.L.R. 837; In re Estate of Anthony, 127 Cal.App. 186, 189, 15 P.2d 531; In re Estate of Carr, 82 Cal.App.2d 780, 783, 187 P.2d 912; cf. Marculescu v. City Planning Comm., 7 Cal. App.2d 371, 374, 46 P.2d 308.

Respondent does not cite any California authority, nor have we found any, on the precise point presented: whether one who is, or who may become, liable to the estate of a deceased person, is a person interested. A number of other jurisdictions have statutes identical with, or similar to, ours. In those jurisdictions it is held that a debtor of the estate is not a person interested. In re Stone's Estate, 173 Iowa 371, 155 N.W. 812, 813; Finnerty v. Shade, 210 Iowa 1338, 228 N.W. 886, 888; In re Hardy v. Minneapolis & St. L. Ry. Co., 35 Minn. 193, 28 N.W. 219; Yazoo & M. V. R. Co. v. Jeffries, 99 Miss. 534, 55 So. 354; Missouri Pac. R. Co. v. Bradley, 51 Neb. 596, 71 N.W. 283, 285; In re Barmeier's Estate, 248 App.Div. 636, 288 N.Y.S. 318, affirmed 272 N.Y. 601, 5 N.E.2d 351; In re Walsh's Estate, 131 N.J. Eq. 376, 25 A.2d 424; In re Mayo's Estate, 60 S.C. 401, 38 S.E. 634, 635, 54 L.R.A. 660;

In re Upton's Estate, 199 Wash. 447, 92 P.2d 210, 213, 123 A.L.R. 1220; Woodward v. Spear, 10 Vt. 420, 423; In re Hart's Estate, 105 Misc. 290, 172 N.Y.S. 807, 808; In re Santini's Estate, 56 Nev. 350, 53 P.2d 338; Conner v. Brown, 9 W.W.Harr. 529, 39 Del. 529, 3 A.2d 64, 74; 68 C.J. 902, sec. 631; 57 Am.Jur. 541, sec. 798.

Appellant relies on *Jeffersonville Railroad Company v. Swayne's Administrator*, 26 Ind. 477. The case is not in point for the reason that it does not appear that at the time of the decision there was a statute in Indiana restricting the persons who were authorized to contest the grant of letters of administration to any person interested in the devolution of the estate.

[3] The phrase "any person interested" includes only persons who, either absolutely or contingently, are entitled to share in the estate. Appellants are not entitled to share in the estate. They do not have any pecuniary interest in the devolution of the estate as may be defeated or impaired by the probate of the will. They are not in any way interested in preserving the assets, or in the settlement of the estate. They have no right to oppose the probate of the will or the grant of letters of administration with the will annexed, or to appeal from the order with respect thereto.

Appeal dismissed.

SHINN, P. J., and WOOD, J., concur.



JOSEPH et al. v. DREW et al.

Civ. 17436.

District Court of Appeal, Second District,
Division 1, California.

March 2, 1950.

Rehearing Denied March 20, 1950.

Hearing Granted April 27, 1950.*

Oscar G. Joseph and Graeme Joseph, individually and doing business as Joseph and

* Subsequent opinion 225 P.2d 504.

Joseph, sued Florence Drew and others, to recover for services rendered in preparing plans and specifications for buildings to be constructed. Defendants cross complained.

The Superior Court of Los Angeles County, Allen W. Ashburn, J., rendered a judgment for defendants on the cross complaint and plaintiffs appealed.

The District Court of Appeal, Drapeau, J., held that the contract was void under statute and that plaintiffs could not recover for the services.

Judgment affirmed.

1. Licenses $\S$ 39.40

The term "instruments of services" within statute requiring name of architect to appear as architect on instruments of service when an architect forms a partnership with persons who are not architects, is an all-inclusive term including plans, drawings, specifications and other data relating to practice of architecture. Business & Professions Code, §§ 5536, 5537, 5539, 5582, 5586.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Instruments of Services".

2. Licenses $\S$ 39.40

Where partnership consisting of two architects and a building contractor, was designated in names of all three partners upon the drawings, plans, and specifications submitted by partnership which was retained to prepare plans and specifications for buildings to be constructed, and statute requiring name of architect to appear as architect on instruments of service when an architect forms a partnership with persons who are not architects, was complied with only as regarded blue print plans submitted to City Building Department, the employment contract was void and partnership could not recover for its services. Business & Professions Code, §§ 5536, 5537, 5539, 5582, 5586.

Hindin, Girard, Lewis & Green, Los Angeles, for appellants.

Aaron Sapiro, Los Angeles, for respondents.

DRAPEAU, Justice.

Plaintiffs are architects licensed to practice in California. Prior to October 12, 1946, they had an associate, P. B. Fletcher, a licensed building contractor but not an architect, and under the name of Joseph, Fletcher and Joseph, a copartnership, the three men were engaged in rendering architectural and building contracting services to the general public.

Mr. Fletcher died on October 12, 1946, and thereafter plaintiffs proceeded to liquidate the partnership, continuing the business under the name of Joseph and Joseph and limited themselves to the practice of architecture.

During the existence of the partnership, defendants retained the firm to prepare plans and specifications for the construction of several proposed buildings, and paid the partnership from time to time on account of services rendered and for expenses a total sum of \$1,254.50.

The instant action was brought to recover for services so rendered. The answer, among other things, set up a special defense to the effect that since P. B. Fletcher was not an architect plaintiffs were not legally competent or entitled to accept or collect fees for services as architects as members of the partnership under section 5539 of the Business and Professions Code, in accordance with sections 5536 and 5537 of the same code.

Trial was had upon the issues presented by the first amended complaint, the answer and the cross-complaint of defendants by which they sought recovery of the money paid by them on account.

It was stipulated and the court found that the partnership rendered architectural services to defendants of the reasonable value of \$4,644. However, the court further found that said firm was not entitled to collect any compensation for such services and gave judgment in favor of defendants on their cross-complaint.

Plaintiffs appeal from the judgment and urge that failure to comply substantially with section 5539 of the Bus. & Prof. Code by a partnership of two licensed architects and a person who is not an architect,

will not bar recovery by the liquidating partners for the reasonable value of services rendered by the two architects.

It is conceded that their advertising and other matters dealing with the general public in which the partnership name of Joseph, Fletcher and Joseph was used, carried the further designation "Architectural and Mechanical Engineering," and that the firm was listed in the telephone directory as "Architects."

The pertinent sections of the Bus. & Prof. Code are:

5536: "*Unauthorized practice a misdemeanor: Advertising.* It is a misdemeanor punishable by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment, for any person, without a certificate, to practice architecture in this State or to advertise or put any sign or card or other device which might indicate to the public that he is an architect or that he is qualified to engage in the practice of architecture."

5539: "*Partnerships with uncertificated persons: Names used.* This chapter does not prevent an architect from forming a partnership with persons who are not architects but the name of the architect shall appear as the architect on all instruments of service and in no case may the other members of the partnership be designated as architects."

Appellants argue that since section 5539, supra, expressly provides for a partnership between licensed and unlicensed architects within certain limitations as to the conduct of the business, but no provision is made for penalties in the event of failure to comply with such limitations, the partnership herein is not barred from recovery of the reasonable value of the services rendered by qualified and licensed members of the firm.

The penalties for unauthorized practice are imposed by section 5536, supra. Moreover, it is made a ground for disciplinary action by section 5582 of the same code, for a licensed architect to aid and abet in the practice of architecture any person not au-

thorized to do so, or any person not registered as a civil engineer.

In order for a partnership to escape the penalties imposed by section 5536, it is only necessary that the name of the architect member of the firm appear on all instruments of service, and that the other members thereof in no case be designated as architects. Sec. 5539, *supra*.

The evidence is uncontradicted that the partnership here was designated "Joseph, Fletcher and Joseph, Architecture—Mechanical Engineering" upon the many drawings, plans and specifications submitted by the partnership and presented as exhibits at the trial, only one of which carried the designation required by section 5539, to wit:

"O. G. Joseph, Architect & Civil Engr.

Graeme Joseph, Archt.

Licenses C-483, C 583 & 6382"

appearing on blueprint plans submitted to the City Building Department.

Appellants here rely upon that one exhibit and the quoted designation as proof of compliance with the statutory requirement. They assert that, since the testimony of Oscar Joseph stands uncontradicted that the term "instruments of service", as used in section 5539 meant, not working papers or preliminary drawings, but had reference only to final instruments, the only obligation imposed upon the partnership was to designate the names of the architects on such final draft.

This court has been cited to no judicial interpretation of the term "instruments of service". However, it is used in several sections of the Business and Professions Code here under consideration. Section 5537 refers to "plans, drawings, specifications, instruments of service, or other data for buildings"; section 5538, "plans, drawings, specifications, instruments of service or other data for labor and materials"; section 5539, "all instruments of service"; and section 5586, to "plans, drawings, specifications or other instruments of service."

[1] Such use of the term denotes no special meaning, but is rather an all-inclusive term including plans, drawings,

specifications and other data relating to the practice of architecture.

It follows that there was no substantial compliance with the terms of the statute by appellants.

[2] "A contract for architectural services to be performed in violation of the terms of the statute is void. *Binford v. Boyd*, 178 Cal. 458, 174 P. 56; *People v. Allied Architects' Ass'n*, 201 Cal. 428, 257 P. 511; *Payne v. De Vaughn*, 77 Cal.App. 399, 246 P. 1069; *Jones v. Wickstrom*, 92 Cal.App. 292, 268 P. 449." *Force v. Hart*, 209 Cal. 600, 605, 289 P. 828, 830. See, also, *Loving & Evans v. Blick*, 33 Cal.2d 603, 607, 204 P.2d 23; *Baer v. Tippet*, 34 Cal.App.2d 33, 35, 92 P.2d 1028; *Cash v. Blackett*, 87 Cal.App.2d 233, 237, 196 P.2d 585, 588, in which latter case it was stated: "The Public policy involved here has been determined by the legislature; it is not a subject of debate in the courts. *Howard v. State of California*, 85 Cal.App.2d 361, 193 P.2d 11."

For the reasons stated, the judgment appealed from is affirmed.

WHITE, P. J., and DORAN, J., concur.



MAYERS et al. v. LOEW'S, Inc. et al.

MAYERS et al. v. LOEW'S, Inc.

Civ. 17061.

District Court of Appeal, Second District,
Division 1, California.

March 2, 1950.

Rehearing Denied March 27, 1950.

Hearing Granted April 27, 1950.*

Action by C. Mayers, and others, against Loew's, Inc., and others, for an accounting and breach of a contract based on a written collective bargaining agreement.

The Superior Court for Los Angeles County, Leo Freund, J., rendered a judgment in

* Subsequent opinion 221 P.2d 26.

favor of C. Mayers and other plaintiffs, and the defendant appealed.

The District Court of Appeal, White, P. J., held that provisions of a bulletin and tentative agreement could be considered in construing the printed contract, and that the documents showed that plaintiffs were entitled to retroactive pay. The court further found that deficiencies, if any, in findings presented no ground for reversal.

Judgment affirmed.

1. Appeal and error ⇐1008(3)

An Appellate Court is not bound by the construction placed upon a contract by the trial court when it is based solely upon terms of the written instrument without aid of evidence, where there is no conflict in the evidence, or a determination has been made upon incompetent evidence.

2. Contracts ⇐42

A written contract does not become effective until delivery to party in whose favor it is made or to his agent. Civ.Code, § 1626.

3. Contracts ⇐164

Several papers relating to the same transaction are to be construed as a single contract.

4. Evidence ⇐450(5)

Where printed collective bargaining agreement and letter document were executed and delivered simultaneously, and letter document referred to and incorporated certain bulletins, and bulletin in turn referred to a tentative agreement between the parties, tentative agreement was admissible to aid in construction of final printed agreement.

5. Master and servant ⇐68

In employee's action for accounting and breach of contract based on written collective bargaining agreement, employees were entitled to retroactive pay for certain number of days in view of printed agreement, letter document, bulletin and tentative agreement considered together.

6. Trial ⇐404(1)

Findings should be accorded a liberal construction with a view to supporting rather than defeating a judgment.

7. Appeal and error ⇐1071(1)

In employee's action for accounting and breach of contract based on written collective bargaining agreement, deficiencies, if any, in finding relating to letter and bulletin affecting provisions of formal written agreement presented no ground for reversal.

8. Limitation of actions ⇐46(1)

Preliminary negotiations leading up to execution of a written contract cannot be made a basis for computing period of the statute of limitations in an action for breach of the contract.

Loeb & Loeb, Los Angeles, by Keating Coffey, and Adrian A. Kragen, Los Angeles, for appellant.

Mohr & Borstein, Los Angeles, David L. Mohr, Alfred J. Borstein, Los Angeles, for respondents.

WHITE, Presiding Justice.

Plaintiffs filed action for accounting and breach of contract based on a written collective bargaining agreement with defendant, Loew's Incorporated. Three of the plaintiffs were members of Local 399, Studio Transportation Drivers affiliated with the Teamsters Union of the American Federation of Labor, and judgment having been in favor of defendant as to these three plaintiffs, their claims are not involved in this appeal. The remaining plaintiffs are members of Local 728, International Alliance of Theatrical Stage Employees (referred to hereinafter as "the Union"). The trial court found that the plaintiff members of Local 728 were entitled to retroactive compensation from July 1, 1941 to August 30, 1942, and this appeal was taken from the judgment rendered in their favor, the amount of retroactive compensation, if found due, having been stipulated to by the parties.

The latter part of January, 1942, a conference was held in New York attended by representatives of various producers, including the defendant studio, and the Union, at which conference there was entered

into a tentative collective bargaining agreement. Subsequent to the tentative collective bargaining agreement, the Union and the producers discussed changes therein and the changes and additions made from time to time were evidenced by bulletins issued by the producers' representative.

Before all the bulletins were issued, the business agent of the Union delivered a draft of the tentative collective bargaining agreement to a printer and as the bulletins setting forth the changes in the tentative agreement were issued, the Union would make changes in the printer's copy or proofs in compliance with the bulletins. The latter part of January or early part of February, 1943, the printer delivered printed copies of the agreement, incorporating the changes made by the Union, to the latter, and these printed copies were in turn distributed to the various producers, including the defendant, for their signatures. The producers, including defendant, delivered the signed copies to their representative, who was to deliver the same to the Union representative and obtain duplicate originals signed by the Union.

Testimony at the trial revealed that the producers' representative prepared a letter that was signed by the Union representative at the same time he signed the printed agreement with defendant, and upon which occasion delivery of the printed agreement was made to the Union on February 12, 1943. It is this letter that defendant contends is a part of the printed agreement and abrogates the claims of the plaintiffs to retroactive compensation. The letter document in question reads as follows:

"Hollywood, California
February 1, 1943

"Mr. Pat Casey, Chairman
Producers' Committee
5504 Hollywood Boulevard
Hollywood, California

"Dear Mr. Casey:

"Notwithstanding the provisions of Section 3 of the wage agreements dated February 15, 1942,* between the various Mo-

tion Picture Producers whom you represent, and the undersigned, the effective dates of the 'working conditions' in such wage agreements shall be subject to the following bulletins issued by your office:

Date	Subject
"May 22, 1942	Meal Periods
"Aug. 24, 1942	Standard Starting Time of Graveyard Shift
"Aug. 25, 1942	Golden Hours
"Aug. 27, 1942	'On Call' Employees, Split Week between Studio and Distant Location
"Aug. 28, 1942	Distant Location Definitions and Working Conditions.

"Yours very truly,
Studio Electrical Technicians
Local 728 of the I.A.T.S.E.
By A. J. Moran"

The provisions of Section 3 of the wage agreements referred to in the letter document are as follows:

"3. Wage scales, hours and working conditions for Local 728 shall be set forth in the 'Wage Scales and Working Conditions' attached hereto and shall be effective as of February 15, 1942, subject to the retroactive adjustments specified in said 'Wage Scales and Working Conditions'."

The phrase "subject to the retroactive adjustments" contained in the above Section 3 apparently referred to Section 57 of "Wage Scales and Working Conditions," which reads as follows:

"57. Retroactive pay to be based on this schedule as of July 1, 1941. Time not worked which is now guaranteed shall not be included in the retroactive computation. Adjustment to be made on Sunday Rate and on Golden Hours worked."

The bulletin pertinent to this litigation referred to in the letter document as the one dated August 24, 1942, reads as follows:

* The date "February 15, 1942", refers to the date on the first page of the printed

agreement found by the trial court to have been executed on February 12, 1943.

"Notice To All Studios

"Subject: Standard Starting Time
of 'Graveyard' Shift.

"Re: Wage Scales and working
Conditions for the follow-
ing I.A.T.S.E. Unions.

"Q—Local No. 80 — Grips

"R—Local No. 728— Lamp Operators

"T—Local No. 44 — Property Craftsmen

"V—Local No. 727— Laborers

"X—Local No. 165— Projectionists

"Y—Local No. 695— Sound Technicians

"Effective August 30, 1942, the first paragraph of Section 6 in the above references will be replaced and superseded by the following:

"6. *Shifts*—The Work Day shall be divided into four shifts of six hours each. First shift may start between six a.m. and eight a.m. Men called to start work at nine p.m. or later shall be considered as performing work on the fourth (graveyard) shift."

The Wage Scales and Working Conditions referred to in the bulletin of August 24, 1942, Section 6 of which was to be replaced and superseded by the last paragraph of said bulletin, are the tentative wage scales and working conditions that served as the basic copy for the printer and in which changes were made from time to time to conform to the bulletins. The last paragraph of the bulletin of August 24, 1942, as above quoted appears verbatim in the final printed agreement executed on or about February 12, 1943, referred to in the letter document as the wage agreements dated February 15, 1942. No mention is made in Section 6 of the final printed agreement of the date August 30, 1942.

Though the tentative agreement was stricken from the evidence in the trial court, by stipulation of both parties it was included in the record on appeal. Section 57 of the printed agreement appears as Section 53 in the tentative agreement, the difference in numbering apparently being due to additions made from time to time as evidenced by the bulletins. The first paragraph of Section 6 of the tentative agreement at the time the bulletin of August 24, 1942, was issued read:

"6. *Shifts*—The Work Day shall be divided into four shifts of six hours each. First shift may start between six a. m. and eight a. m. Men called to start work two or more hours after the start of the third regular shift shall be considered as performing work on the fourth (graveyard) shift."

In other words, under the tentative agreement, the first starting time for the graveyard shift was 10 p. m. and a bonus of one-half time was to be paid therefor. Under the change effected by the bulletin of August 24, 1942, the first starting time was nine p. m.

The essence of the plaintiffs' cause of action is that under Sections 6 and 57 of the printed agreement, plaintiffs are entitled to retroactive compensation of a one-half time bonus for the work days commenced at nine p. m. from July 1, 1941, to August 30, 1942. Defendant contended that from July 1, 1941, to August 30, 1942, the graveyard shift could not start before 10 p. m. and that the starting time of nine p. m. was not effective until August 30, 1942, according to the letter document and the bulletin of August 24, 1942; in other words, that the letter document and the bulletins referred to therein are a part of the final agreement and as such the retroactive pay date of July 1, 1941, is inoperative as to the graveyard shift beginning at nine p. m.

The trial court concluded as a matter of law that the letter document was collateral and extrinsic to the printed agreement; that the printed agreement embraced the entire subject matter of the collective bargaining agreement; and that the plaintiff members of Local 728 are entitled to recover retroactive compensation from July 1, 1941, to August 30, 1942. From this judgment defendant appeals.

Appellant urges reversal of the judgment on six main grounds:

(1) The finding of the trial court that the letter document was not a part of and purported to modify or alter the collective bargaining agreement is not supported by the evidence and is contrary to law inasmuch as when instruments relating to the

same transaction are delivered together, they must be construed together;

(2) The finding of the trial court that the letter document purported to change, contradict, modify, vary and alter the provisions of the printed instrument is not supported by the evidence and is contrary to other findings and to the law;

(3) The finding that the parties had previously dealt and agreed upon the subject of retroactive compensation is not supported by the evidence, is at variance with the pleadings and is uncertain and indefinite;

(4) The findings are uncertain, unintelligible, ambiguous and inconsistent in that it cannot be ascertained therefrom whether the letter document was executed prior to, contemporaneously with, or after the execution of the printed agreement, and that the use of blanket findings as to defendant's answer and affirmative defenses was improper;

(5) Defendant was entitled to a finding in its favor on the issue of the Statute of Limitations;

(6) The trial court erred in excluding evidence of the circumstances under which the contract was made.

Respondents' main argument in support of affirmance of the judgment is based upon the parol evidence rule.

[1] Appellant's contentions numbered (1), (2), (4), and (6) all seek to establish that the letter document was not collateral and extrinsic to the printed agreement as found by the trial court but constituted a part of the final agreement. There is no conflict in the evidence to the effect that the printed instrument and the letter document were executed and delivered simultaneously and that the letter document refers to and incorporates the bulletins, particularly the bulletin of August 24, 1942. An appellate court is not bound by a construction placed upon a contract by the trial court when it is based solely upon the terms of the written instrument without the aid of evidence, where there is no conflict in the evidence, or a determination has been made upon incompetent evidence. In re Estate of Platt, 21 Cal.2d 343, 131

P.2d 825; MacDonald v. Rosenfeld, 83 Cal. App.2d 221, 188 P.2d 519.

[2,3] It is apparent from the testimony that the letter document was an integral part of the printed contract, for the printed document was not delivered to the Union until the letter document was signed. A written contract does not become effective until its delivery to the party in whose favor it is made or to his agent, Civ.Code, § 1626; Ivey v. Kern County Land Co., 115 Cal. 196, 46 P. 926; McKinney v. Sargent, 216 Cal. 18, 13 P.2d 373; Rockefeller v. Smith, 104 Cal.App. 544, 286 P. 487. Several papers relating to the same transaction are to be construed as a single contract. Lynch v. Bank of America Nat. Trust & Savings Ass'n, 2 Cal.App.2d 214, 37 P.2d 716; Torrey v. Shea, 29 Cal.App. 313, 155 P. 820.

[4,5] But even assuming, as appellant asserts, that the letter document is to be construed as part of the printed agreement, we can find no change in the retroactive pay provision of the printed agreement effected by the letter document. No proper construction can be made of the printed agreement in conjunction with the letter document without taking into consideration the provisions of the bulletin of August 24, 1942, and the tentative agreement inasmuch as the letter document refers to the bulletin and the bulletin in turn refers to the tentative agreement. Striking the tentative agreement from the evidence was therefore erroneous. When the printed agreement, the letter document, the bulletin, and the tentative agreement are considered together, the conclusion is inevitable that what was contemplated was that the letter by its very terms merely refers to the bulletin of August 24, 1942, and said bulletin made no change in any provisions of retroactive pay but merely redefined the start of the graveyard shift. The retroactive pay date of July 1, 1941, remained unchanged in Section 57 of the printed agreement (Section 53 in the tentative agreement). If the parties had intended to change the retroactive pay provision, they would have encountered no more difficulty in so stating than they did in redefining the shifts in Section 6.

That the only purpose of the bulletin was to redefine the start of the graveyard shift is further borne out by the testimony of the Union business agent:

"So we got together with Casey and Pelton and some of the labor relations managers and we worked—and I said, 'Let's make a standard starting time for the graveyard shift.' They said, 'all right, what do you want?' I said, 'Well, we want eight o'clock'; and the producers said, 'Well, we want ten.' So we said, 'We will compromise and split the difference and make it nine o'clock.'"

"Then that bulletin was sent out."

Furthermore, the letter document merely makes the effective dates of the "working conditions" subject to the various bulletins notwithstanding the provisions of Section 3 of the printed agreement. Appellant contends that the phrase "effective August 30, 1942" in the bulletin is meaningless unless it refers to retroactive pay—yet the effective date of the working conditions in Section 3 is February 15, 1942, and that is still subject to the retroactive adjustments. If the parties meant to change the retroactive pay date, they should have said so in the bulletin of August 24, 1942. *Nourse v. Kovacevich*, 42 Cal.App.2d 769, 109 P.2d 999.

[6, 7] The third contention of appellant has reference to the finding of the trial court that reads in part "said letter and the bulletin to which it referred purported to change, contradict, modify, vary and alter the provisions of the formal collective bargaining agreement * * * with respect to retroactive pay * * * the latter collective bargaining agreement being full and complete on its face and embracing the entire subject matter, including retroactive pay, on which the parties had theretofore dealt and agreed * * *" While criticism of this finding may have some merit, yet in view of the foregoing discussion relative to a proper construction of a contract involving all the documents, as desired by the appellant, and further, in view of the rule that findings should be accorded a liberal construction, with a view of supporting, rather than defeating a judgment (24 Cal.Jur., 1007, 1008), any deficien-

cy therein furnishes no ground for a reversal on this appeal.

[8] Appellant's fifth contention as to the defense of the Statute of Limitations is based on a computation of time beginning prior to the execution of the printed agreement. The printed agreement was executed February 12, 1943, and the complaint of respondents was filed September 28, 1946. The action was predicated upon the contract of February 12, 1943, and is well within the statute. Preliminary negotiations can not be made the basis for computing the Statute of Limitations. The provision as to retroactive pay could not become final until the execution of the printed agreement and no rights could accrue thereunder until February 12, 1943. Appellant's contention to the contrary is mainly based upon the wording of the finding set forth in the preceding paragraph, but it seems manifest that the trial court could not have meant that there was a prior final and binding agreement as to retroactive pay in view of its other findings but rather meant that prior to the execution of the final agreement an accord had been reached between the parties concerning the retroactive pay provision that was to be contained in said final agreement when it was executed.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.



96 Cal.App.2d 315

STILL v. PEARSON.
Civ. 17007.

District Court of Appeal, Second District,
Division 3, California.
March 2, 1950.

Action by Leslie M. Still against Robert C. Pearson for injuries sustained while in the employ of defendant who had not secured the payment of workmen's compensation.

The Superior Court of Los Angeles County, Frank M. Smith, J., entered judgment on a verdict in favor of plaintiff, from which defendant cross-appealed, and the Superior Court of Los Angeles County, Clarence M. Hanson, J., entered an order granting a new trial, from which plaintiff appealed.

The District Court of Appeal, Wood, J., held that granting the motion for new trial on ground of insufficiency of evidence to sustain verdict was not abuse of discretion, and that affirmance of order rendered moot defendant's cross-appeal from judgment.

Order granting a new trial affirmed and appeal from judgment dismissed.

1. New trial ⚭114

The statutory provision that motion for new trial shall be heard and determined by judge who presided at the trial is mandatory, except that in case of his inability or absence from the county at time noticed for hearing on motion, motion shall be heard by any other judge of the same court, and record need not show such inability or absence, the jurisdiction of another judge to determine the motion being dependent on whether presiding judge was in fact unable to hear the motion or absent from the county. Code Civ.Proc. § 661.

2. Appeal and error ⚭528(1)

Where a judge other than the one who presided at trial proceeds to hear a motion for new trial, better practice is to cause a record to be made reciting the fact of the inability or absence of judge who presided at the trial. Code Civ.Proc. § 661.

3. New trial ⚭114

Where judge who presided at trial was in fact unable to hear and determine the motion for new trial, another judge of the same court had jurisdiction to hear and determine the motion. Code Civ.Proc. § 661.

4. New trial ⚭163(2)

In action for injuries sustained while in the employ of defendant, who had not secured the payment of workmen's compensation, written opinion of trial judge in granting defendant's motion for new trial disclosed that trial judge had given plaintiff the benefit of statutory presumption of negligence of defendant as to specific acts of negligence alleged but had concluded that

the presumption was overcome by the evidence. Labor Code, §§ 3700, 3706, 3708.

5. Appeal and error ⚭843(4)

Where insufficiency of the evidence to sustain verdict for plaintiff in action for injuries sustained while in the employ of defendant, who had not secured the payment of workmen's compensation, was one of the grounds on which defendant's motion for new trial was granted and abuse of discretion in granting a new trial did not clearly appear, on appeal from order granting a new trial, it was not necessary to determine whether pleadings were sufficient to allege general negligence of defendant. Labor Code, §§ 3700, 3706.

6. Appeal and error ⚭979(2)

The granting of a motion for new trial on ground of insufficiency of the evidence to sustain the verdict rests within the discretion of trial judge to such an extent that appellate court will not interfere unless an abuse of discretion clearly appears.

7. Appeal and error ⚭933(1)

On appeal from order granting a new trial, all presumptions are in favor of the order.

8. New trial ⚭68

Workmen's compensation ⚭2120

In action for injuries sustained by experienced carpenter while in the employ of defendant, who had not secured the payment of workmen's compensation, trial judge could reasonably conclude that statutory presumption of negligence of defendant had been overcome by evidence that plaintiff was injured when end of plank on which he was standing slipped from end of saw-horse placed length-wise of plank with one end on concrete platform and the other on soft ground, and hence granting a new trial on ground of insufficiency of the evidence to sustain verdict for plaintiff was not abuse of discretion. Labor Code, §§ 3700, 3706, 3708.

9. Appeal and error ⚭790(3)

Affirmance of order granting defendant's motion for new trial rendered moot and dismissable defendant's appeal from judgment.

Irwin W. Rainier, North Hollywood, Stanton & Stanton, Los Angeles, for appellant.

Zeutzius & Steffes, Los Angeles, for respondent.

WOOD, Justice.

Action by an employee against his employer, who did not have compensation insurance, for damages for personal injuries sustained in the course of his employment. In a trial by jury, wherein Judge Frank M. Smith presided, the plaintiff obtained judgment for \$8,000. Defendant's motion for a new trial was granted by Judge Clarence M. Hanson, and the plaintiff appeals from the order granting that motion. Defendant appeals from the judgment.

[1-3] Plaintiff, as appellant in the appeal from the order granting the motion for a new trial, contends that it was error for Judge Hanson to hear and determine the motion for a new trial inasmuch as the record does not show that Judge Smith was unable to hear the motion or that he was absent from the county at the time noticed for the hearing. Section 661 of the Code of Civil Procedure provides: "The motion for a new trial shall be heard and determined by the judge who presided at the trial; provided, however, that in case of the inability of such judge or if at the time noticed for hearing thereon he is absent from the county where the trial was had, the same shall be heard and determined by any other judge of the same court." The motion for a new trial came on for hearing on July 27, 1948, before Judge Hanson, and on said day the motion was submitted. On July 30, 1948, a minute order was made which recited that the motion "is granted on account of insufficiency of the evidence to justify the verdict, and error in instructing the jury." An "Order Granting a New Trial" signed by Judge Hanson was filed on August 6, 1948 (and entered on August 23, 1948), which order states that the motion of defendant for a new trial is granted on the grounds of the insufficiency of the evidence to justify or sustain the verdict, and error in instructing the jury. It does not appear

that the plaintiff objected to the hearing of the motion for a new trial by Judge Hanson. In plaintiff's opening brief on this appeal the plaintiff raised the point that the record did not show inability or such absence on the part of Judge Smith. Upon application of the defendant for leave to produce additional evidence concerning the inability of Judge Smith to hear and determine the motion for a new trial, this court made an order on October 6, 1949, that additional evidence be taken as to whether Judge Smith was able (at the time noticed for the hearing) to hear and determine the motion; and this court appointed Superior Judge Julius V. Patrosso referee to take evidence upon said issue and to report his findings to this court. The report of Judge Patrosso as referee, filed herein on November 9, 1949, shows that the referee found that Judge Smith "was on July 27, 1948, and during the period from June 8, 1948 to September 22, 1948, ill and unable to determine respondent's motion for a new trial." This court approves the report of the referee, and it adopts the findings therein and makes them the findings of this court. Appellant does not assert that Judge Smith was able to hear the motion, but, as above stated, asserts that the record does not show that he was unable to hear the motion. Appellant argues that "undoubtedly it is mandatory that the record must show in the words of the section [sec. 661, Code Civ. Proc.] the basis of the jurisdiction of a judge other than the trial judge" to determine a motion for a new trial. The argument of appellant is to the effect that since the record of the superior court does not show that Judge Smith was unable to hear the motion, the acts of Judge Hanson in connection with the motion were ineffectual, and that by reason of the lapse of time the motion for a new trial was denied by operation of law. The provision of said section that "The motion for a new trial shall be heard and determined by the judge who presided at the trial" is mandatory, *Francis v. Superior Court*, 3 Cal.2d 19, 29, 43 P.2d 300, but there are two exceptions to that requirement, namely, the inability of the judge who presided at the trial, or his

absence from the county. As above shown, the said section 661 of the Code of Civil Procedure provides "that in case of the inability" of the judge who presided at the trial, the motion for a new trial "shall be heard and determined by any other judge of the same court." That section does not provide that the minutes or any other record must recite the fact of such inability of the judge who presided at the trial. It is not mandatory that the record show that the judge who presided at the trial is unable to hear and determine the motion for a new trial. Whether a judge who did not preside at the trial is authorized to hear and determine a motion for a new trial is dependent upon whether it is a fact that the judge who presided at the trial was unable to hear and determine the motion or was absent from the county at the time noticed for the hearing of the motion; and such authorization is not dependent upon whether a minute entry, or other record of the trial court, recites the fact of such inability or absence. Of course, when a judge other than the one who presided at the trial proceeds to hear the motion for a new trial, it is the best practice, in the interests of certainty and convenience, to cause a record to be made reciting the fact of the inability or absence of the judge who presided at the trial. The fact is, in the present case, that Judge Smith, who presided at the trial, was unable to hear and determine the motion for a new trial. Judge Hanson was authorized to hear and determine the motion for a new trial.

Defendant, a building contractor, hired plaintiff, a carpenter, to make certain alterations on premises owned by a person who is not a party to this action. Plaintiff was then approximately 56 years of age and had been a carpenter more than 40 years. The last 11 years he had been a carpenter foreman or supervisor. The alteration work included: enclosing a brick fireplace with knotty pine; building a panel in the fireplace; changing doors in the house; and building an addition to the garage. Before plaintiff started the work defendant went to the premises with him and showed him what was to be done. He also told plaintiff that in building the addition to

the garage to use "the old material which was on the place, as far as possible." Plaintiff commenced the work about December 1, 1946. The alterations in the house were made first and, in doing some of the work there, he used two wood sawhorses which he found on the premises. He did not know to whom the sawhorses belonged, but he "checked" them before using them. After completing the alterations inside the house, which required about a week, plaintiff commenced the construction of the addition to the garage, which addition was to have walls, a cement floor, and a shingle roof. He made an excavation where the addition was to be built. He then made the cement floor, and after working five days on said addition he had it near completion. On December 14, 1946, the day of the accident, plaintiff was placing tar paper and stucco wire on the outside of the addition. He began work at 8 a. m. and was assisted by a truck driver who had been hired by defendant, as a helper for plaintiff, for that day only. The walls of the addition were approximately 9 feet in height, and the front wall was 10 feet in length. In order to put the tar paper and stucco wire on the walls plaintiff and his helper made a scaffold with the two sawhorses (which he had used in the house) and a plank (6 feet long, 10 inches wide and 2 inches thick) which he found on the premises. They did not make the scaffold in the manner in which a sawhorse scaffold is usually made—by placing each sawhorse at a right angle to the wall (or approximately at such an angle) and then placing the plank on them so that it would extend from one sawhorse to the other sawhorse. On the contrary, they placed the sawhorses in a position parallel with the wall, and then placed the plank on them so that one end of the plank was on the end of one sawhorse and the other end of the plank was on the end of the other sawhorse. In other words, the tops (or backs) of the sawhorses and the plank (which together formed the top of the scaffold) were parallel with the wall. By using the scaffold, which was constructed in this manner, they put the tar paper on the walls of the addition, and they put the stucco

wire on the back wall. Then, in proceeding to put the stucco wire on the front wall, they moved the scaffold to the front wall and set it up in the same manner. According to the testimony of plaintiff, the scaffold was constructed in this manner so that its length would be approximately the length of the 10-foot front wall—each sawhorse being about 3 feet in length and the plank being 6 feet in length. If the scaffold had been made in the customary manner, by placing the sawhorses crosswise to the wall instead of lengthwise with it, the scaffold would not have been 10 feet long but would have been 6 feet long, the length of the plank. In the scaffold at the front wall one sawhorse was at one end of the wall and the other sawhorse was at the other end of the wall, and there was a 3-foot space between the inside ends of the sawhorses. The plank extended across the 3-foot space—with approximately 18 inches of one end of the plank resting on one sawhorse and about 18 inches of the other end of it resting on the other sawhorse. Apparently the top or back of each sawhorse was about 6 inches wide. The ground in front of the wall was soft. Plaintiff and his helper then used the scaffold about an hour, and during that time they got on and off the scaffold. About 11:30 a. m., while they were tacking a strip of wire along the top of the wall, the defendant “came up” to the place where they were working and stood about 15 feet behind them. The helper then “jumped off” the scaffold to talk with defendant, and plaintiff, who was standing approximately in the middle of the plank, continued to tack the wire on the wall. About two minutes later, while plaintiff was still standing in the middle of the plank, with his arms upraised holding the wire, one end of the plank went down and one end “flew up,” striking plaintiff over his left eye and causing the injuries here involved.

Plaintiff testified that he did not remember checking to see if the plank was on the sawhorses properly before getting on it; two legs of one sawhorse were on a concrete landing which plaintiff had made outside a door in the front wall, and the landing might have been a little higher

than the ground around it; while working on the scaffold he felt the plank wiggling and he “noticed that the horse [referring to the one with two legs on the concrete landing] wasn’t solid all the time” he was working on top of it; he had felt that it was “wiggly” but he continued working; and the next thing he knew the end of the plank, which had rested on that sawhorse, was going down. He also testified that there were “1 x 6” braces underneath the sawhorses; the piece of wood which formed the tops of the sawhorses was about “2 x 6”; the plank which they used in making the scaffold was somewhat wider than the tops of the sawhorses; he looked for a longer board but they had used up practically everything that was around there, and they had no plank long enough to reach the entire length of the front wall so he put the sawhorses parallel with the wall and placed the plank from one sawhorse to the other. He testified further that he had been working with sawhorses for more than 40 years; when he worked as a carpenter foreman or supervisor most of the work “was high work,” and it was a part of his duties to see whether the conditions under which the men worked on high places were safe; and that when he had inexperienced men working he “watched” that they did the right thing.

An expert witness called on behalf of plaintiff testified that when wooden sawhorses are used as a scaffold it is the custom in the contracting business to set them “cross ways” or “perpendicular” to the building; that he knew of no custom or trade practice in which planks could be used end to end, and he had never seen them used that way; that it is not the proper practice to put a plank lengthwise on sawhorses; that a 2 x 10 plank 6 feet long would be strong; and that a reasonably safe span between sawhorses would be “somewhere” between 6 and 10 feet.

Defendant did not carry workmen’s compensation insurance and was not self-insured. Section 3700 of the Labor Code provides that “Every employer * * * shall secure the payment of compensation in one or more of the following ways: (a) By being insured against liability to pay compen-

sation * * * (b) By securing from the commission a certificate of consent to self-insure * * *." When an employer fails to secure the payment of compensation, as required by said section, an injured employee "may proceed against such employer by filing an application for compensation with the commission, and, in addition, may bring an action at law against such employer for damages". Labor Code, sec. 3706. Pursuant to the provisions of that section plaintiff filed this action for damages.

It was alleged in the complaint that on December 14, 1946, plaintiff was in the employ of the defendant and was engaged, as directed by defendant, in certain carpenter work; that defendant was present and was acting as supervisor and foreman; that to accomplish the task assigned by defendant, plaintiff and another employee of defendant were obliged to stand on certain wooden sawhorses and planks placed thereon; that defendant negligently provided, and "obliged" plaintiff to use, unsafe, defective and insecure wooden sawhorses and planks which had become slippery with age and wear, and also that defendant provided a fellow servant who was negligent and who was not qualified to engage upon the task assigned; that for want of due care, while plaintiff was standing upon said sawhorses and plank in the act of placing certain wires upon said wall, the said plank "by reason of the unsafeness, defectiveness and insecurity thereof and, or by reason of the negligent, careless and unskillful acts of the fellow servant furnished to plaintiff by defendant, did fly up and strike plaintiff in the left eye thereby causing extreme, severe and permanent injury." It was further alleged therein, paragraph VII, "That by reason of the negligence and carelessness of defendant, plaintiff was not only painfully and seriously bruised and wounded, but was permanently injured."

Section 3708 of the Labor Code provides that, in an action at law against the employer for damages, "it is presumed that the injury to the employee was a direct result and grew out of the negligence of the employer, and the burden of proof is upon the

employer, to rebut the presumption of negligence. It is not a defense to the employer that the employee was guilty of contributory negligence, or assumed the risk of the hazard complained of, or that the injury was caused by the negligence of a fellow servant. No contract or regulation shall restore to the employer any of the foregoing defenses."

[4-7] Plaintiff (appellant) contends in effect that the court, in ruling upon the motion for a new trial, did not give plaintiff the benefit of said presumption of negligence on the part of the employer. It seems that said contention is based upon statements of the trial judge, in his written opinion, to the effect that since the employee (plaintiff) had alleged specific acts of negligence only, the issues in the case were thereby narrowed to those specific acts; that the charging of specific acts of negligence was equivalent to stating that there were no other acts of negligence; and that the evidence did not support the allegation of specific acts of negligence. It is to be noted, however, that the trial judge also stated in the opinion that "the employee was not entitled to recover if the presumption of negligence accorded by the statute to these alleged specific acts was overcome by the evidence of the defendant"; and that "The record clearly discloses that the plank slipped from the saw horse and that it did so due to the manner in which the saw horse had been placed by the plaintiff and to the use he was making of it. There is nothing in the record to indicate that at the time the saw horses were defective, or defective to the extent that such defect was a proximate cause of the accident." It therefore appears that the trial judge gave the plaintiff the benefit of the presumption of negligence on the part of defendant as to the specific acts alleged, but concluded that the presumption was overcome by the evidence. Plaintiff argues further that the court erroneously construed the pleadings to allege specific negligence only. He asserts that general negligence was alleged in paragraph VII of the complaint (above quoted). In that paragraph, which followed the allegation of specific acts of negligence, it was al-

leged in substance that by reason of the negligence of defendant plaintiff was not only painfully wounded but was permanently injured. The question therefore arises as to whether the allegation of that paragraph pertains to negligence other than the specific acts of negligence which had just been alleged, or whether that was only an allegation that the specific acts of negligence alleged caused a permanent injury. Upon the appeal from the order granting defendant's motion for a new trial it is not necessary to decide that question. One of the grounds upon which the motion was granted was the insufficiency of evidence to sustain the verdict. The granting of a motion for a new trial on that ground "rests within the discretion of the trial judge to such an extent that an appellate court will not interfere unless an abuse of discretion clearly appears." *Ballard v. Pacific Greyhound Lines*, 28 Cal.2d 357, 358, 170 P.2d 465, 467. All presumptions are in favor of the order granting the motion. In the case of *Sweeley v. Leake*, 87 Cal.App.2d 636, at page 640, 197 P.2d 401 at page 404, it was said that the trial court in hearing a motion for a new trial "must weigh all the evidence and determine the just conclusions to be drawn therefrom, and its ruling will not be disturbed on appeal where there is a conflict in the evidence or where there is substantial evidence which would support a judgment in favor of the moving party. [Citing cases.] The fact that the motion in the instant case was heard and determined by a judge other than the one who presided at the trial does not extend the power of this court in reviewing the matter. The judge hearing the motion stands in the shoes of the former judge and has the same power and is charged with the same duty as if the motion had come before the former judge."

[8] In the present case the trial judge, in determining the motion for a new trial, might reasonably have concluded that the evidence overcame the presumption of negligence on the part of defendant. Plaintiff examined the sawhorses when he first used them in making the alterations in the house, and he used them over a period of two weeks prior to the accident. There was

no evidence that they were defective. Also there was no evidence that the plank was defective. It appears that plaintiff, although he had had many years of experience in the use of sawhorses, did not follow the customary method of making a sawhorse scaffold, namely, placing each sawhorse at a right angle to the wall, but on the contrary he placed them parallel to the wall, which was an improper position for their use as part of a scaffold. The plaintiff knew that the ground in front of the wall was soft. He placed two legs of one sawhorse on the concrete landing (which landing might have been a little higher than the ground) and the other two legs on the soft ground. He noticed, while he was on the scaffold, that the sawhorse was not firm, and that the plank was wiggly. The trial judge did not abuse his discretion in granting the motion for a new trial.

[9] In view of our conclusion that the order granting a new trial must be affirmed, the defendant's appeal from the judgment is moot and is dismissed. The order granting the motion for a new trial is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



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PFINGST v. GOETTING et al.

Civ. 14103.

District Court of Appeal, First District,
Division 2, California.

March 2, 1950.

Margaret Geotting Pfingst, as administratrix of the estate of Annie Hinds, deceased, sued Gaston I. Goetting and Ruth Goetting to recover money which had been transferred by deceased into joint bank accounts in the names of deceased and a nephew of deceased.

The Superior Court in and for the City and County of San Francisco, Franklin A.

Griffin, J., rendered a judgment adverse to plaintiff, and plaintiff appealed.

The District Court of Appeal, Goodell, J., held inter alia that bank employees could testify that employees explained to deceased the effect of the transfers and that deceased acquiesced in transfers, notwithstanding bank employees were not intimate acquaintances of deceased, and that deceased had independent advice.

Judgment affirmed.

1. Gifts ⇨47(3)

Where relationship of mutual trust existed between elderly person and her nephew, and nephew occupied superior position, and elderly person transferred money into joint bank accounts in names of herself and her nephew, a presumption that nephew exercised undue influence arose which nephew had burden of overcoming by showing that transfers were voluntarily made by elderly person with a full knowledge of the facts.

2. Gifts ⇨36

Fact that elderly person was sick and quite helpless physically did not render her incompetent to transfer her money into joint bank accounts in names of herself and a nephew.

3. Gifts ⇨36

Advanced age did not render person incompetent to transfer money into joint bank accounts in names of herself and a nephew.

4. Gifts ⇨47(3)

Advanced age of person who transferred money into joint bank accounts in names of herself and a nephew did not raise a presumption of undue influence.

5. Gifts ⇨48

In action to recover money which had been transferred by a decedent into joint bank accounts in names of decedent and nephew on ground that decedent was incompetent and acting under defendant's undue influence, defendant was entitled to show that decedent when she made transfers appeared to be rational and to act of her volition, as a free agent and without pressure, and appeared to know what decedent was doing.

6. Appeal and error ⇨204(1)

An objection to admission of evidence not made at trial could not be urged on appeal.

7. Appeal and error ⇨931(6)

Trial ⇨105(1)

If admitted without objection, incompetent evidence may be accepted in proof of issues, but it may be assumed that court disregarded it.

8. Evidence ⇨474(4)

Gifts ⇨48

In action to recover money which had been transferred by decedent into joint bank accounts in names of decedent and nephew, bank employees who visited decedent to interview decedent concerning proposed transfers could testify that decedent understood what bank employees explained to decedent relative to effect of transfers, and acquiesced in transfers, notwithstanding bank employees were not intimate acquaintances of decedent, and such testimony was admissible on issue of competence and of undue influence. Code Civ.Proc. § 1870, subd. 10.

9. Gifts ⇨38

Where a fiduciary relationship exists between the donor and donee, absence of independent advice is a circumstance to be considered in determining whether gift should be avoided because of alleged undue influence or fraud, but its nonexistence alone does not authorize court to avoid gift.

10. Trusts ⇨283(1)

In transactions between trustee and trust beneficiary, whether beneficiary received independent advice is a fact to be weighed in determining whether trustee performed full duty, and whether an opportunity for independent advice was afforded is important.

11. Gifts ⇨38

Where bank employees, before aged persons transferred money into joint bank accounts in names of herself and nephew, did not advise her as to what to do, but did explain the meaning and consequences of a joint account, aged person acted on "independent advice", and transfers were not invalid.

12. Appeal and error ⇐1008(1)

In action to recover money which had been transferred by decedent into bank accounts in names of decedent and nephew when relationship of mutual trust existed between decedent and nephew and nephew occupied superior position, weight and effect of testimony tending to show that decedent had independent advice before making gift was for trier of facts.

13. Appeal and error ⇐1008(1)

In action to recover money which had been transferred by decedent into joint bank accounts in names of decedent and nephew of decedent, whether evidence outweighed presumption of undue influence arising from fact that relationship of mutual trust existed between decedent and nephew and that nephew occupied superior position was for trier of facts.

14. Gifts ⇐49(5)

Evidence established that cash an aged person gave her nephew was given to nephew freely and voluntarily and that aged person was not acting under undue influence.

15. Appeal and error ⇐989

Power of an appellate court begins and ends with a determination as to whether there is any such actual evidence, contradicted or uncontradicted, which will support conclusion reached by jury, and when two or more inferences can reasonably be deducted from facts, reviewing court cannot substitute its deductions for deductions of trial court, and rule is as applicable when reviewing findings of a trial judge as when considering a jury's verdict.

Hilary H. Crawford, San Francisco, for appellant.

Dreher, McCarthy & Erickson, San Francisco, for respondent.

GOODELL, Justice.

This action was brought to recover for the estate of Annie Hinds upwards of \$81,000 which had been transferred by her into joint accounts in the names of herself and her nephew, respondent Gaston I. Goetting, several years before her death. The suit

was based on the claim that she was incompetent and acting under his undue influence at the time of the transfers. The findings negated these charges, and judgment went in favor of defendants. After the denial of a new trial this appeal was taken.

Annie Hinds, who was unmarried and a retired teacher, died on October 20, 1945. She left a sister named Florence Morgan, who did not appear in the case as a witness or otherwise. Other next of kin were Margaret Goetting Pfingst (appellant) and her brother Gaston I. Goetting (respondent) who were children of a deceased sister of decedent named Frances Goetting; others were Lucille Clayton and Joseph Mitchell, children of a deceased niece of decedent, and Lila Doyle and Charles Goetting, children of a deceased nephew.

The transfers were made in February, 1942, at which time decedent was 82 years old and confined to her home because of serious illness. For some years she had lived with her sister and brother-in-law, Mary and William J. Young, in a flat on Second Avenue in San Francisco. Each month decedent received from the School Department a pension check for \$117.18 and as these checks came in Mrs. Young would take them to the Hibernia Bank and deposit them in a joint account in the names of Annie Hinds or Mary Young. A power of attorney had been made by Annie to Mary to enable her to attend to this business. In January, 1942, however, Mary Young became so ill that she, too, was confined to the house, and decedent told her nephew that she desired to give him her power of attorney to attend to her checks, and desired also to change all her five bank accounts into joint accounts in her name and his. Such power of attorney was executed and such transfers made under circumstances presently to be stated.

The five accounts were as follows: (a) in Crocker First National Bank, \$18,101.67; (b) in Bank of America, \$15,096.92; (c) in American Trust Co., \$21,247.22; (d) in The Hibernia Bank, \$23,590.58, and (e) in The San Francisco Bank, \$3,654.93. They aggregated \$81,691.32 and constituted practically all of decedent's property.

Within a few days after February 15, 1942 the Crocker, Bank of America, American Trust Co. and Hibernia accounts were transferred into joint accounts in the same banks in the names *Annie Hinds or Gaston I. Goetting* and The San Francisco Bank account was transferred into the names *Annie Hinds or Gaston I. Goetting, Trustee*. These five transfers are the principal basis for this litigation.

Mrs. Young steadily declined in health, and passed away in July, 1942. Meanwhile, because of the war, black-outs, and apprehension over the possibility of air raids, Miss Hinds' illness was aggravated by nervousness and she expressed to her nephew her discomfort and worry over living in a frame dwelling. Respondents who lived in an apartment building looked for larger quarters and finally found an 8-room apartment in the same building which would accommodate themselves, the decedent and her nurse, and Mr. Young, and in August, 1942, moved decedent there, where she continued to live with the Goettings until her death in October, 1945. The brother-in-law also moved there.

It appears that in these new surroundings decedent was comfortable, with the freedom of the entire apartment, the opportunity to have her friends visit her, and with a practical nurse to take care of her.

As time went on the nephew withdrew from the several accounts sums of money which he invested in Government bonds and other corporate securities which were put into the names of both respondents. He testified that whenever such withdrawals and investments were made it was only after full discussion with his aunt, and her approval.

There was no evidence whatever of any importunity or pressure such as would constitute actual undue influence. Although it was alleged that the power of attorney was obtained for the purpose of gaining control of decedent's bank accounts there was no such proof; the record shows that the power of attorney, although general in form, was never used except for the endorsement and deposit of the pension checks.

The court found that at all times mentioned in the complaint and until the date of decedent's death a relationship of mutual trust and confidence existed between her and Gaston I. Goetting; that at no time did he control or influence her mind or actions and that at all such times until approximately one week prior to her death she was mentally competent to manage her business and affairs; that the creation by her of the joint bank accounts and the withdrawals therefrom of funds used to purchase securities in the joint names of the respondents, and the gift by decedent to her nephew of \$3,000 were her free and voluntary acts; that at and before the times of said acts she knew and understood the nature and effects thereof and that none of said acts was influenced or controlled by the mind or conduct of the defendants or either of them.

The sufficiency of the evidence to sustain these findings is not challenged. Counsel for appellant candidly says: "As might be expected, there was a sharp conflict in the testimony. The appellant claimed that the aunt was incompetent and produced evidence to that effect. The respondent claimed that she was competent, and they introduced evidence in support of that contention. The case was a close one and the decision could have gone either way. It is our claim that because of the sharp conflict in the evidence any error in the admission of evidence should be scrutinized carefully by this Court. In view of the fact that there was this conflict in the evidence, we are not in position to say that there was not some testimony to support the decision of the Court that the decedent was competent."

The foregoing statement of counsel has reference to the testimony of three bankers respecting decedent's actions and conversations at the time of the transfers, which is the basis of appellant's first point on appeal. Her second point is that decedent had no independent advice.

[1] At the outset it must be conceded that there was ample evidence, including that of respondent Gaston I. Goetting, to support the finding that a relationship of mutual trust and confidence existed between

decedent and her nephew. And in view of all the circumstances it must also be conceded that the nephew occupied what the authorities call the superior position. That being so, a presumption of undue influence arose, as contended by appellant and as held by numerous authorities (which need not be cited). The burden, then, was cast on the nephew to dispel and overcome that presumption by showing "that the gift was freely and voluntarily made, and with a full knowledge of all the facts, and with a complete understanding of the effect of the transfer". *Brown v. Canadian Industrial Alcohol Co.*, 209 Cal. 596, 598, 289 P. 613, 614 and cases cited. Such burden, of course, could not have been sustained unless the evidence convinced the court that decedent was competent at the time of the transfers.

When, according to the nephew's testimony, decedent had proposed these transfers, he consulted his attorney who advised him that she could make them provided she was competent. Accordingly, the nephew requested Dr. John A. Haderle, who was decedent's family doctor, and had been for over twenty years, to examine his aunt "for the purpose of determining her mental composure [competency?] or the lack of it." Such examination was made on February 16, 1942 and Dr. Haderle testified at considerable length respecting it. He said: "I thought she was perfectly mentally competent to conduct her own business, excepting she was physically unable." He saw decedent about once a week in January and February, 1942, and continued as her physician until her death, the causes of which were "cerebral apoplexy, general sclerosis and myocarditis, chronic." In his judgment she remained competent until her death except probably the last week when she was in a comatose condition. "Prior to that time, she seemed to be quite rational."

On cross-examination he testified that she was confined to her bed a great part of the time; for many months she could not leave the house; she had a paralysis from anemia and also a very marked arthritis. She was not "necessarily" in bed for the last six or eight months, but was sitting up

most of the time; she was confined to bed sometimes, when some acute illness came on, such as intestinal illness. About January, 1945, she had such serious illness or toward the end of the year (meaning, no doubt, 1944). When asked whether she was senile he answered "I think pretty nearly everybody after 75 or 76 gets senile." He testified, however, that she was never confused during his visits. On redirect he testified that her health improved very much after she went into the Goetting home. On the occasions of his visits, he was permitted to be alone with the patient; usually there would be a nurse there, but frequently decedent would be alone with him while the nurse would step out of the room. There was never any restriction on his movements while in the Goetting home. On cross-examination he testified:

"Q. Did you ever see her walk unassisted? A. No, I can't say I did.

"Q. Could she feed herself? A. She tried to, but not very well, on account of this condition about the hands.

"Q. Never even combed her hair, did she? A. I didn't see her.

"Q. Never bathed herself? A. No, I don't think so.

"Q. She was just practically helpless, as a matter of fact, was she not? A. Pretty much so."

Dr. Haderle had never been the doctor for either of the respondents, but had been the Hinds' family doctor including Mrs. Young and Annie. There was no objection to any of his testimony.

Seven witnesses on appellant's side testified that decedent was incompetent. None of them was asked by either counsel to give her idea of competency, and its meaning was not defined or explained to them. They were simply asked whether decedent was competent or not, and answered in the negative.

The witnesses who so testified were Mrs. Margaret Goetting Pfingst, a niece, Mrs. Margaret Glensor Cumming, a grand-niece of decedent and the daughter of plaintiff, Mrs. Lucile E. Clayton a grand-niece, Mrs. Lila Doyle a grand-niece, Mrs. Lila Goet-

ting, widow of Charles Goetting who was a deceased nephew of decedent, and two practical nurses, Mrs. Mary Armstrong and Mrs. Margaret West. Each of them stated their opportunities for observation and the frequency and duration of their visits or contacts with decedent. Each of them laid considerable emphasis on the serious physical condition of decedent, but it is not necessary to detail that testimony since none of them gave decedent a poorer bill of health than that given by decedent's own doctor, who was respondents' witness. His testimony, already related, concluded with the question "She was just practically helpless, as a matter of fact, was she not?" and his frank answer "Pretty much so."

One of the nurses, Mrs. West, who testified decedent was incompetent, did not attend decedent, or know her, except for a period of service from December, 1943, until June 1944, which was over a year and a half after the transfers, and again from December, 1944, until decedent's death in October, 1945, which was even more remote.

Before leaving this subject it should be noted that although the plaintiff testified that her aunt was incompetent—based on a visit with her in January, 1942,—she admitted on cross-examination that "on some subjects, she would be very clear, particularly about money matters. She would get terribly confused over minor matters * * *. On some points, she was very clear * * *. Money matters, at the time she took to her bed, became almost a mania with her, she brought the subject up constantly with all of us, never seemed to deviate from the first thought. When we thought her mind was getting senile on many other things, her mind always remained the same on the disposition of her finances."

Plaintiff's daughter gave somewhat similar testimony on her cross-examination. She said referring to money, "She turned towards us and was a little bit surer when she was talking about it. The rest of the time, she was wandering again. Q. Was she agitated at all when your mother was discussing the financial affairs? A. I

wouldn't say agitated. She was just a little bit more alert."

[2-4] There can be no doubt that Annie Hinds, at the time of the transfers was a very sick woman and quite helpless. However, serious illness is not a determining factor. In the case of *Carty v. Connolly*, 91 Cal. 15, 20-21, 27 P. 599, 600, the court said: "* * *, we know of no reason * * * why a person of perfect mental capacity, acting freely and voluntarily, who is sick with mortal illness, is not entirely competent to make a voluntary conveyance of his property as fully and completely as when experiencing the enjoyments of perfect health, * * *. It is not a question of physical condition, of pain or absence of pain, of long life or short life, but it is a question of mental capacity, and the free and untrammelled action of the mind." Followed in *Re Wilson's Estate*, 117 Cal. 262, 277, 49 P. 172, 711, *Becker v. Schwerdtle*, 6 Cal.App. 462, 466, 92 P. 398 and *Anderson v. Nelson*, 83 Cal.App. 1, 5, 256 P. 294. See, also, *Nessen v. Nessen*, 218 Cal. 59, 61, 21 P.2d 415. Nor is advanced age a determining factor. Standing alone it is not sufficient to raise a presumption of undue influence. *Soberanes v. Soberanes*, 97 Cal. 140, 146, 31 P. 910, followed in *Best v. Paul*, 101 Cal.App. 497, 499, 281 P. 1089; see, also, *In re Wilson*, supra, 117 Cal. at page 277, 49 P. 177, and *Johnson v. Studley*, 80 Cal.App. 538, 559, 252 P. 638.

It is true, of course, that if age or ill health impairs ones mental faculties another situation is presented. The doctor's testimony was that decedent "was perfectly mentally competent" despite her many bodily ailments and her helplessness. In weighing his testimony and that of the respondents who testified that she was competent, against that of the witnesses on the other side of the case, we assume the court considered the opportunity which the several witnesses had for observation and their own ages and experience, or, in other words, their own qualifications and competency for judging.

Respondents produced three witnesses with no interest whatever in the outcome

of this litigation. It is out of their testimony that appellant's first point on appeal arises, namely, "*That it was error to permit witnesses who were not intimate acquaintances of Annie Hinds to express their opinions that she was competent.*"

"It is our claim", says appellant, "that because of the sharp conflict in the evidence any error in the admission of evidence should be scrutinized carefully by this court * * *. We * * * claim * * * that the Court was swayed by incompetent evidence which should have been excluded."

Within a day or two after February 15, 1942, The San Francisco Bank, the American Trust Company and The Hibernia Bank each sent a representative to decedent's home to interview her respecting the proposed transfer of these three bank's deposits, from her name to the names of herself and her nephew in joint account. Neither the Crocker Bank nor the Bank of America sent any representative. The three representatives who went out were experienced bankers, having been with their institutions for at least 35, 23, and 44 years, respectively. All had gone many times before on similar missions to homes and hospitals where elderly or infirm depositors were confined.

None of them knew decedent well enough to qualify as an intimate acquaintance, and none of them knew the nephew before this visit.

The nature of the case, and appellant's suggestion that the claimed errors be carefully scrutinized, call for a rather detailed recital of their testimony. Moreover, it is important as well on the question of independent advice, later discussed.

John F. Muller, assistant cashier of The San Francisco Bank, testified that at decedent's request he visited her for the purpose of establishing a joint tenancy account with her nephew; that he "explained to her the consequences of establishing a joint tenancy account with right of survivorship, also that he would have the right to make withdrawals from the account at any time, as he so desired, and that upon her death, it would go to him." When asked whether she indicated what she want-

ed done he replied: "I asked her that, I asked her if she understood it thoroughly and she said she did, and I made a notation to that effect on the transfer order at that time in her presence." He testified that he thought the nephew was not present, but that decedent's brother-in-law was, and signed as a witness; decedent signed the signature card and withdrawal slip in the presence of the witness.

"Q. In your judgment, at that time could she understand what was explained to her? A. Perfectly.

"Mr. Crawford: I object on the ground it is not shown that the gentleman is an intimate acquaintance of hers.

"The Court: That would not make any difference, he could have an opinion as to whether she understood what he had to explain to her, and acquiesced in it."

He testified that his duties included visiting elderly and sick depositors to ascertain their intentions and to report to the bank whether or not they were, in his judgment, competent to perform the act that they requested done; "it was left to me", he said, "to decide whether the party was rational and fully understood the consequences of what they were doing."

"Q. In your judgment, on the day that you discussed the joint tenancy account with Annie Hinds, was she competent to conduct her property and business affairs?

"Mr. Crawford: * * * I object on the ground it is not shown that the gentleman is an expert or intimate acquaintance, he has not shown how many times he ever saw her.

"The Court: If he only saw her once, he can form an opinion - * * * overruled. A. I was sure she was fully aware of the fact of what she was doing."

His interview lasted from 15 to 20 minutes; it was just a "routine job". He identified both signatures on the signature card reading "Annie Hinds or Gaston I. Goetting, Trustee" and testified that the latter signed it "Trustee". When asked "You didn't give her any advice about what to do, you just asked her?" he answered "No, I just asked her what she wanted to do."

William H. Phipps, manager of the savings department of American Trust Company's Savings Union office, testified that in February, 1942, he was assistant manager, and his duties included interviewing depositors unable to visit the bank, to ascertain their intentions with reference to requested action on their part affecting their accounts. He was assigned by the bank to interview decedent, and discussed with her the transfer of her account from her name to a joint account with her nephew. When he talked with her there were present her nephew, her brother-in-law and a nurse named Mary Armstrong, but the nephew took no part in the conversation. Its substance was: "Mr. Goetting introduced me and explained I was the gentleman from the bank to confirm this request and to get her acknowledgment and complete the transfer action, changing her individual account to a joint tenancy"; that he explained to her what the effect of the transfer would be and she stated her intention as to what she wanted done; that she acknowledged her signature "and further confirmed it, she acknowledged the first written request before the witnesses, Mr. Young and Mary Armstrong, and I further confirmed that by originating an entirely new request and transfer order." He prepared a new withdrawal slip for her signature and she signed it in his presence.

"Q. Mr. Phipps, in the course of your conversation with Annie Hinds, could she understand what you said to her? A. Clearly, yes.

"Q. She expressed herself clearly to you, too, did she? A. Clearly and completely.

"Q. And in your opinion or your judgment at that time, Mr. Phipps, was she competent to manage and conduct her property and business affairs? A. Yes.

"Mr. Crawford: * * * I object on the ground the witness is not qualified as a mental expert, and it is not shown he is an intimate acquaintance.

"The Court: Well, I will let him testify as to whether she could understand the transaction in which she was involved at that time. A. Yes.

"Mr. McCarthy: The question was whether she was competent.

"The Court: I asked another question * * *."

The examination continued:

"Q. Well, really, all you went out to do was just take a look at the lady, wasn't it, and see if that was her signature? A. Satisfy myself as to her capacity and responsibility, the same as the other gentlemen, I listened to the testimony preceding, the gentlemen of the banks. It is more or less routine.

"Q. It was just a kind of routine visit? A. Yes.

"Q. You didn't give the lady any advice about what she should do, did you? A. No, I gave her an explanation of the joint tenancy and the features of the transaction.

"Q. But you didn't advise her either to do it or not to do it, did you? A. No, sir."

Hugh F. Mullin, manager of the Geary-Tenth Avenue office of the Hibernia Bank, testified that in February, 1942, his duties included the interviewing of depositors who were unable to visit the bank, to ascertain their intention with reference to accounts including the matter of determining for the bank's purposes the competence of the individuals to procure the accounts that they requested, and that his visit was at the request of his bank. He said that although there were two or three other persons there, and he was not certain who they were, he talked with decedent alone. "Q. Will you tell the court what the substance of your conversation with Annie Hinds was? A. Well, my main object in visiting her was to find out just what she wanted, and that she was—" Appellant called for the conversation, the court so ruled, and he answered: "She told me that she had this account and wished it transferred and placed in her name with that of her nephew, and I ascertained that she was clearly competent to know what she was doing, and complied with her request.

"Q. Did you explain to her the effect of the creation of the joint account? A. Oh, yes, thoroughly.

"Q. Did you tell her what the other joint tenant could or could not do? A. Absolutely.

"Q. Did she understand that at that time? A. She understood it thoroughly.

"Q. Did she state what her wishes were with reference to the opening of the new account? A. No.

"Q. I mean, did she tell you that she wanted the account transferred to a joint account? A. Oh, there was no question on that, yes.

"Q. In your judgment, at that time was she competent to act? A. She was."

On cross-examination he was asked:

"Q. Did you give her any advice at all? A. None at all.

"Q. Did she ask any advice from you? A. No, she seemed to be prepared to do a certain thing, and knew what she was doing."

Appellant's objections to two of the questions asked the witness Muller and to the question asked the witness Phipps were that they were neither experts nor intimate acquaintances. Section 1870, Code Civ. Proc. provides that evidence may be given of the following facts: (subd. 10) "* * * the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given;". Mental sanity was not involved; the inquiry was with respect to competency, an altogether different question. See discussion and cases cited in *Re Jackson*, 34 Cal.2d 136, 141-143, 208 P.2d 657.

[5] Appellant's counsel states that "Such witnesses could not, by any stretch of the imagination, have been her intimate acquaintances." That may be conceded, but apparently their testimony was neither offered nor admitted on that theory. Respondents were certainly entitled to show, if they could, that decedent when she made these transfers appeared to be rational and to act on her own volition, as a free agent and without pressure, to know what she was doing, and to comprehend the legal effects and consequences of her acts.

A long line of authorities sanctions the admissibility of such testimony without any regard to the intimate acquaintance rule.

In *People v. Lavelle*, 71 Cal. 351, 12 P. 226, one of the earliest cases on the subject, a witness testified that the defendant appeared rational at a given time. The court said: "The evidence sought to be elicited was not the opinion of the witness as to the mental sanity of the defendant, based on an acquaintance with him, but was rather as to a fact, namely, his appearance at the time. The appearance of a person at a given time is one thing; the opinion of a witness as to the mental condition of that person, based on an acquaintance with him, is quite another."

Among the many authorities there are four cases which are somewhat similar to this case because they involve—as this case does—testimony as to the conversation, actions, alertness and conduct of a person at a given time and *during a particular transaction*.

First: *In re Wax' Estate*, 106 Cal. 343, 349, 350, 39 P. 624, 626. There the testator's soundness of mind was in question. A merchant who "had a slight acquaintance with him" testified that Wax had sought a loan of \$1200 from him; that they had conferred respecting security, and the loan had been made and repaid; that he had "closely observed Wax when the loan was being negotiated". He was asked "How did he conduct the transaction of borrowing the money, paying the interest, etc.?" and over objection answered "He acted like any rational man would; like anybody else would." The court said: "The question did not call for an opinion of the witness, but for a statement as to the conduct and appearance of Wax at the time he made the loan and paid it. The question was relevant and material, and was proper under the law as declared in *People v. Lavelle*, 71 Cal. 351, 12 P. 226, and in *Holland v. Zollner*, 102 Cal. 633, 36 P. 930, 37 P. 231."

Second: *De Arellanes v. Arellanes*, 151 Cal. 443, 450, 90 P. 1059, 1062, where a witness who had drawn and witnessed a deed testified over objection that he then found plaintiff in a perfectly rational condition and that her mind was clear. The court said: "This answer was substantially simply that she then appeared to be rational, a matter as to which any witness

to a transaction is competent to testify. *People v. Manoogian*, 141 Cal. 592, 595, 75 P. 177."

Third: *Carleton v. Bonham*, 60 Cal.App. 725, 730, 214 P. 503, 505, which is particularly pertinent since it, too, involved the testimony of a bank employee respecting the alertness of a depositor. There a Mrs. Hildreth had a joint account with a Mrs. Bonham. A bank clerk with whom Mrs. Hildreth generally dealt, when asked "* * * whether in all her business transactions at the bank she appeared to be keen mentally and a business woman," replied, over objection, "She did." The court held that the objection had been properly overruled, saying "the question merely called for appearances—not for a state of facts." (Citing *inter alia* the *Holland*, *Wax* and *Manoogian* cases.)

Fourth: *Jorgensen v. Dahlstrom*, 53 Cal. App.2d 322, 337, 127 P.2d 551, 558, a case like the preceding one, where the assistant manager of a bank where the donor had kept her accounts for many years testified that "In all the transactions we had with her, why, we considered her a woman of very alert mind and positive in her manner * * * I would consider that Mrs. Jorgensen was a very alert business woman." The court said: "Such characteristics and traits may be testified to by a non-expert witness, without first qualifying as an intimate acquaintance * * * *People v. Lavelle*, 71 Cal. 351, 12 P. 226; *People v. Manoogian*, 141 Cal. 592, 75 P. 177."

Appellant attempts to distinguish the *De Arellanes*, *Carleton* and *Jorgensen* cases on the ground that they were not decided under the rule under discussion. Their language and the cases they cite show that they were.

It should be noted that in the *Wax*, *Carleton* and *Jorgensen* cases the questions were directed to observations made on occasions other than that on trial. Here, as in the *De Arellanes* case, the questions were focused on the very transaction under investigation, which presents a much stronger picture.

In the leading case of *People v. Manoogian*, *supra*, 141 Cal. 592, 597-598, 75 P.

179, the court said "* * * questions like those under consideration do not call for the opinion of the witness as to the sanity of the person concerning whom the inquiry is being made. Such an opinion can properly be given only by an intimate acquaintance or an expert. They simply call for the result of the observation of the witness as to the manner of conduct of such person *at a certain time* * * *." (Emphasis added.) That was a murder case and the rule seems to be applied as freely in criminal as in civil cases. See citations in *People v. Sprague*, 52 Cal.App. 363, 365, 198 P. 820.

Many of the civil cases on the subject are cited at 10 Cal.Jur., pp. 1001-2.

The questions to which appellant objected were the following: the witness Muller was asked "In your judgment, at that time could she understand what was explained to her?" and answered "Perfectly". Appellant objected that he was not an intimate acquaintance. The court ruled "That would not make any difference, he could have an opinion as to whether she understood what he had to explain to her, and acquiesced in it."

There is no substantial difference between this question and those in the cases cited, or between this and the question in *People v. Loomis*, 170 Cal. 347, 349, 149 P. 581, 582, a death penalty case, where the question asked was whether the defendant answered questions quickly and promptly. "There was no error in this" said the court there, "Such facts may be stated * * * by any witness who has observed them. They are mere matters of observation, and not of expert knowledge." (Citing the *Lavelle*, *Holland*, *Wax* and *Manoogian* cases.)

The same witness (Muller) was asked: "Q. In your judgment, on the day that you discussed the joint tenancy account with Annie Hinds, was she competent to conduct her property and business affairs?" Appellant objected that the witness was neither an expert nor an intimate acquaintance and that "he has not shown how many times he ever saw her." It must be admitted that this question was possibly too broad, as it called for an opinion on com-

petency, not appearances. But, as it turned out, no damage could have resulted. The ruling was that "If he only saw her once, he can form an opinion" which incidentally, could not have been based on the intimate acquaintance rule. The answer was "I was sure she was fully aware of the fact of what she was doing." By its very unresponsiveness it removed all possibility of error since it left unanswered the broader question of competency, and apparently did so designedly. Respecting unresponsive answers see *Hirshfeld v. Dana*, 193 Cal. 142, 148, 223 P. 451.

The witness Phipps was asked "And in your opinion or your judgment at that time * * * was she competent to manage and conduct her property and business affairs?" Appellant objected that he was neither a mental expert nor an intimate acquaintance. The court in this instance took the matter in hand and narrowed the question by ruling "I will let him testify as to whether she could understand the transaction in which she was involved at that time." The answer was "Yes". Respondents' counsel then sought to press the original question by reminding the court that "The question was whether she was competent" but the court stopped that by saying: "I asked another question" which ended the discussion. The court's action in reframing the original question was a virtual sustaining of appellant's objection.

[6,7] The witness Mullin was asked "In your judgment, at that time was she competent to act" and answered "She was." Appellant did not object in this instance. It is too late to urge on appeal an objection not made at the trial. 2 Cal.Jur. p. 805; *Fintel v. Engelbrecht*, 28 Cal.App.2d 23, 25, 81 P.2d 1044. If admitted without objection incompetent evidence may be accepted in proof of the issues of a cause, *Nelson v. Fernando Nelson & Sons*, 5 Cal. 2d 511, 518, 55 P.2d 859, but it may be assumed that the court disregarded it. *Roth v. Thomson*, 40 Cal.App. 208, 216, 180 P. 656; *Watt v. Copeland*, 92 Cal.App. 161, 170, 267 P. 928; *Cordi v. Garcia*, 56 Cal.App.2d 584, 589, 132 P.2d 887.

Frank J. McCarthy, one of respondents' counsel, also testified as to decedent's con-

duct and appearance. He had gone out to see Miss Hinds, accompanied by her nephew, soon after she had proposed the transfers, and had explained to her the meaning, operation, effect and consequences of a joint account. There is no pretense that he was an intimate acquaintance since he had never met her before. The nephew left the room while the attorney talked to decedent. The witness detailed what he said to her and she to him, the effect of which was that she knew about joint accounts and knew what she wanted to do. He was then asked:

"Q. At the time you had this conversation with Annie Hinds, did you form any opinion as to her competency to transact this particular business? A. I did.

"Q. What was your opinion? A. In my judgment, she understood what I said to her, the explanation I gave her, and she gave me a clear and explicit expression of her intention and desire."

It will be noted that the witness did not answer categorically respecting competency. His answer was in guarded language and speaks for itself, and under the authorities heretofore cited it was perfectly admissible.

[8] The testimony of the three bankers and the attorney has been discussed in its relation to the issue of decedent's competency. Respondents had the burden, also, of rebutting the presumption of undue influence arising out of the nephew's fiduciary status by satisfying the court that the transfers were made voluntarily, free from pressure, with knowledge of the facts and the effects and consequences. The answers which all four witnesses gave tended to show such knowledge, understanding and comprehension on decedent's part at the time of the transfers by showing that she was rational and lucid and had a grasp of the transaction. These four witnesses gave their observations of decedent *as of the time* of the transfers while other witnesses testified as to decedent's condition at times more remote from the transaction. The evidence just reviewed was admissible on the issue of undue influence as well as competency.

Appellants' second point is that "*The decision of the court was erroneous for the reason that the decedent had no independent advice in any of the transactions involved in this case.*"

On this point appellant cites *Khoury v. Barham*, 85 Cal.App.2d 202, 192 P.2d 823 and *Hilton v. Hilton*, 54 Cal.App. 142, 201 P. 337. *Khoury v. Barham* follows the early case of *Ross v. Conway*, 92 Cal. 632, 636, 28 P. 785, 786, which holds "that the transaction will not be upheld, unless, it shall be shown that such other had independent advice * * *." However, *Brown v. Canadian Industrial Alcohol Co.*, 209 Cal. 596, 599, 289 P. 613, *supra*, lists *Ross v. Conway* among the early cases which do not state the correct rule, while *Smith v. Lombard*, 201 Cal. 518, 524, 258 P. 55, shows that *Hilton v. Hilton*, *supra*, likewise fails to do so.

[9] It is now definitely settled that independent advice is not indispensable. In *Brown v. Canadian Industrial Alcohol Co.*, *supra*, 209 Cal. at page 599, 289 P. at page 614, the court says: "In some early cases of this court, where the factual situation was particularly aggravating, expressions may be found, when considered separately and without reference to the text, which imply that independent advice is essential to the validity of such a gift. *Ross v. Conway*, *supra*; *Dolliver v. Dolliver*, 94 Cal. [642], 647, 30 P. 4; *Yordi v. Yordi*, 6 Cal.App. 20, 91 P. 348; *Nobles v. Hutton*, *supra* [7 Cal.App. 14, 20, 93 P. 289]. But those cases were never intended to hold that independent advice was indispensable. We are in accord with the rule that, where a fiduciary relationship exists between the donor and donee, the absence of independent advice is a circumstance to be considered in determining whether the gift should be avoided because of alleged undue influence or fraud, but its nonexistence alone does not authorize the court to avoid the gift. All utterances to the contrary have been squarely repudiated by this court. A fairly recent case so holding is *Smith v. Lombard*, 201 Cal. 518, 258 P. 55. See, also, *Wilbur v. Wilbur*, *supra* [197 Cal. 1, 239 P. 332]; *Soberanes v. Soberanes*, *supra*."

Later cases to the same effect are cited in *Helbing v. Helbing*, 89 Cal.App.2d 224, 229, 200 P.2d 560.

[10] While independent advice is not indispensable, the question whether there was such advice in any given case is "one of the facts to be weighed in determining whether the trustee performed his full duty." *Stevens v. Hutton*, 71 Cal.App.2d 676, 683, 163 P.2d 479, 482, and cases cited; see, also, *Broaddus v. James*, 13 Cal.App. 464, 475, 476, 110 P. 158. Likewise important is the question whether an *opportunity* for such advice was afforded. *Estate of Cover*, 188 Cal. 133, 144, 204 P. 583. The court found that the decedent had independent advice, and the present inquiry is whether that finding is supported.

The testimony of the three bank witnesses has been already summarized. None of them knew decedent's nephew until the time of the interviews and one of them did not remember meeting him even then. None of the three knew the decedent until the interviews except perhaps for seeing her in the bank years before. Appellant's argument that they cannot be considered independent advisers since they "were there representing the interests of their respective banks" is difficult to follow. That very fact would seem to qualify rather than disqualify them as disinterested and independent advisers, when coupled with the fact that none of them was a friend of either joint tenant, or an "agent" of either. See *Rocha v. Rocha*, 197 Cal. 396, 408, 240 P. 1010. Moreover, if they had any duty other than that owing to their respective banks it would seem that their natural leaning would be toward the protection of the interests of their depositor whose acts and conduct they had been sent out to carefully scrutinize.

The witness Muller was asked "You didn't give her any advice about what to do, you just asked her?" and answered "No. I just asked her what she wanted to do", but his testimony shows that he explained to her the meaning and consequences of a joint account.

The witness Phipps was likewise asked on cross-examination: "Q. You didn't

give the lady any advice about what she should do, did you? A. No. I gave her an explanation of the joint tenancy and the features of the transaction.

"Q. But you didn't advise her either to do it or not to do it, did you? A. No, sir."

The witness Mullin testified that he, too, explained to her the effect of the creation of the joint account, and told her what the other joint tenant could and could not do and that "she understood it thoroughly." On cross-examination he was asked:

"Q. Did you give her any advice at all? A. None at all.

"Q. Did she ask any advice from you? A. No, she seemed to be prepared to do a certain thing, and knew what she was doing."

[11] The fact that none of the three volunteered any advice (in the sense of recommendation or suggestion) and that decedent asked for none, does not necessarily mean that she acted without independent advice. Had they proffered advice unasked they might easily have subjected themselves to criticism. See *Broadus v. James*, 13 Cal.App. 464, 476, 110 P. 158, *supra*. They apparently were careful to refrain from leading questions, but inquired of her what *she* wanted to do. All that they volunteered was the explanation to her of a joint account and its operation, effect and consequences. This may fairly be called advice. She seemed to be already informed about joint accounts (which is understandable as she had carried one with her sister, as the record shows, compare *Broadus v. James supra*, 13 Cal.App. at page 476, 110 P. 158, but if she had required any information or had entertained any doubt as to any feature of such accounts the bankers were there to inform her. Their presence at the very least afforded the opportunity for independent advice. *Estate of Cover, supra*. The court, however, apparently determined that there was more than mere opportunity, as indicated by its finding that she had independent advice.

In a dictum in *Johnson v. Studley*, 80 Cal. App. 538, 555, 252 P. 638, 644, a somewhat

similar situation was presented. The court said: "The trial court, in its decision, as do counsel for the respondent in their brief, stresses the proposition that the deceased in carrying out the transactions, was without independent advice as to the nature and consequences to him of the proposed agreement. The undisputed evidence shows, as has been pointed out above, that Mr. Horton, president of the bank with which the deceased had for many years deposited his money, explicitly explained to the deceased, before the agreement was consummated, and prior to its being reduced to writing, that the effect of the agreement, if executed by him, would be to transfer his entire estate to the defendants, and advised him to consider the proposition well before accepting it. If, therefore, this were a case where the relation of the parties was of a fiduciary or confidential character, the advice or caution thus given deceased by Mr. Horton, in whom we may assume the deceased had full confidence, since he had extensive dealings with him as a banker, would entirely measure up to the rule as to independent advice in such cases."

The testimony of the three bankers, in our opinion, furnished a sufficient foundation for the finding that the decedent received independent advice.

[12] In the instant case although independent advice is not indispensable, there was, in fact, such advice. It was "an important part of the evidence the weight and effect of which were committed to the judgment and conscience of the trial judge". *Broadus v. James, supra*, 13 Cal.App. 464, 475-476, 110 P. 163. As said in *Schurman v. Look*, 63 Cal.App. 347, 357, 218 P. 624, 628, "Affirmative evidence of independent advice furnishes a potent reason for sustaining the validity of a conveyance."

[13] At the outset we recognized that the burden rested on respondents to overcome the presumption of undue influence. In *Khoury v. Barham, supra*, 85 Cal.App. 2d 202, 212, 192 P.2d 829, the court said: "It was for the trial court to say whether the evidence offered * * * outweighs the presumption *Smellie v. Southern Pacific Co.*, 212 Cal. 540, 555, 299 P. 529; *People v. Chamberlain*, 7 Cal.2d 257, 260, 60 P.2d 299;

Lane v. Whitaker, 50 Cal.App.2d 327, 330, 123 P.2d 53; Fortier v. Hogan, 115 Cal. App. 50, 58, 1 P.2d 23."

Eighteen witnesses testified in this case, and there was a great deal of testimony on both sides which we have not attempted to relate. The fact that appellant makes no claim of insufficiency of the evidence justifies confining the statement of facts to those only which illustrate the legal points, of which there are but two.

[14] In addition to the bank accounts there was testimony respecting \$3000 or thereabouts which decedent had in currency in her home and turned over to her nephew after he told her that a frame house was no place to keep so much currency. It is sufficient to say that there was ample evidence to sustain the court's finding that decedent gave this to her nephew freely and voluntarily.

There is an abundance of evidence to have warranted the trial judge in concluding that decedent was very fond of her nephew and that he had always been very devoted and attentive to her, also that when decedent proposed these transfers into joint tenancy her nephew of his own volition and on the advice of his counsel as well, took care and pains to see that the transaction was subjected to the scrutiny of numerous persons.

[15] In Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689, 690, the court said: " * * * the power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." (Italics added.) Crawford v. Southern Pacific Co., 1935, 3 Cal.2d 427, 429, 45 P.2d 183, 184. The rule quoted is as applicable in reviewing the findings of a judge as it is when considering a jury's verdict."

The judgment is affirmed.

NOURSE, P. J., concurs.

PEOPLE v. VAN BIBBER.

PEOPLE v. CRUYSEN.

Cr. 599.

District Court of Appeal, Fourth District,
California.

Feb. 28, 1950.

Rehearing Denied March 9, 1950.

Hearing Denied March 27, 1950.

William Noah Van Bibber and John Paul Cruysen were convicted in the Superior Court of Tulare County, Glenn L. Moran, J., for burglary. After affirmance of the judgments, the remittitur was withdrawn and the order of affirmance set aside as to defendant Cruysen, whose case was considered on its merits.

The District Court of Appeal, Griffin, J., held that error in failing to order consolidation of the two informations for trial was not available nor prejudicial to defendant Cruysen, that the evidence supported the jury's conclusion that defendant Cruysen was one of the participants in the burglary, and that he was properly cross-examined as a witness concerning his two previous felony convictions.

Judgment on conviction of defendant Cruysen affirmed.

1. Criminal law ☞620(2)

Consolidation for trial of two separate informations against different defendants is error, but such error is procedural, not jurisdictional. Pen.Code, §§ 954, 1098.

2. Criminal law ☞1035(2)

A defendant not objecting to or complaining of his joint trial with another before same jury on same day on same charge of burglary in two separate informations should not be heard to complain for first time on appeal from judgment of conviction that trial court erred in failing to order consolidation of informations for trial. Pen.Code, §§ 954, 1098.

3. Criminal law ☞1186(4)

Where a defendant, complaining, on his appeal from conviction of burglary after joint trial with another defendant, that trial court erred in failing to order consolidation of two informations against defendants was charged with same crime, committed at same time, as that of other defendant, same evidence applied to both

defendants, and evidence fully justified appellant's conviction, such error was not prejudicial to him, as no miscarriage of justice resulted. Pen.Code, §§ 954, 1098; Const. art. 6, § 4½.

4. Burglary ☞45

In burglary prosecution, sufficiency of state's witnesses' identification of defendant as one of perpetrators of crime charged was fact question for jury.

5. Burglary ☞41(6)

In burglary prosecution, evidence supported jury's conclusion that defendant was one of participants in burglary.

6. Witnesses ☞337(5)

In burglary prosecution, defendant was properly cross-examined as witness to show that he had been twice convicted of felonies. Code Civ.Proc. § 2051; Pen. Code, §§ 1025, 1093, subd. 1.

John Paul Cruysen, in pro. per.

Fred N. Howser, Attorney General,
Stanford D. Herlick, Deputy Attorney
General, for respondent.

GRIFFIN, Justice.

Defendant William Noah Van Bibber was charged by information filed on June 24, 1948, with the crime of burglary in the first count, grand theft in the second count, and with four prior felony convictions. Defendant and appellant John Paul Cruysen was charged in a separate information filed on July 7, 1948, with the same offenses, allegedly committed on the same day, and further charged that he had previously suffered two convictions of a felony. On arraignment, while represented by the same counsel, each defendant entered a plea of not guilty to the offenses charged. Van Bibber denied, but Cruysen admitted the prior convictions. The court announced that the trial of the two defendants would be set for August 3. On motion of the district attorney the count of grand theft was dismissed as to each defendant. The reporter's transcript recites that the above-entitled actions came on regularly for trial "jointly" in said

court. A jury was selected to try the defendants on the issues presented. It returned a verdict against both defendants. Through their attorney, a notice of appeal was filed and their appeal from the judgment of conviction was subsequently affirmed under sec. 1253 of the Penal Code. Upon sufficient showing by defendant Cruysen leave was granted to withdraw the remittitur as to him and to set aside the order of affirmance in reference to his case which is now being considered on its merits.

[1] The first complaint is that the trial court failed to order a consolidation of the two informations for trial under sec. 954 of the Penal Code. Under that section and sec. 1098 of the Penal Code it has been held error to consolidate for trial two separate informations against different defendants. Such error is, however, one of procedure and not jurisdictional. *People v. Shepherd*, 14 Cal.App.2d 513, 520, 58 P.2d 970.

In *People v. Aguinaldo*, 3 Cal.App.2d 254, 39 P.2d 505, this court held likewise and sustained the judgment of conviction under sec. 4½ of Article VI of the Constitution upon the theory that the conviction did not result in a miscarriage of justice. In *People v. Johns*, 69 Cal.App.2d 737, 160 P.2d 102, it was stated that an objection to the consolidation of separate informations against different defendants for the purpose of trial comes too late to be considered on appeal where the objection is first made by defendant after he has proceeded to trial and rested his case.

[2, 3] So far as the record here is concerned, the two defendants were to be tried on the same day, before the same jury, on the same charge, and apparently all parties permitted this procedure. No objection or complaint was made to this method of trial. The reporter's transcript indicates that the two defendants were being "jointly" tried on the same charge. Although the record does not contain a signed order of consolidation the facts shown are tantamount to an order of consolidation. Defendant should not now be heard to complain for the first time on

appeal. Since appellant was charged with the same crime, committed at the same time, and the same evidence was applicable to both defendants, and since the error committed was one of procedure and not of jurisdiction and the evidence fully justifies the conviction, it cannot be said that a miscarriage of justice resulted. Under sec. 4½, Article VI of the Constitution the error was not prejudicial. *People v. Davis*, 42 Cal.App.2d 70, 108 P.2d 85; *People v. Shepherd*, supra.

[4, 5] Appellant's next complaint involves the sufficiency of the evidence to support the verdict of guilty of burglary, as charged, and is directed mainly to the claim that there was insufficient evidence of the identification of appellant as one of the perpetrators of the crime charged.

The people's evidence discloses that about 1:45 a. m. on June 8, 1948, a drugstore in Pixley was burglarized. Rolls of pennies and other money was taken from the cash register. A small safe containing cash and checks was rolled out of the store and taken to a near-by alley. Shortly before this time, three men entered a bar near the drugstore. They approached the bartender, seated themselves in front of him and ordered drinks and change. The bartender closely observed them. Shortly thereafter they left those premises. Some time later two deputy constables, who were patrolling the alley in their car, came upon an Oldsmobile car parked across the alleyway. They testified that defendant Van Bibber was seated at the driver's seat of that car and two other men were doing something on the opposite side of it. One officer testified that he identified appellant Cruysen as one of those men; that Cruysen jumped into the back seat of the Oldsmobile and the other men jumped into the front seat; that at that time the officer's car was about 25 feet from the Oldsmobile and had its high-beam lights shining directly on the men; that defendant Van Bibber drove on and it was then that the mutilated safe was discovered in their pathway; that the officers gave chase and secured the license number of the Oldsmobile; that defendant outmaneuvered them and the officers returned

for assistance. One of these officers, accompanied by the bartender, then set out to find the men. Van Bibber was seen dodging between near-by houses. The officer gave chase on foot and shot his revolver several times in the air. While climbing over a wire fence Van Bibber fell to the ground and was apprehended. He gave a false account of his conduct, claimed that he was a hitchhiker and had just alighted from a train. He later admitted he owned the Oldsmobile but refused to talk further until he had "a mouthpiece". He was then identified by the bartender as one of the men who had visited his bar a few minutes before the burglary. The Oldsmobile was later found parked under near-by trees in a damaged condition. Two rolls of pennies, the handle of a safe, a sledge hammer, two crow-bars, drills, a flashlight, and other such tools, were found in or near that car. Black gloves worn by Van Bibber were also found therein. Fishing licenses bearing the names and address of William Van Bibber and Bert E. Van Bibber, brother of defendant, were also there found.

Appellant Cruysen was later arrested in Pasadena along with Russell Van Bibber. At the preliminary hearing, the proceeding against Russell Van Bibber was dismissed, due to lack of identification.

At the trial appellant Cruysen testified that he was not in Pixley on the night in question; that "I was pretty sure I was at Third and Hill, 410 West Third Street, where I believe I was stopping * * * I am pretty positive I was there but I wouldn't get up and stake my life on it * * *." He then testified that he knew Russell Van Bibber for a period up to seven years and knew William Van Bibber about three years and was visiting the latter's home when he was arrested. On the witness-stand he admitted being previously convicted of burglary and of possession of counterfeit coins.

William Van Bibber admitted being in the bar on the occasion mentioned but claimed he was alone at the time. He also said he was sitting in the Oldsmobile near the alley that night but insisted that no one was with him; that he saw no safe,

was not chased by an officer, but parked his car near the eucalyptus trees to rest, and that in parking he damaged his car and was on foot hunting for a repairman when accosted by the officer whom he believed to be a person about to rob him; that he ran and fell over a fence about the time the officer shot and then offered the officer his pocket-book, believing that he was being robbed but discovered that it was an officer pursuing him.

The testimony of the bartender in respect to appellant's identity was quite positive. He testified that he recalled seeing both defendants on trial, at the bar that night with one other person; that they sat "right in front of where I was on the stool"; that he waited on them and gave the change to Van Bibber. He was asked how he identified Cruysen and he stated: "I just remember him by the face. At the job I have, I remember most all my customers by the face. If a stranger ever comes in I remember the face, and his face was of unusual * * * I remember him by the color of his eyes and his face * * * He has light gray eyes * * * gray hair * * * the three of them sat side by side."

The officer testified, as to his identification, that he saw appellant get into the Oldsmobile that night and he described the incident as follows: "When this man got in the car, in the rear seat, he came up facing me. Full face when he came in the car, close enough to get in the car. When he came in the car he turned around and sat down and with his left side of his face to me. I got a good look at his face. He had on a light shirt. I wouldn't say it was a white shirt. It was a light color. I got a good look at his face, the sight of his face, and the color of his hair * * * Once I get a good look at a man's face, I can always identify it again. I don't think there are two faces just like his."

Appellant is comforted by the fact that he had a scar on his face which neither witness seemed to describe and that his eyes are blue rather than gray, and claims therefore that the witnesses must have been mistaken in their identification of

him, citing *People v. Gibbons*, 93 Cal.App. 2d 28, 208 P.2d 411.

The question of the identification of appellant by these witnesses was a factual question for the jury to determine. There is sufficient competent evidence to support its conclusion that defendant was one of the participants in the burglary committed.

[6] The last complaint of appellant is that since he admitted his prior convictions of felonies the prosecution had no right to have such convictions alluded to at the trial, citing sections 1025 and 1093, subdivision 1 of the Penal Code. No mention was made of appellant's prior convictions until he took the stand as a witness in his own behalf. It was proper, on cross-examination, to show that the defendant had been twice convicted of a felony. *People v. Peete*, 28 Cal.2d 306, 319, 169 P. 2d 924; sec. 2051, C.C.P.

We have read the entire record and conclude that the appellant had a fair and impartial trial and that no prejudicial error resulted.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.



96 Cal.App.2d 270

PEOPLE v. MALONE.

Cr. 2166.

District Court of Appeal, Third District,
California.

Feb. 28, 1950.

Don Malone was convicted of grand theft, and he filed a petition for writ of error coram nobis.

The Superior Court of Stanislaus County, H. L. Chamberlain, J., rendered a judgment adverse to defendant, and he appealed, and the People moved to dismiss the appeal.

The District Court of Appeal, Adams, P. J., held that facts alleged in petition were insufficient to authorize issuance of the writ, and that appeal would be dismissed as sham and frivolous.

Appeal dismissed.

1. Criminal law ☞997

A "writ of error coram nobis" is a remedy of narrow scope, the purpose of which is to secure relief where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it, and which, through no negligence or fault of defendant, was not known to the court.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Writ of Error Coram Nobis".

2. Criminal law ☞997

An application for a writ of error coram nobis must show that the facts on which the applicant relies were not known to him and could not, in exercise of due diligence, have been discovered by him at any time substantially earlier than the time of his petition for the writ, and that application for such writ was made promptly.

3. Criminal law ☞997

Petition for writ of error coram nobis alleging that jury in criminal prosecution was excused for eight days because of death of a relative of one of the jurors, that court allowed jury to be polled after it returned its verdict without consulting defendant, that defendant, though he represented himself at the trial, was not permitted to use his own law books, that he was brought into court manacled, that complaining witness allegedly committed perjury, and that defendant was not permitted to swear out a complaint against witness, would be dismissed, since alleged errors were not such as were reviewable by coram nobis, and since application therefor was not made promptly.

4. Criminal law ☞1131(4)

Where petition for writ of error coram nobis showed that there was no ground for relief, appeal by defendant from judgment

denying the writ would be dismissed as sham and frivolous.

Don Malone, in pro per.

Fred N. Howser, Attorney General, by Doris H. Maier, Deputy Attorney General, for respondent.

ADAMS, Presiding Justice.

In October, 1948, appellant above named, after trial by jury, was convicted in the superior court of Stanislaus County of grand theft, and sentenced to state prison to serve the term fixed by law. No motion for a new trial was filed, nor was an appeal taken from said judgment. On June 15, 1949, Malone filed in the said superior court a petition for a writ of error coram nobis, alleging therein that he was being held in the custody of the warden of San Quentin prison illegally because of errors committed by the trial court and misconduct of the district attorney during his trial, and because the evidence was insufficient to warrant his conviction.

The first alleged error of the trial court is that at the close of the evidence the jury was excused for eight days because of the death of a relative of one of the jurors, and that the jury was not charged until it returned and resumed its duties. The second alleged error is that the court allowed the jury to be polled after it returned its verdict, without consulting defendant. Appellant also alleged that he represented himself at his trial, but that while he was in jail the sheriff's department refused him the right to use his own law books; also that he was brought into court manacled and made to sit before the jury for several minutes before such manacles were removed, and that the trial court should have then and there dismissed the charges against him, though he admits that he made no motion for such dismissal. He further alleged that the complaining witness who testified against him at the trial made conflicting statements and committed perjury, and that petitioner was not permitted to swear to a complaint against said witness.

The petition for writ of error coram nobis was denied by the superior court, and from the order of denial this appeal was taken. The record on appeal, which was filed in this court on July 28, 1949, consists solely of the petition, the order denying same, and the notice of appeal with notice to the court reporter to prepare transcript. No transcript of the proceedings on the original trial was included.

On December 7, 1949, the People of the State of California filed in this court a notice of motion to dismiss the appeal, on the ground that it is irregular, frivolous, sham, and without merit. Said motion was heard by this court on February 2, 1950.

[1, 2] In view of the decisions of the Supreme Court of this state in *People v. Adamson*, 34 Cal.2d 320, 210 P.2d 13; *People v. Shorts*, 32 Cal.2d 502, 516-518, 197 P.2d 330, and *People v. Tuthill*, 32 Cal.2d 819, 821, 198 P.2d 505, and our decision in *People v. Coates*, 95 Cal.App.2d 78, 212 P.2d 263, we are constrained to hold that the motion to dismiss should be granted. In those cases the limitations of review by way of writ of error coram nobis were defined, the court saying that it is a remedy of narrow scope, the purpose of which is to secure relief where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it, and which, through no negligence or fault of defendant, was not then known to the court; that an applicant for the writ must show that the facts upon which he relies were not known to him and could not, in the exercise of due diligence, have been discovered by him at any time substantially earlier than the time of his petition for the writ; and that application for such writ was made promptly.

[3] It is obvious from the petition filed by appellant in the superior court that his application was not made promptly, and that the alleged errors are not such as are reviewable by way of proceedings for a writ of error coram nobis. All of the asserted grounds were known to petitioner before he was sentenced; and if errors were committed by the trial court, or there was misconduct on the part of the district

attorney or the sheriff or his subordinates, or if the evidence was insufficient to support the verdict, such errors could and should have been presented on motion for a new trial or reviewed on appeal from the judgment of conviction.

[4] But whether the record before us be considered on its merits, or the appeal be dismissed pursuant to the motion filed by the People, the results will be the same; and since the petition shows no ground for relief in this proceeding, on the authority of the cases above cited it may be dismissed as sham and frivolous.

Appeal dismissed.

PEEK, J., and SPARKS, Justice pro tem., concur.



96 Cal.App.2d 278

RAKOW v. INNES CO.

Civ. 3800.

District Court of Appeal, Fourth District,
California.

March 1, 1950.

Rehearing Denied March 29, 1950.

Hearing Denied April 27, 1950.

Action by F. D. Rakow against the Innes Company to recover advance rental paid on a "potato harvester".

From a judgment of the Superior Court of Kern County, Norman F. Main, J., for plaintiff, the defendant appealed.

The District Court of Appeal, Mussell, J., held that the evidence sustained the judgment for plaintiff.

Judgment affirmed.

1. Appeal and error ☞994(3), 1010(1), 1012 (1)

Weight and sufficiency of evidence, construction to be placed thereon and inferences to be drawn therefrom and questions as to the credibility of witnesses and determination of conflicts in the testimony are for the trial court.

2. Bailment ↪31(3)

Evidence justified recovery by plaintiff of advance rental paid on a "potato harvester" on ground that the harvester was wholly unfit for the purpose let, and that because thereof there was a failure of consideration for the contract of rental.

Siemon, Maas & Siemon, Alfred Siemon, Walter L. Maas, Jr., Bennett Siemon, Bakersfield, for appellant.

Calvin H. Conron, Jr., Bakersfield, for respondent.

MUSSELL, Justice.

Defendant appeals from a judgment in favor of plaintiff in an action to recover advance rental paid on a "potato harvester".

Plaintiff, who had farming interests in the Edison area in Kern County, was approached by Mr. Innes, the president of defendant company, in the fall of 1944, and a conversation took place between them in which Mr. Innes stated that he was manufacturing or going to manufacture a potato harvester which would pick potatoes from the ground, elevate them into a truck, and, therefore, eliminate hand picking. Plaintiff stated that he would be very much interested in such a machine. Soil conditions were discussed and Mr. Innes, upon being asked if he was building a machine that would operate in all types of soil, stated that that would have to be so or the machine would be valueless otherwise. In January of 1945, Mr. Innes again called upon plaintiff and stated that he wanted to build a machine to harvest potatoes; that they were to allocate one to plaintiff and others to different people in the Edison district. He asked plaintiff if he were willing to advance \$2,000 to the Innes Company as a rental on this equipment when it was perfected and delivered for use. Plaintiff stated that he would be "willing to do that" and on January 11, 1945, plaintiff entered into a written contract with the defendant wherein the defendant leased to the plaintiff an "Innes Potato Harvester" for the term of one year. The agreement provided that the

machine was to be delivered to the plaintiff on or before the 20th of April, 1945, "to be used by him for and during the potato harvest season of each succeeding year, beginning about December 20th and ending not later than the 15th day of July, 1945". It was further provided: "2. First Party warrants that the Innes Potato Harvester herein leased is well made of proper material and workmanship and when properly operated will well do the work for which it is designed and intended. * * " Plaintiff agreed to harvest his potato crop with reasonable dispatch and, when finished, to release the machine to defendant so that, if desired by the company, the machine might be leased to some other grower or operator during the same season. The rental was based on the potato yield and on January 15, 1945, plaintiff paid the defendant the sum of \$2,000 advance rental for the 1945 season.

After the execution of the lease agreement, Mr. Innes had difficulty with the War Production Board in procuring authority to make and lease the potato harvesters and returned the \$2,000 to the plaintiff. Shortly thereafter, Mr. Innes wrote to the plaintiff stating that he had obtained formal authority from the War Production Board to proceed to make and lease the potato harvesters; that the arrangements the parties had prior to the interruption were valid and that they could proceed as though nothing had happened; that both understood the conditions and terms and that if plaintiff would acknowledge the letter and send a check for \$2,000 that that would be all the memorandum necessary for the 1945 season. Plaintiff acknowledged the receipt of the letter and mailed his check for \$2,000 to the defendant company.

Some time in the early part of May, 1945, Mr. Innes brought a digger out to plaintiff's field, where it was put into operation, pulled with a tractor belonging to plaintiff and operated by an employee of Mr. Innes.

The digger harvested the potatoes and elevated them into a truck; but in so doing, it took great quantities of dirt and loaded it with the potatoes. The plaintiff had put

in a special belt upon which to dump the potatoes in order that they could be handled, but he was only able to handle 300 sacks of potatoes in the one day in which the machine was operated as against a normal day's run of four and five thousand, using the old system of hand digging. During the day's operation, approximately one and one-half acres of potatoes were harvested.

The machine was returned to the defendant and in the fall of 1945 plaintiff and Mr. Innes had a further conversation in reference to the potato digger. In this conversation Mr. Innes expressed the belief that he could make the digger work with a pit similar to one used at Pixley, California; that by using a pit and dumping in water, the water would take the dirt out of the potatoes and they could be handled, and that the digger could be used in that fashion. Mr. Innes also stated that they had rebuilt the digger and that he believed plaintiff would have very little trouble with it in the future.

In July or August, 1945, the Innes Food Equipment Company was organized. Mr. Innes was the president of it as well as of the Innes Company.

On April 5, 1946, the Innes Food Equipment Company and plaintiff, F. D. Rakow, executed a memorandum of agreement wherein each party agreed to release the other from any obligation in connection with the stock subscription of Rakow in the Innes Food Equipment Company. This memorandum also contained the following provision: "Innes Food Equipment Company, however, is still obligated to harvest 200 acres of potatoes for F. D. Rakow because of \$2,000 which he advanced to Innes Company as full payment for such service."

Some time after November 7, 1945, the Innes Food Equipment Company installed equipment to handle potatoes in bulk in plaintiff's building at Edison. This equipment consisted of a reinforced concrete tank with a conveyor and pump to convey the muddy water from a sump in or by the bottom of the tank.

In May, 1946, plaintiff commenced to harvest his potatoes and a digger was

again brought to plaintiff's field. Plaintiff testified that it was constructed "better than the previous one" and that it held up and did not break down too much; that it was pulled with his own equipment and operated by the Innes Food Equipment Company; that the machine still brought up as much dirt as always and loaded it on the truck with the potatoes and that it bruised an "awful lot of potatoes"; that there was so much dirt with the potatoes that they could not get them through the machine; that "we were getting too much bruising from the Innes Food Equipment Company and I couldn't continue using the digger, or we would have lost a lot of money on the quantity of potatoes". The digger was operated two or three days and approximately twenty acres of potatoes were dug with it.

The machine used in 1946 was produced by the Innes Food Equipment Company and not by the Innes Company, which had furnished the one operated in 1945. Plaintiff received no refund of the \$2,000 deposited by him in 1945 and commenced this action for the recovery thereof on the theory that plaintiff had paid that sum in consideration of which the defendant had agreed to harvest 200 acres of potatoes for plaintiff in the year 1945-1946 and that defendant had breached the agreement. In the second count of the amended complaint it was alleged that the defendant had rented the potato harvester to the plaintiff and expressly warranted that the potato digger and harvester, when properly operated, would do the work for which it was designated and intended; that said machine was designed for and intended to be used for the digging and harvesting of potatoes without the use of hand labor in such a manner that the same could be marketed free of dirt; that the machine was wholly unfit for said purpose.

The trial court found that the defendant agreed in writing to rent to plaintiff one potato harvester for the crop season April 20, 1945, and to and including July 1, 1945, and expressly warranted that said potato digger and harvester, when properly operated, would do well the work for which it was designed and intended; that said

machine was designed for and intended to be used for the digging and harvesting of potatoes without the use of hand labor, in such a manner that the same could be processed without unreasonable interference by clods and dirt and that the machine was wholly unfit for said purpose; that by reason of the failure of said machine to perform the work for which it was hired and let, the consideration passing to plaintiff wholly failed except for the digging of twenty acres of potatoes. Judgment was rendered in favor of the plaintiff for the sum of \$1,800 and a deduction of \$200 from the amount claimed was allowed, apparently upon the theory that the digging of twenty acres of potatoes constituted one-tenth performance of the contract.

[1] The Innes potato harvester was warranted to "well do the work for which it was designed and intended" (par. 2 of the contract) and there is substantial evidence in the record that it was intended to eliminate hand picking of potatoes from the ground and to elevate them into a truck. True, there is a conflict in the testimony as to the intended use of the machine, but we are here bound by the trial court's finding in that respect. The weight and sufficiency of the evidence, the construction to be put upon it and the inferences to be drawn therefrom, as well as questions as to the credibility of witnesses and the determination of conflicts and inconsistencies in the testimony were matters for the determination of the trial court. *Dillard v. McKnight*, 34 Cal.2d 209, 209 P.2d 387.

The evidence shows that the defendant company furnished the harvester in 1945 and that it was only operated one day. The following season the harvester was furnished by the (Innes Food Equipment Company), a different corporation, which, on April 5, 1946, agreed in writing that the defendant company was still obligated to harvest 200 acres of potatoes for plaintiff because of the \$2,000 advanced to the defendant company as full payment for such service. Mr. Innes was president of both companies and the execution of the agreement of April 5th is a strong indication that both plaintiff and defendant were

well aware that the machine furnished plaintiff in 1945 would not and did not do the work for which it was designed and intended.

[2] Plaintiff testified that in 1945, before he obtained the machine, they stated to him that they would have a machine that would dig potatoes free of sand and dirt and at the close of the 1945 season Mr. Innes stated that they were going to rebuild the machine and remove more of the dirt. Mr. Innes also informed plaintiff that he could make the digger work by using a pit and dumping in water. We cannot say that there was no substantial evidence upon which the trial court based its findings that the machine was wholly unfit for the purpose let, nor can we say that the court's finding that there was a failure of consideration is not supported by sufficient evidence. The failure of defendant company to perform the contract constituted a failure of consideration. *Bliss v. California Cooperative Producers*, 30 Cal. 2d 240, 248, 249, 181 P.2d 369, 170 A.L.R. 1009.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J.,
concur.



96 Cal.App.2d 250

BIEDEBACH et al. v. CHARLES et al.

Civ. 17254.

District Court of Appeal, Second District,
Division 2, California.

Feb. 28, 1950.

Action by John A. Biedebach and Jack J. Sale, doing business under the fictitious firm name and style of Pioneer Heating & Sheet Metal Works, against Emerson Charles, doing business under the fictitious firm name and style of Charles Manufacturing Company, and Winfield Manufacturing Company, to recover balance due on merchandise pur-

chased by defendants. The defendants filed a counterclaim.

The Superior Court, Los Angeles County, Paul A. Eymann, Justice of the Peace of Township Eight, Fresno County, presiding as Judge of the Superior Court under designation of the Chief Justice as Chairman of the Judicial Council, entered judgment for the plaintiffs, and the defendants appealed.

The District Court of Appeal, Moore, P. J., held that since the testimony of the defendants' absent witness would have only been cumulative, the denial of a continuance was not an abuse of discretion, and that the burden was on the defendants to establish matters relied on in mitigation of damages.

Judgment affirmed.

1. Continuance ⚡24

Where defendants based application for a continuance and a motion for leave to take depositions on ground that a third party was out of state and defendant had been unable to locate him until two weeks prior to trial and on ground that such party's testimony was only available evidence of dealings between plaintiff and party regarding defendant's purchases, but evidence would merely have been cumulative, denial of motions was not error.

2. Appeal and error ⚡966(1)

Continuance ⚡7

An order denying a motion for a continuance rests largely in the discretion of the trial court and will not be ground for reversal in the absence of a clear showing of an abuse of discretion.

3. Estoppel ⚡52, 58

A waiver can result only from an intentional relinquishment of a known right and it will be inferred only when conduct of parties has resulted in some prejudice by reason of a justifiable belief that a waiver was intended.

4. Appeal and error ⚡1008(1)

In action to recover balance due on merchandise sold and delivered, where attempts of sellers to collect from third party were made in accordance with buyers' wishes, whether acts of sellers constituted a waiver of their accounts against buyer was a question of fact for the court.

5. Estoppel ⚡77

Where, at buyers' direction, sellers delivered merchandise to third party, and buyers had notice that third party was not paying for merchandise which was tendered, buyer did not change his position in reliance on any statement or act of sellers and sellers were not estopped from asserting liability of buyer on his contract.

6. Estoppel ⚡52

The basis of an equitable estoppel is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations on which he acted.

7. Payment ⚡39(1)

Where sellers had delivered other goods to third party prior to time he was billed for goods delivered to him at buyers' request, and account for first goods delivered appeared first in point of time in sellers' books and third party did not designate to which account money paid to sellers was to be applied, there was no duty on sellers to discharge more recent account rather than to apply on third party's account.

8. Sales ⚡381

Where buyers ordered type of metal cabinets which had no sale on open market, and which were made for a highly specialized purpose, and there was no proof that they had any salvage value, it was incumbent on buyer to establish matters relied on in mitigation of damages.

9. Contracts ⚡28(3)

In action to recover balance due for merchandise delivered to third party at buyers' direction, evidence sustained trial court's finding that no contract was made whereby sellers were to pay buyer any commission on merchandise delivered to third party.

Blanche and Fueller, Pasadena, by John K. Blanche, Pasadena, for respondents.

Max Hurwitz, Newport Beach, for appellant.

MOORE, Presiding Justice.

August 8, 1946, appellant ordered 2000 metal cabinets from respondents at the agreed price of \$1.79 per cabinet. Subsequently, respondents were directed to deliver the cabinets to one Kluge and to collect \$1.97 and remit the 18 cents differential to appellant. Nine hundred sixty-five cabinets were delivered to Kluge pursuant to appellant's instructions. The balance of the 2000 cabinets were ready for delivery November 20, 1946, of which fact appellant was at that time notified. After their unsuccessful attempts to collect the accounts from Kluge, respondents demanded payment of the balance by appellant. About the time of the completion of the entire order by respondent, they fabricated goods on a second order for Kluge at an agreed price of \$721.45. At that time they received \$1500 from Kluge. They applied \$721.45 upon the second order and the balance to the account of appellant. March, 1947, the undelivered cabinets were tendered to appellant and demand for the unpaid portion of the purchase price was made. Following a trial, judgment was awarded respondents in the sum of \$2,601.45, whence comes this appeal.

[1] Appellant assigns as error the court's denial of his motion for a continuance and his contemporaneous motions for leave to take the deposition of Kluge on the ground that the latter was out of the state and that appellant had been unable to locate him until two weeks prior to the trial. He based the latter application upon the claim that Kluge's testimony was the only available evidence of dealings between respondents and Kluge and that the latter would have established that respondents failed to supply the cabinets within a reasonable time. There was no error in the court's rulings. The testimony of Kluge could have created no more than a conflict in the evidence. Substantial proof was received to the effect that respondents had supplied the cabinets more rapidly than Kluge could store them. Also, there was apparently no time specified in the original order for the delivery and there was no showing that the cabinets were not completed within a reasonable

time. Respondent Jack Sale testified that he dealt directly with Kluge. Therefore, since the evidence would be merely cumulative there was no probability that Kluge's testimony would change the result of the trial.

[2] Moreover, an order denying a motion for a continuance rests largely in the discretion of the trial court. It will not be ground for reversal in the absence of a clear showing of an abuse of discretion. *Jennings v. American President Lines*, 61 Cal.App.2d 417, 422, 143 P.2d 349, 144 P.2d 54; *Tiffin v. Cummings*, 144 Cal. 612, 613, 78 P. 23; *Sheldon v. Landwehr*, 159 Cal. 778, 781, 116 P. 44; *Flynn v. Fink*, 60 Cal.App. 670, 673, 213 P. 716.

Appellant in support of his assignment cites *Dunlap v. Plummer*, 1 Cal.App. 426, 82 P. 445, which held that it was error to refuse a continuance to procure a deposition. The decision is not pertinent. It involved an action on a note and the witness whose deposition was sought was the only person available who could establish defendant's contention. It might with reasonable probability have affected the outcome of the trial.

[3, 4] Appellant contends that by plaintiffs' dealing with Kluge and making no demand on appellant for payment or tendering the cabinets to defendant they thereby waived the right to collect from appellant. But respondents were acting at appellant's request in making deliveries of the merchandise directly to Kluge and in billing him. They were in fact appellant's agents. A waiver can result only from an intentional relinquishment of a known right and it will be inferred only when the conduct of the parties has resulted in some prejudice by reason of a justifiable belief that a waiver was intended. *Pacific Gas and Electric Co. v. I. A. C.*, 8 Cal.App.2d 499, 503, 47 P.2d 783; *Cross v. Superior Court*, 83 Cal.App. 144, 147, 256 P. 453. Appellant was not misled to his prejudice by any act of respondents. The attempts of the latter to collect from Kluge were made in accordance with appellant's wishes. Nothing was done by respondents from which it could have been

reasonably inferred that they had released appellant from the obligation created by his original order for the merchandise. Whether the acts of respondents constituted a waiver of their account against appellant was a question of fact for the trial court. *California Southern Hotel Co. v. Callender*, 94 Cal. 120, 126, 29 P. 859, 28 Am.St.Rep. 99.

[5, 6] Appellant further contends that by reason of respondents' dealing only with Kluge they are estopped from asserting the liability of appellant on his contract. But there is no showing that appellant was actually misled by any act of respondents to his prejudice. If they dealt with Kluge at the request of appellant, they were thereby serving appellant. Appellant had notice that Kluge was not paying for the merchandise which was tendered to appellant. In no sense did the latter change his position in reliance upon any statement or act of respondents. The very basis of an equitable estoppel is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. *Struckman v. Board of Trustees*, 38 Cal.App.2d 373, 377, 101 P.2d 151.

[7] Appellant contends that the \$1500 on the second order and another \$200 received by respondents from Kluge should have been applied in its entirety to the cabinet account rather than to close the account for work previously done by respondents for Kluge. But the other goods had been delivered to Kluge and he had been billed for them prior to the completion of the cabinets ordered by appellant and the account for such other goods appeared first in point of time in respondents' books. Also, Kluge did not at the time of the payment designate to which account it was to be applied. In such event there was no duty on respondents to discharge the more recent account rather than to apply it on the account of appellant.

[8] It is next contended that plaintiffs have not attempted to minimize the damages by reselling the cabinets which

were not accepted by Kluge. In support of such contention is cited 8 Cal.Jur. 785, to the effect that it is the seller's duty to resell as much of rejected merchandise as he can to others at the best possible price. But in the situation here presented, the cabinets were of a type which had no sale on the open market. They were made for a highly specialized purpose. There was no proof that they had any salvage value. It was incumbent upon appellant to establish the matters relied upon in mitigation of the damages. *Steelduct Co. v. Henger-Seltzer Co.*, 26 Cal.2d 634, 654, 160 P.2d 804; *De La Falaise v. Gaumont Picture Corp.*, 39 Cal.App.2d 461, 469, 103 P.2d 447; *Cope v. Sutter County*, 206 Cal. 445, 455, 274 P. 750.

[9] Lastly, appellant contends that he is entitled to a commission on the \$1700 paid to respondents by Kluge or upon such part of it as was applied upon the cabinet account. Unfortunately for appellant, the court determined that no contract was ever made whereby respondents were to pay appellant any commission. Such conclusion is supported by the evidence.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.



96 Cal.App.2d 361

EDWARDS v. FLOYD et al.

Civ. 17496.

District Court of Appeal, Second District,
Division 2, California.

March 7, 1950.

Powell C. Edwards brought action against Earl F. Floyd and others to recover for crop damage, and defendants filed a cross-complaint.

The Superior Court of Los Angeles County, Arthur S. Guerin, J., rendered an order granting defendants' motion for a new trial

on ground of newly discovered evidence, and the plaintiff appealed.

The District Court of Appeal, McComb, J., held that defendants made an insufficient showing of diligence to discover the newly discovered evidence, and that granting of new trial was therefore improper.

Order reversed.

1. New trial ⇐157

On hearing of motion for new trial on ground of newly discovered evidence, it is incumbent on moving party to show that he has exercised reasonable diligence to discover before trial the evidence which he relies on as newly discovered. Code Civ. Proc. § 657, subd. 4.

2. New trial ⇐150(4)

On motion for new trial on ground of newly discovered evidence, a general averment of diligence is not sufficient, and the particular circumstances or acts performed by the moving party must be stated. Code Civ. Proc. § 657, subd. 4.

3. New trial ⇐150(4)

On motion for new trial on ground of newly discovered evidence, an affidavit that newly discovered evidence was "wholly unknown" to moving party is a mere allegation of a conclusion, and, in absence of supporting facts, is insufficient to show diligence. Code Civ. Proc. § 657, subd. 4.

4. New trial ⇐150(4)

The granting of motion of defendants for new trial on ground of newly discovered evidence, was improper, where only showing made by defendants of diligence was affidavits that such evidence was unknown to defendants at time of trial and that they could not with reasonable diligence have discovered such evidence in time to produce it at the trial. Code Civ. Proc. § 657, subd. 4.

McCOMB, Justice.

This is an appeal by plaintiff from an order granting defendants' motion for a new trial on the ground of newly discovered evidence. The action was for crop damage suffered by plaintiff as a result of defendants' interfering with plaintiff's water supply.

This is the sole question presented for our determination:

Did the trial court abuse its discretion in granting the motion for a new trial on the ground of newly discovered evidence for the reason that defendants failed to show that they had used "reasonable diligence" to discover and produce such evidence at the time of the trial?

[1-3] This question must be answered in the affirmative and is governed by these rules:

(1) On the hearing of the motion for a new trial it is incumbent upon the moving party to show that he has exercised reasonable diligence to discover before the trial the evidence upon which he relies as "newly discovered". (Forman v. Goldberg, 42 Cal.App.2d 308, 317, 108 P.2d 983; Slemmons v. Paterson, 14 Cal.2d 612, 616, 96 P.2d 125; Sec. 657, subsection 4, Code Civ. Proc.)

(2) A general averment of "diligence" is not sufficient. The particular circumstances or acts performed by the moving party must be stated. (Butler v. Vassault, 40 Cal. 74, 76; Ross v. Sedgwick, 69 Cal. 247, 251, 10 P. 400.)

(3) An affidavit that newly discovered evidence was "wholly unknown" to the moving party is a mere allegation of a conclusion, and in the absence of supporting facts is insufficient to show that the moving party has used reasonable diligence to discover the evidence relied upon in his motion for a new trial. (Hutchason v. Marks, 57 Cal.App.2d 612, 614, 134 P.2d 495.)

In the instant case the only showing made by defendants in an effort to meet the requirement that they had shown reasonable diligence to obtain, prior to the time of trial, the alleged newly discovered evidence was defendants' affidavits that such evidence "was unknown" to them "at the time

Miller, Vandegrift & Middleton, Los Angeles, Bent & Clapp, Los Angeles, Thomas Middleton, Los Angeles, for appellant.

James M. Gammon, William V. Krowl and Kinball Fletcher, Jr., Los Angeles, for respondents.

of the trial" and that they "could not with reasonable diligence have discovered the said evidence in time to produce the same at the trial."

[4] Clearly under rules (2) and (3), supra, the foregoing statements were merely conclusions of law and did not constitute facts sufficient to show that defendants could not have obtained the evidence prior to the time of trial had they used reasonable diligence. Therefore under rule (1), supra, having failed to show that they had used reasonable or any diligence to obtain such evidence before the date of trial the record failed to disclose any evidence to sustain the trial court's implied finding to the effect that they had been reasonably diligent.

Such a finding was a prerequisite to the granting of a motion for a new trial.

The order is reversed.

MOORE, P. J., and WILSON, J., concur.



96 Cal.App.2d 259

SIMONIAN v. DONOIAN.

Civ. 17387.

District Court of Appeal, Second District,
Division 2, California.

Feb. 28, 1950.

Action by Ralph Simonian against Mary Donoian to recover diamond ring and wrist watch.

The Superior Court, Los Angeles County, Walter R. Evans, J., entered judgment for defendant and plaintiff appealed.

The District Court of Appeal, Moore, P. J., held that refusal of plaintiff to celebrate marriage vested title to ring in defendant under statute providing that donor may recover gift of property if donee refuses to enter into marriage as contemplated or it is given up by mutual consent, and in view of finding that watch was not a gift made by

a party to contemplated marriage, plaintiff could not recover it under said statute.

Judgment affirmed.

1. Gifts ⇨34

In action to recover diamond ring and wrist watch, allegedly given in promise of marriage, evidence sustained finding that plaintiff refused to celebrate the proposed marriage and by his conduct prevented it.

2. Breach of marriage promise ⇨23

Breach of a marriage contract may be shown by any words or conduct although there is neither verbal nor written refusal to marry, and mere cessation of intimate communications and visits without explanation is sufficient to support the finding of a breach.

3. Gifts ⇨34

Where donor refused to celebrate proposed marriage, ring given in contemplation of marriage could not be recovered under statute providing that donor may recover a gift of property if donee refuses to enter into marriage as contemplated or it is given up by mutual consent. Civ. Code, § 1590.

4. Gifts ⇨34

In action to recover watch allegedly given in contemplation of marriage, evidence was sufficient to sustain finding that watch was gift of plaintiff's parents.

5. Appeal and error ⇨1010(1)

Where any substantial evidence supports the finding it will not be disturbed on appeal even though there is sufficient support for a contrary finding.

6. Gifts ⇨34

Where watch was gift to defendant from plaintiff's parents, it was not recoverable under statute providing that donor may recover a gift of property if donee refuses to enter into marriage as contemplated or it is given up by mutual consent, since it was not a gift made by party to contemplated marriage. Civ.Code, § 1590.

Joseph Duchowny, Los Angeles, for appellant.

Chase, Rotchford, Downen & Drukker, Richard T. Drukker, Los Angeles, for respondent.

MOORE, Presiding Justice.

The parties litigant became engaged to marry on November 22, 1947. At that time appellant presented to respondent a diamond engagement ring, and his mother gave her a diamond set wrist watch. They set the date of their wedding for June 27, 1948, planned to effect their union on that day and pursuant thereto made arrangements for the wedding. But before the day arrived appellant without cause or provocation on the part of respondent and without her consent refused to go through with their marriage plans and stated that the wedding would have to be postponed indefinitely. To such delay respondent did not agree but on the contrary held herself ready, willing and able to celebrate the proposed marriage on the day fixed or on any date within a reasonable time that appellant might designate. While at no time did respondent agree to abandon the contract of marriage, appellant on the contrary in the month of August, 1948, terminated the agreement without cause.

Thereafter he filed the instant action for the recovery of the diamond ring and the wrist watch claiming such property to be his own. The court found the facts above recited to be true and that respondent is the owner of and entitled to the possession of both chattels. It was thereupon adjudged that since June 27, 1948, she has been the owner and entitled to the possession of the engagement ring.

[1,2] Appellant now contends that the court's finding that appellant without cause refused to celebrate the marriage on June 27 was erroneous. He contends that the illness of his father was just cause for a postponement as he testified. However, appellant himself testified that the father desired the wedding to occur as it had been planned and there is no proof of the elder Simonian's having suffered such illness as would reasonably interfere with his son's marriage. The finding that appellant refused to celebrate the connubial alliance and by his conduct prevented it was amply supported by the evidence. The proof that in the early part of August appellant returned all his gifts from respondent without explanation and that he

did not thereafter contact her in any way is sufficient basis for the inference he did not intend to consummate the wedding as planned. The breach of a marriage contract may be shown by any words or conduct although there is neither verbal nor written refusal to marry. *Campbell v. Arbuckle*, 51 Hun. 641, 4 N.Y.S. 29, Id., 123 N.Y. 662, 26 N.E. 750. Also, the mere cessation of intimate communications and visits without explanation is sufficient to support the finding of a breach. *Bowes v. Sly*, 96 Kan. 388, 152 P. 17.

Appellant insists that the failure to celebrate the marital agreement even though neither party refused to go forward with the marriage constitutes a mutual rescission of the marriage contract. In that connection, he contends that a mere postponement or failure to be married on the date set is not a breach of contract; citing 9 Corpus Juris, 333, 12 C.J.S., Breach of Marriage Promise, § 12. But the determination of this case does not require a decision as to the significance of the postponement of the wedding day in view of the finding that appellant refused to celebrate the marriage which finding has evidential support.

[3] Appellant contends also that his refusal to celebrate the marriage does not entitle respondent to the ring for the reason that a marriage was a necessary prerequisite to the passing of the title of the ring—in other words, an implied condition to the vesting of the title to the ring in respondent, citing *Ruehling v. Hornung*, 98 Pa. Super. 535. However, the law as announced by other jurisdictions has no persuasive force in view of the provision of section 1590 of the Civil Code which is as follows: "Where either party to a contemplated marriage in this State makes a gift of money or property to the other on the basis or assumption that the marriage will take place, in the event that the donee refuses to enter into the marriage as contemplated or that it is given up by mutual consent, the donor may recover such gift or such part of its value as may, under all of the circumstances of the case, be found by a court or jury to be just."

The clear meaning of the quoted statute is that the donee of an engagement ring is entitled to retain possession thereof when the marriage contract is breached by the donor without any fault on donee's part.

[4-6] While the testimony is in conflict as to the author of the gift of the wrist watch, the finding is that on November 22 the mother of plaintiff did present to defendant a wrist watch set with diamonds. In the absence of a motion to correct the findings it will be presumed that the court intended to declare that the mother made a gift of the wrist watch to respondent. This item was presented on the occasion of the announcement of the engagement. After appellant had put the ring on respondent's finger, his mother who sat next to respondent opened her purse and said, "This is from dad and I," and thereupon presented the wrist watch to respondent. Such proof is sufficient support of the finding that the watch was the gift of appellant's parents. Where any substantial evidence supports the findings it will not be disturbed on appeal. *Cate v. Certainteed Products Corporation*, 23 Cal.2d 444, 448, 144 P.2d 335. And this is true even though there is sufficient support for a contrary finding. *Rice v. California Lutheran Hospital*, 27 Cal.2d 296, 301, 163 P.2d 860. Therefore, under Civil Code section 1590 appellant could not in any event recover the watch as it was not a gift made by a party to the contemplated marriage.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.



96 Cal.App.2d 245

KATZ v. GREENINGER et al.

Civ. 14202.

District Court of Appeal, First District,
Division 2, California.

Feb. 28, 1950.

Suit by Phil C. Katz, as administrator with the will annexed of the estate of Kate Heath

215 P.2d—87½

Maher, deceased, against Frances Greeninger and The Hibernia Savings & Loan Society, a corporation, to recover funds on deposit in defendant bank.

The Superior Court in and for City and County of San Francisco, Theresa Meikle, entered judgment in favor of defendant, and plaintiff, who was public administrator with will annexed and substituted as plaintiff after death of executrix, appealed.

The District Court of Appeal, Nourse, P. J., held that document accompanying deposit in bank created a trust, and that guardian of estate of incompetent trustee did not have right to demand and take possession of trust fund.

Judgment affirmed.

1. Trusts ⇐34(2)

Where settlor deposited money in bank under agreement with bank, which in form was creation of trust for another, and which clearly expressed terms of a valid trust, a valid trust was created. Banking Code, § 853.

2. Trusts ⇐43(1)

Where deposit is made in bank entitled, "A, in trust for B," with no further expression in writing of depositor's intent, oral testimony is admissible to prove depositor's intent, as well as to prove an intention contrary to claim of a trust relation.

3. Appeal and error ⇐907(2)

Where there was no evidence before District Court of Appeal, finding by trial court was binding.

4. Trusts ⇐169(1)

A guardian who is appointed to fill vacant trusteeship has no right to possession and management and distribution of corpus of trust, and takes trust property not as guardian, but as trustee.

5. Trusts ⇐287

Where depositor of fund in bank creates trust and is subsequently declared incompetent, court may authorize use of deposit so far as necessary for care of depositor.

6. Trusts ⇐153

Where depositor of fund in bank created trust, and expressly reserved right on her order alone to withdraw any part of fund from bank, discretionary power was

subject to control by court only under special circumstances. Civ.Code, § 2269.

7. Trusts ⚡169(1)

Where trustee was adjudged incompetent, a vacancy in trusteeship occurred, and duty was then cast upon Superior Court to appoint new trustee on petition for that purpose.

8. Trusts ⚡243

Where new trustee is appointed by Superior Court after vacancy by former trustee, new trustee succeeds to title of trust and will be required to hold estate under terms of trust instrument.

9. Insane persons ⚡65

Guardian of an incompetent person does not have legal title to his ward's estate, and while guardian has right of possession and control, property is said to be "in custodia legis" and subject to orders of court.

10. Insane persons ⚡65

Trusts ⚡163

Where valid trust was created by deposit of money in bank, and trustee was subsequently declared incompetent, trustee's guardian did not have legal title to trust and power to withdraw trust funds under statute giving guardian power to collect debts owing to ward, where application of statute would require a rejection of entire trust relation and treatment of deposit as nothing more than creation of relation of debtor and creditor. Probate Code, § 1501.

11. Insane persons ⚡65

Trusts ⚡59(1)

Where trustee, who created trust in bank deposit, and reserved sole right to make withdrawals and discontinue trust, was declared incompetent, and died nine days after appointment of guardian, guardian could not show need of trust estate for trustee's support, and was without power, in absence of a court order, to take possession of trust estate, or to exercise right of election to discontinue trust.

12. Trusts ⚡169(1)

Where guardian of incompetent trustee had no power to take possession of

trust estate or to exercise right of election to discontinue trust, court would appoint a new trustee to take possession of trust estate.

Elden C. Friel, San Francisco, Henry F. Boyen, San Francisco, for appellant.

Charles L. James, San Francisco, for respondent Frances Greeninger.

NOURSE, Presiding Justice.

This appeal relates to questions of law alone. Evidence was taken at the trial, findings of fact were filed, but appellant did not request a reporter's transcript and none has been filed.

On August 24, 1945, Kate Maher deposited the sum of \$5,000 with the Hibernia Savings & Loan Society under a written declaration of trust hereinafter set forth.

On August 6, 1946, Kate Maher was adjudged incompetent and the San Francisco Bank was appointed guardian of her estate. The following day the guardian made written demand upon the Hibernia Bank for possession of the fund on deposit, which was refused. The money on deposit was not required for the maintenance of the incompetent. On August 15, 1946, Kate Maher died. The executrix of her will commenced suit against Frances Greeninger and the Hibernia Bank to recover the fund on deposit, and following the trial the executrix died. After findings were filed and judgment entered in favor of the defendants the public administrator was appointed administrator with the will annexed and substituted as plaintiff in place of the executrix named in the will.

On the trial the defendants put in evidence the document which they assert is a trust agreement and which reads as follows:

"To the Hibernia Savings and Loan Society,

"San Francisco, California—No. 675-669

"Date: August 24, 1945

"I hereby agree to all the conditions of deposit governing deposits with the Hibernia Savings and Loan Society and to

all amendments thereto which may hereafter become effective. I further agree, certify and declare that the moneys deposited by me in the above numbered account, and all future deposits made therein and all accruals thereto are held by me in trust for the benefit of Frances Greeninger hereinafter called the Beneficiary subject to the following conditions:

"1. During my lifetime payments shall be made on my order alone and my receipt shall be a sufficient acquittance to the Hibernia Savings and Loan Society for such payments so made.

"2. In the event of my death the amount then remaining on deposit shall be payable on the order of the Beneficiary and any amounts so paid shall be his or her exclusive property.

"3. In the event that the Beneficiary predeceases me, this trust shall terminate as of the date of his or her death.

"4. It is hereby expressly agreed that The Hibernia Savings and Loan Society may accept as sufficient proof of my death a duly certified copy of the death certificate issued by the competent authorities whose duty it is to issue such certificates.

"Kate Heath Maher

"For identification of Beneficiary see reverse hereof."

The appeal presents two questions for decision.

First: Does the document accompanying the deposit create a trust? Second: Did the guardian of the estate of the incompetent trustee have the right to demand and take possession of the trust fund?

[1] *First*: The document shows every evidence of a clear and fixed intention to create a trust in accordance with the terms expressed therein. Such a trust is accepted with approval in section 853 of the statute relating to banking (Bank C.A.) which is based on the former section 15a of the original Bank Act. Stats.1909, Chap. 76. That section provides that when a deposit in a bank is made "which in form is in trust for another" it may be paid to the beneficiary on the death of the trustee though no terms of a valid trust are given in writing. It is a natural corollary that

when such terms are clearly expressed in writing, as we have here, then a legal and valid trust is created.

[2] The validity of such a trust is recognized in Restatement, Trusts, § 58; Scott on Trusts, § 58; Bogert, Trusts and Trustees, § 47. These authors discuss at length the question of the intent of the depositor and this is the subject upon which the great number of authorities depend. Generally these cases relate to a deposit entitled "A, in trust for B" with no further expression in writing of the depositor's intent. In such instances oral testimony has been held admissible to prove the depositor's intent as well as to prove an intention contrary to the claim of a trust relation.

[3] In *Kuck v. Raftery*, 117 Cal.App. 755, 4 P.2d 552, this court had for consideration a deposit of that character. The trial court had found that no trust was intended. We reversed the judgment holding that the evidence did not support that finding. In doing so the two rules of decision—one known as the New York rule, the other as the Massachusetts rule—were discussed and many cases cited. The decision rested on the authority of *Booth v. Oakland Bank of Savings*, 122 Cal. 19, 54 P. 370, which is in accord with the New York rule. In *Bank of America Nat. Trust & Savings Ass'n v. Hazelbud*, 21 Cal. App.2d 109, 68 P.2d 985, a case in which the deposit contained more explicit terms of intention to create a trust, the court followed the Booth case and *American Bible Society v. Mortgage Guarantee Co.*, 217 Cal. 9, 17 P.2d 138. *Kosloskye v. Cis*, 70 Cal.App.2d 174, 160 P.2d 565, was an "A in trust for B" case. The trial court took evidence of events occurring years after the deposit to show the intention of the depositor and held that no trust had been intended. This was affirmed on appeal. In our case the appellant did not request a reporter's transcript and hence we have no knowledge of what evidence was taken. The trial court found that the deposit was made "with intent to create a voluntary express revocable trust" with Frances Greeninger as the beneficiary. This finding is binding on the appeal. Ap-

pellant does not attack it on any specific ground. His argument on the validity of the trust is based on the Massachusetts rule which has been rejected as authority in this state.

[4] *Second*: Did the guardian of the estate of the incompetent trustee have the right to take immediate possession of the trust fund? *Hallinan v. Hearst*, 133 Cal. 645, 650, 66 P. 17, 19, 55 L.R.A. 216, deals with the question of the relation of the guardian of a minor and a vacant trusteeship. It was held that the guardian, as such, "would have no right whatsoever to the possession and management and distribution of the *corpus* of such a trust fund." And also, that if the guardian should be appointed to fill the vacant trusteeship, "he would not take the trust property as *guardian*, but as trustee".

[5] The authorities are apparently in accord that the court may authorize the use of the deposit so far as necessary for the care of the depositor who has been declared incompetent. *Scott on Trusts*, p. 363 and cases cited in 1944 supplement. But in *Re Grant's Estate*, 122 Misc. 491, 204 N.Y.S. 238, it was held that the guardian of an incompetent trustee could not, without order of court, take possession of the trust fund since the right of election to withdraw the fund was personal and that the right of the guardian to take possession of the ward's estate applied only to ministerial acts. See generally 112 A.L.R. 1063; 54 Am.Jur. p. 82; *Rickel v. Peck*, 211 Minn. 576, 2 N.W.2d 140, 138 A.L.R. 1375, 1383, a case coming from Minnesota, which follows the New York rule on bank deposit trusts.

[6-8] Here the depositor expressly reserved the right "on my order alone" to withdraw any part of the fund from the bank. Such discretionary power is subject to control by the court only under special circumstances. Civil Code, § 2269. The method of control is found in the Civil Code. Section 2282 provides that a trustee is removed by a judgment finding that he is of unsound mind. Section 2287 provides that "The superior court shall appoint a trustee whenever there is a va-

cancy * * *." When the trustee was adjudged incompetent a vacancy in the trusteeship occurred and the duty was then cast upon the superior court to appoint a new trustee on petition for that purpose. Such trustee would thereupon succeed to the title of the trust deposit and would be required to hold the estate under the terms of the trust instrument.

[9,10] But the guardian of an incompetent person does not have legal title to his ward's estate. 39 C.J.S., *Guardian and Ward*, § 75. While the guardian has the right of possession and control, the property is said to be "in custodia legis" and subject to the orders of the court. (25 Am. Jur. *Guardian and Ward*, sec. 72.) Appellant relies on section 1501 of the Probate Code which gives a guardian power to collect debts owing to the ward. To apply this section it would require a rejection of the entire trust relation and a treatment of the deposit as nothing more than a relation of debtor and creditor.

From the foregoing discussion there would appear to be some confusion in the authorities relative to the duties of a guardian of an incompetent trustee. This is because no authorities have been found which pass directly on the point involved. Those cases which hold that the guardian may draw on the trust estate for the necessary support of his ward are not applicable here because the trial court found that Mrs. Maher left an estate of over \$43,000 of which more than \$10,000 was in cash. She died nine days after she was declared incompetent and it does not appear that the trust fund was needed for her maintenance. But even in those cases which permit a withdrawal for maintenance the better reasoned ones tie the power of the guardian to the supervision and control of the court.

[11,12] Whatever may be the rule in this state when the guardian is in need of a trust estate for the support of the ward, we are satisfied that, when such condition does not exist, the guardian is without power, in absence of a court order, to take possession of the trust estate, or to exercise the right of election to discontinue the trust which had been reserved to the trustee alone. And in absence of authority

either way we would conclude that the proper procedure would be to appoint a new trustee to take possession of the estate.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.



96 Cal.App.2d 324

STOWELL et al. v. FITCH et al.
Civ. 17027.

District Court of Appeal, Second District,
Division 3, California.
March 2, 1950.

Sheridan A. Stowell and another instituted an action of accounting against Alice Anna Fitch, The Cambridge Company and others. The three corporate defendants and defendant Stowell filed a cross-complaint for approval of the trustee's account.

The Superior Court, Los Angeles County, Wilbur C. Curtis, J., rendered judgment for the defendants on the cross-complaint, and the plaintiffs appealed.

The District Court of Appeal, Shinn, P. J., held that the findings of the trial court were not contradictory and were sufficient to support a conclusion that the successor trustee had made a full and fair accounting of trust to beneficiaries. The court refused to award penalty where appeal, although ill advised, was not frivolous.

Affirmed.

1. Trusts ⇨326

A finding that a corporate trustee under an express trust rendered a full and fair accounting to beneficiaries, which was substantiated by the record, implied that accounting related to all property held by trustee with respect to which it had a duty to account.

2. Appeal and error ⇨931(1)

Where the evidence had not been brought up on appeal and appellants' plead-

ings contained material allegations upon which no findings were made, Court of Appeal presumed that no evidence was introduced to support allegations.

3. Trusts ⇨315(3)

Evidence established that successor trustee under an express trust was entitled to its compensation even though it acquired title to trust property without knowledge of beneficiaries.

4. Trusts ⇨326

Findings were not contradictory and were sufficient to support a conclusion that a successor trustee under an express trust had made a full and fair accounting of trust to beneficiaries.

5. Costs ⇨260(4)

Where an appeal was ill advised but it did not appear that it was taken for purpose of delay, the Court of Appeal would not penalize appellants for a frivolous appeal.

Walter G. Lincoln, Los Angeles, for appellants.

W. L. Pollard, Los Angeles, for respondent.

SHINN, Presiding Justice.

Sheridan A. Stowell and Clara W. Stowell instituted the present action for an accounting against Alice Anna Fitch, Cambridge Company, the Corona Development Company and Vitruvian Company, corporations, and Wilhelmina E. Stowell. It was alleged that in 1941 plaintiffs, Alice Anna Fitch and Cambridge Company, entered into an agreement with Corona Development Company and Wilhelmina E. Stowell, by the terms of which Corona agreed to collect certain claims and to pay over to each of the plaintiffs, to Alice Anna Fitch and Cambridge Company, one-fourth of any "net profits received from such collections, endeavors or transactions described in said written agreement"; it was also alleged that Wilhelmina E. Stowell owned more than 90 per cent of each of the three corporations which were used by her in her private enterprises; that defendant Stowell presented an accounting in 1944 showing

a net income of \$2,255.23, but the defendants Corona Development Company and Stowell refused to make a correct accounting or to pay any sums to plaintiffs. The prayer was for payment to plaintiffs of the sum of \$2,255.23 and for an accounting. The answer admitted that an accounting was made in 1944 showing a net income of \$2,255.23, but alleged that the sum was paid out in taxes and that a correct accounting had been made and that all moneys received by defendants had been used for the same purpose. The three corporate defendants and defendant Stowell filed a cross complaint, in which the property, the subject of the agreement, was described as consisting of a great many lots in real estate subdivisions in Riverside County. It was alleged that Cambridge Company, as successor in interest of Corona and Vitruvian, acquired title to the property in trust in March, 1943; that it sold all the property and collected under the terms of the trust agreement \$30,491.62, and that its charges against the trust for moneys expended and for compensation of Cambridge, as trustee, amounted to \$30,940.26, leaving a balance due the trustee of \$448.64 and a balance of \$500 due to W. L. Pollard for legal services rendered the trustee. The prayer of the cross complaint was for approval of the account. The answer to the cross complaint denied the propriety of certain disbursements and denied that Cambridge Company was entitled to compensation for fees and services. It was also alleged that there was certain acreage consisting of 13½ acres in certain blocks, and 19½ acres designated as streets on the various maps, for which no accounting had been rendered. The findings were that Corona transferred the property to Cambridge Company, in trust, without consideration and without the knowledge of plaintiffs; that the accounting as rendered was full and fair; there remained in the hands of the trustee \$148.61; the services of the attorney employed by the trustee were worth \$400, \$300 of which was unpaid and chargeable to the trust; the "trust estate" (beneficiaries) was indebted to the trustee in the sum of \$151.39, and that the trustee, Cambridge Company, was entitled to compensation for services rendered in

the sum of \$939.83. The judgment awarded plaintiffs their costs against Cambridge Company of \$172.50, directed Cambridge Company to pay to itself, as trustee's fee, \$939.83, and to W. L. Pollard attorney's fees in the sum of \$300, all from trust funds. Cambridge Company was awarded judgment against plaintiffs in the sum of \$37.86 each. Plaintiffs appeal upon a clerk's transcript.

The points on appeal are the following:

(1) That there were material issues upon which no findings were made; (2) that the findings are contradictory; (3) that Cambridge Company was not entitled to trustee's fees; and (4) that the conclusions of law are not supported by the findings.

[1, 2] On the first point it is claimed there should have been findings with respect to the allegations that Wilhelmina E. Stowell owned practically all of the capital stock of the three corporations and controlled the same; "that Cambridge Company owned one-half of said property in its own right"; and that there had been a failure to account for some 23 acres that had been transferred to Cambridge Company. The contention that the findings are deficient with respect to these matters is not substantiated by the record. It was immaterial whether defendant Stowell controlled the three corporations. The finding that Cambridge Company had rendered a full and fair accounting must be construed as relating to all the property held by it as trustee, with respect to which it had a duty to account. Moreover, the evidence has not been brought up on the appeal and even if appellants' pleadings had contained material allegations upon which no findings were made we would have to presume that no evidence was introduced to support them.

[3] It is contended that Cambridge Company acquired title as trustee wrongfully, in that it took title without the knowledge of plaintiffs, and was therefore not entitled to compensation. The contention fails for several reasons: (1) Appellants' pleadings did not raise the issue; (2) it will be presumed, in the absence of evidence to the contrary that Corona Development Company had authority to appoint a successor trustee and (3) it will be presumed

there was evidence that appellants accepted the services of Cambridge Company as trustee over a period of years without objection and ratified the appointment, if it needed ratification.

[4, 5] With respect to the other points it is sufficient to say there is no conflict in the findings and that they furnish ample support for the conclusions of law. Judged by familiar rules of law and procedure this is an ill advised appeal. However, since it does not appear to have been taken for the purpose of delay, we shall assume that appellants thought it had merit and are therefore not disposed to penalize them for a frivolous appeal.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.



96 Cal.App.2d 283

PEOPLE v. GREEN et al.
Cr. 812.

District Court of Appeal, Fourth District,
California.
March 1, 1950.

Amos Moody Green, Virginia Ann Green and Kirby K. Kennelley were convicted in the Superior Court of Tulare County, Glenn L. Moran, J., of unlawfully failing to stop automobile following an accident, and they appealed from the judgment and from orders denying motions for new trial.

The District Court of Appeal, Mussell, J., held that an "accident" occurred within the hit-and-run statute, that occupants other than person behind the wheel of automobile were not "drivers" within the hit-and-run statute, and that occupants other than driver were not guilty as aiders and abettors.

Judgment against defendant Amos Moody Green and order denying a new trial affirmed, and judgment and orders denying a new trial as to defendants Kirby K. Kennelley and Virginia Ann Green reversed.

1. Automobiles ⚡336

The purpose of the "hit and run statute" is to prevent the driver of an automobile from leaving the scene of an accident in which he participates or is involved without proper identification, and to compel necessary assistance to persons who have been injured. Vehicle Code, §§ 480, 482(a).

2. Automobiles ⚡336

Where person riding in moving automobile fell out of automobile and was injured, an "accident" occurred within "hit and run statute" requiring driver of vehicle involved in accident resulting in injury or death to person to immediately stop and render assistance to injured person. Vehicle Code, §§ 480, 482(a).

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Accident".

3. Automobiles ⚡355(8)

In prosecution for unlawfully failing to stop automobile and give assistance to prosecuting witness who was injured when he fell from moving automobile, evidence did not sustain implied findings that occupants other than driver exercised or had right to exercise control over operation of automobile at time of accident, so as to render them guilty under "hit and run statute" as "drivers" of automobile although they were not behind the wheel. Vehicle Code, §§ 480, 482(a).

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Driver".

4. Criminal law ⚡59(5)

Where persons are not actors in actual commission of crime charged, but aid and abet others in its commission or procure others to commit crime, all are equally guilty.

5. Criminal law ⚡59(5)

To authorize conviction of one as an aider and abetter, evidence must show not only that he aided and assisted in the doing thereof, but also that he aided, with guilty knowledge or intention, the actual perpetrator in commission of acts.

6. Automobiles ☞355(8)

In prosecution for unlawfully failing to stop automobile and give assistance to prosecuting witness who was injured when he fell from moving automobile, evidence did not establish that occupants of automobile other than driver aided or assisted in driving from scene of accident, or participated in crime charged, so as to render occupants other than driver guilty as aiders and abettors. Vehicle Code, §§ 480, 482(a).

7. Criminal law ☞1186(4)

Where conduct of deputy district attorney in trial of criminal prosecution was assigned as prejudicial to defendant, and evidence clearly supported conviction, and jury in all probability would have rendered verdict of guilty even in absence of any dereliction on part of deputy district attorney, a reversal of conviction was not justified. Const. art. 6, § 4½.

8. Criminal law ☞1202(3)

Where defendant pleaded not guilty and answered that he had suffered a previous conviction alleged, and portions of testimony of police officer as to part of conversation between defendant and police officer in which defendant admitted prior criminal record, was separable from portion of conversation containing material admissions of defendant, portion of conversation relating to defendant's admissions concerning defendant's prior criminal record was improperly admitted. Pen.Code, § 1025.

Nathaniel O. Bradley, San Francisco, for Appellant Kirby K. Kennelley.

J. M. Lopes, Visalia, for Appellants Amos Moody Green and Virginia Ann Green.

Fred N. Howser, Attorney General; Donald D. Stoker, Deputy Attorney General, for Respondent.

MUSSELL, Justice.

Defendants were charged in the third count of an information with a violation of section 480 of the Vehicle Code. The charge, in substance, was that the defendants, being drivers of an automobile which

was involved in an accident and which had resulted in an injury to the complaining witness, Dewey L. Dehart, did wilfully, unlawfully and feloniously fail and omit to immediately stop such vehicle and give their names, addresses, operators' or chauffeurs' licenses to the person injured and render him reasonable assistance.

Defendants were charged in the first two counts of the information with robbery and violation of section 503 of the Vehicle Code. A jury trial resulted in a verdict of acquittal on the first two counts and guilty as to the third. Defendant Amos Moody Green was also charged with a prior conviction of burglary and entered a plea of guilty thereto. Motions to set aside the verdict and for new trial were made and denied and defendants appealed.

All defendants contend that the verdict rendered by the jury is not supported by the evidence; that it is contrary to law; and that the court erred in instructing the jury. Defendant Green also contends that the deputy district attorney who prosecuted the case was guilty of prejudicial misconduct by introducing evidence of defendant's prior record when he had admitted the prior conviction alleged.

On June 12, 1949, Mr. Dehart, the complaining witness, went to the White Front Cafe in Tulare at about 9:30 o'clock p. m. He played draw poker in the back room of the cafe until midnight and during that time had several drinks of straight whiskey. After Dehart finished playing cards, he went into another room where Kennelley (who had been the dealer in the card game) was talking to someone at the end of the bar. Dehart offered to buy Kennelley a drink. Kennelley introduced Dehart to the defendants, Mr. and Mrs. Green, and Dehart bought them all several drinks.

Dehart testified that he told the defendants that he had to drive to Porterville and that they could ride with him. Defendant Kennelley testified that Dehart bought a pint of whiskey before leaving the bar and suggested that they go to Visalia to eat and drink. They all left the cafe, walked about a block, got in Dehart's Ford station wagon, which was parked in front of a service station, and Dehart drove toward

Visalia. He stopped at his lumber yard near the junction of Tulare, Lindsay and Visalia highways, about five miles north of Tulare. After stopping, Dehart went into the lumber yard for a few minutes, leaving the defendants in the station wagon. When he returned to the car, defendant Kennelley was in the driver's seat and an argument took place as to who would drive. Finally, with Kennelley driving, the car started toward Lindsay and about a mile east of the lumber yard, Kennelley stopped the car and a fight took place in which Dehart was knocked down several times and finally was put in the rear of the station wagon by the defendants.

Mrs. Barlow, who lived about 105 feet from the place where the station wagon was stopped, testified that she was awakened by the barking of dogs and upon looking out the door, observed the parked station wagon and saw three men struggling; that one of them, "the one that was being knocked down the most", started to run across the road and one of the others started after him; that she then awakened her husband and they saw a man struggling and being put into the station wagon. Mr. Barlow testified that he heard a lady's voice saying "He ought to lie still now, I kicked his damn teeth out".

After the fight, defendant Green got behind the wheel, drove the car back to Tulare and when he was making a right turn in front of the Hotel Tulare at a speed estimated to be between 30-35 miles per hour, Dehart (who had taken hold of the car door handle) went out of the car backwards on the right hand side. Dr. Dailey, a taxi driver who saw Dehart fall out, testified "He came out as if he was trying to jump out, or falling out, or being pushed out. He came out head first in a tumbleway like". Dehart hit the pavement, rolled over, got up, staggered out into the street and waived to Mr. Dailey to stop his taxi. Dehart told Dailey to take him to the police and Dailey then drove to a police car at the Greyhound bus station, where he was directed by the officers to drive to the county hospital.

Mrs. Green testified that while the fight was going on near the Barlow place, she

was sitting in the car with her husband and that defendant Kennelley was trying to get Dehart into the car to take him back to town but Dehart would not get in; that Kennelley asked her husband to come and help him, which he did; that she did not get out of the car and Kennelley and Green put Dehart in the back and started back to Tulare, with Mr. Green driving; that she was seated in the middle of the front seat and Kennelley on her right; that on the way back to Tulare, Dehart attempted to jump out of the car and when Kennelley saw him, he got him away from the door and closed it; that when they were in town and just as they turned a corner, Dehart did jump out of the car. When asked what was done thereafter, Mrs. Green stated: "My husband started over toward the curb and Mr. Kennelley said 'he is standing up'. In other words, he had already gotten up, so my husband, I guess, got scared like all of us did and drove on for two or three blocks and stopped the car and we got out and went to Mr. Kennelley's house and his wife took us home."

Defendant Kennelley testified that after Dehart had been put in the back of the station wagon, Mr. Green got behind the wheel and they drove back to Tulare; that they were going back into town to leave the car where they had found Dehart and let him go; that on the way back to town, Dehart opened the door and tried to jump out when Kennelley "grabbed him by the arm and held him and succeeded in closing the door"; that when they were in front of the Hotel Tulare, Dehart deliberately opened the door and jumped out; that Mr. Green slowed down and they looked back and Dehart had rolled and tumbled and got up and started running in the opposite direction, waving his arms; that "we were somewhat worried about it, but we had been drinking and evidently got a little panicky and Mr. Green drove on for three or four blocks, and we stopped the car and went home".

Mr. Dehart had no recollection of being put into the car or traveling and did not remember hitting the street but did recall that he managed to get hold of the door handle and give it a little pull "and out I

went backwards". The next thing he knew was that he was in the hospital the following morning.

Dehart was admitted to the hospital at 2:17 o'clock a. m. on June 13th and the doctor's examination showed that he had multiple abrasions, bruises and lacerations and that the upper plate of his teeth was broken.

The first contention advanced by the defendants is that the evidence is not sufficient to support the verdicts returned by the jury. At the outset, it may be observed that both defendant Kennelley and Mrs. Green testified at the trial that at the time of the accident the car was being driven by the defendant Green; that he failed to stop, and in his statement made to the officers, Green admitted that to be the fact. There is then no question as to the sufficiency of the evidence to sustain the finding of the jury that defendant Green was guilty of the crime charged, unless it can be said, as contended by the defendants, that an "accident" did not occur within the purview of section 480 of the Vehicle Code. That section provides, among other things, that the driver of any vehicle involved in an accident resulting in injury or death to any person shall immediately stop such vehicle at the scene of such accident and shall fulfill the requirements of section 482(a) of the same code. Section 482(a) provides, among other things, "that the driver of any vehicle involved in an accident resulting in injury to or the death of any person shall also give his name, address, and the registration number of the vehicle he is driving, the name of the owner * * * and shall render to any person injured in such accident reasonable assistance, including the carrying or the making arrangements for the carrying of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person."

[1] The purpose of the "hit and run" statute is to prevent the driver of an automobile from leaving the scene of an accident in which he participates or is involved without proper identification and to compel necessary assistance to those who have been

injured. *People v. Scofield*, 203 Cal. 703, 707, 708, 265 P. 914.

In *People v. Kinney*, 28 Cal.App.2d 232, 82 P.2d 203, it was contended that the statute referring to section 482 of the Vehicle Code does not require the driver of an automobile who is involved in a casualty other than a collision or the striking of a pedestrian to render assistance to a person who is injured while riding in his machine as a guest and the court held such a construction could not be placed upon the statute in question. It was there held, 28 Cal. App.2d at page 238, 82 P.2d at page 207, that "The driver of any vehicle involved in an accident (of any sort) resulting in injury to or death of any person * * * shall render to any person injured in such accident reasonable assistance, including * * * the making (of) arrangements for the carrying of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that such treatment is necessary". It was also held that the language quoted does not limit the performance of such acts to drivers of automobiles which strike and injure a pedestrian, or which are involved in a collision with other vehicles. That it includes all machines which are involved in accidents of any nature whatever in which another individual is injured or killed.

As defined in Webster's Dictionary, an accident is an event that takes place without one's foresight or expectation; an undesigned, sudden, and unexpected event. See also *United States v. Rogers*, 9 Cir., 120 F. 2d 244, 246.

[2] We conclude that, insofar as the defendants are concerned, an "accident" occurred within the meaning of section 480 of the Vehicle Code.

Defendants Kennelley and Mrs. Green contend that the evidence was insufficient to support the verdicts of the jury in that it was not shown that either of them was driving the station wagon at the time of the accident and in that connection direct our attention to section 69 of the Vehicle Code, which provides as follows: "Driver. 'Driver' is a person who drives or is in actual physical control of a vehicle."

There are cases which hold that persons other than the actual driver of an automobile may be found guilty of the offense herein charged where it was shown that someone other than the person behind the wheel had control over the operation of the car and committed some act at the time of the accident to aid, abet or encourage the actual driver to leave the scene of the accident in violation of the statute. In *People v. Steele*, 100 Cal.App. 639, 280 P. 999, the defendant Kearney was a passenger at the time of the accident in a car owned by his employer but under his control. After the car had proceeded four blocks from the point of collision, he took the wheel and drove speedily in a direction away from the victim. By so doing, said the court, he became a principal.

In *People v. Odom*, 19 Cal.App.2d 641, 66 P.2d 206, the defendant, a joint owner of the vehicle involved, was riding therein at the time of the accident and had the absolute right to direct and control his sixteen year old boy in its operation, and in fact did instruct him to drive on after the accident. The court stated, 19 Cal.App.2d at page 647, 66 P.2d at page 209: "The offense of failing to stop an automobile which has struck and injured a person and to render assistance to the victim of the accident, as provided by section 480 of the Vehicle Code, applies with equal force to the owner of the machine who is riding therein at the time of the accident with full authority to direct and control the operation as it does to the person who is actually driving the vehicle. The term 'driver of the vehicle' as it is used in the statute includes the owner of the machine who is present and has the control of its operation. Citing *People v. Rallo*, 119 Cal.App. 393, 397, 6 P.2d 516; *People v. Steele*, 100 Cal.App. 639, 644, 280 P. 999; *People v. Maggio*, 90 Cal.App. 683, 266 P. 813."

In the *Rallo* case, *supra*, 119 Cal.App.2d at page 397, 6 P.2d 516, the court held that the owner of a machine who is riding therein, having control of its operation at the time of an accident, may be deemed to be the driver thereof for the purposes of section 141 of the California Vehicle Act even though another person may be actually seated at the steering wheel.

[3] A consideration of these cases leads us to the conclusion that the evidence is insufficient to support the implied finding of the jury that defendant Kennelley or Mrs. Green exercised or had the right to exercise control over the operation of the car at the time of the accident. The car (which was owned by Dehart) was being driven by defendant Green at the time of the accident and he continued to drive it until it was abandoned. There is no evidence in the record that Kennelley or Mrs. Green suggested that he drive on after the accident happened and it was not shown that either of them exercised control of the vehicle.

[4-6] It is argued by the attorney general that defendants Kennelley and Mrs. Green aided and abetted defendant Green in the commission of the offense charged and are, therefore, liable as principals. It is true, as stated in *People v. Cowan*, 38 Cal.App.2d 231, 239, 101 P.2d 125, 130, that "Where persons are not actors in the actual commission of the crime charged, but aid and abet others in its commission or procure others to commit the crime, all are equally guilty." However, to authorize the conviction of one as an aider and abettor in the commission of a criminal act, the evidence must show, not only that he aided and assisted in the doing thereof, but also that he abetted the actor—i. e. that he aided, with guilty knowledge or intention, the actual perpetrator in the commission of the act. 4 Cal.Jur. 10-Yr. Supp. 559. The evidence does not show that the defendants Kennelley and Mrs. Green aided or assisted defendant Green in driving from the scene of the accident and does not show that either of them participated in the crime charged. In this connection, it should be noted that the first count of the information contained a charge that the defendant did unlawfully and feloniously take personal property consisting of a wallet and contents from the possession and immediate presence of Dewey L. Dehart, against his will, and in the second count the defendants were charged with a violation of section 503 of the Vehicle Code in that they did on or about the same date drive a vehicle, a Ford station wagon, belonging to Dewey L. Dehart upon a public highway, without his

consent and with the intent to deprive him of the vehicle. The jury found all defendants not guilty of these two charges and we are not here concerned with a situation wherein the crime charged in the third count of the information might have been committed in the perpetration of the offenses charged in counts one and two.

The defendants Kennelley and Mrs. Green contend that the court erred in instructing the jury as to the law relative to the responsibility of one who aids and abets a driver of a vehicle involved in an accident and their contention seems to be that the instruction should not have been given when there was no evidence that would establish that the defendants were aiding or abetting the driver. However, a determination of this question is unnecessary to this decision.

It is the contention of defendant Green that the deputy district attorney who tried the case was guilty of prejudicial misconduct by introducing evidence of defendant's prior record when he had in fact admitted his alleged prior conviction at the time of his arraignment. The deputy conducting the trial took the witness stand and testified on behalf of the people. He testified that the defendant, Amos Moody Green, had made a statement to him during the course of the conversation between them that several years ago he had been convicted of a felony in the state of Texas; that he had been arrested for another burglary other than the one for which he was convicted and also that he was familiar with criminal procedure in California and in Texas. Counsel for Mr. Green moved the court to instruct the jury to disregard the deputy's testimony as to his first conversation with Mr. Green during which the foregoing statements were made. The motion was submitted and granted and the court ordered that all members of the jury should wholly disregard the testimony of the deputy as to certain alleged prior convictions of felony, and any and all inferences that might be drawn from the testimony that was given.

Section 1025 of the Penal Code provides, among other things, that in case a defendant pleads not guilty and answers that he

has suffered a previous conviction alleged, the charge of the previous conviction must not be read to the jury nor alluded to on the trial.

[7,8] In the instant case the attorney general attempts to justify the introduction of the part of the statement objected to on the theory that it was part of a conversation in which the defendant Green made certain material admissions concerning the commission of the crime. It is argued that by reason of these material admissions the entire conversation was admissible. The record indicates, however, that the testimony objected to was severable from the balance of the conversation and we think that it was error to permit the objectionable statements in evidence. However, where, as here, the conduct of the deputy district attorney is assigned as prejudicial, and the evidence clearly supports the conviction a reversal is not justified when it appears that the jury in all probability would have rendered a verdict of guilty even in the absence of any dereliction on the part of the district attorney. *People v. Godsey*, 71 Cal.App.2d 83, 93, 162 P.2d 46. Under section 47½ of Article VI of the Constitution of the State of California reviewing courts are not permitted, where matters prejudicial in their character appear in the record, to reverse such judgments unless from the entire record it appears that there has been a miscarriage of justice. *People v. Kaizer*, 22 Cal.App. 10, 20, 21, 134 P. 346, 133 P. 516, 521; *People v. Cassidy*, 86 Cal.App. 45, 53, 260 P. 313.

In the instant case the evidence clearly establishes the guilt of defendant Green and we are not prepared to say that a miscarriage of justice, insofar as defendant Green is concerned, resulted from the error committed.

The judgment against the defendant Amos Moody Green and the order denying a new trial are affirmed. The judgment and orders denying a new trial as to the defendants Kirby K. Kennelley and Virginia Ann Green are reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

**PACIFIC TELEPHONE & TELEGRAPH
CO. v. PUBLIC UTILITIES COMMISSION OF STATE et al.**

S. F. 17952, 17953.

Supreme Court of California, in Bank.
Feb. 28, 1950.

Rehearing Denied March 27, 1950.

Proceeding by the Pacific Telephone & Telegraph Company, a corporation, against the Public Utilities Commission of the state of California and others, to review orders of the commission prescribing terms on which Pacific could contract with American Telephone & Telegraph Company for certain services. The Supreme Court, Traynor, J., held that commission did not have jurisdiction to prescribe terms on which petitioner could contract with parent company for services to be furnished by that company.

Order in S. F. 17952 and those parts of order brought for review in S. F. 17953 annulled.

Shenk and Carter, JJ., dissented.

1. Public service commissions ⇨7.4

Public Utility Commissions have power to prevent utility from passing on to rate-payers unreasonable costs of materials and services.

2. Public service commissions ⇨6.9

Provision of Public Utilities Act empowering commission to prescribe uniform systems of accounts relates not to what transactions are to be made but how they are to be recorded and does not include by implication power to prescribe terms and conditions of any transaction that will be reflected in accounts. Gen.Laws, Act 6386, § 48.

3. Public service commissions ⇨6.10

Under Public Utilities Act requiring Commission to approve securities issued, commission's approval of securities issued does not operate to deprive minority shareholders of remedies they would otherwise have and commission's power to control expenditures under terms of provision is limited to use to be made of funds raised by securities issued. Gen.Laws, Act 6386, § 52, p. 15.

4. Public service commissions ⇨6.8

Provisions of Public Utilities Act that whenever commission shall find that contracts affecting rates are unjust, or unreasonable, commission shall determine sufficient rates or contracts to be enforced and provision that Railroad Commission is vested with power and jurisdiction to regulate every public utility does not give commission jurisdiction to determine terms on which subsidiary utility may contract with parent company. Gen.Laws, Act 6386.

5. Eminent domain ⇨2(1)

The devotion to a public use by a person or corporation of property held by them in ownership does not destroy their ownership and does not vest title to property in public as to justify, under exercise of police power, taking away of management and control of property from owners without compensation on ground that public convenience would better be served thereby or that owners themselves have proven false or derelict in performance of public duty.

6. Public service commissions ⇨6.7

In absence of an enabling statute meeting requirements of due process, Public Utilities Commission cannot require management to make choice whether profit should be diverted from payment of dividends to finance expansion into fields that utility has not theretofore entered. Gen. Laws, Act 6386.

7. Public service commissions ⇨7.4

In absence of statute granting Public Utilities Commission power to fix minimum rates to prevent injurious competition, a zone of reasonableness exists within which carrier can fix its own rates and it is for management to decide what rates within zone are likely to prove most beneficial to carrier.

8. Public service commissions ⇨6.8

In absence of express statutory authority a Public Service Commission's control over contracts between affiliated Public Utility Corporations is limited to disallowance of excessive payments for purpose of fixing rates. Gen.Laws, Act 6386.

9. Public service commissions ¶6.8

If by a device of a contract for services, parent utility were exacting excessive payments that impaired subsidiary utilities' capital and thus weakened its ability to serve public, Public Utility Commission could disregard separate corporate entities and defeat excessive payments as an illegal dividend. Gen.Laws, Act 6386.

10. Public service commissions ¶6.8

Where payments under license contract by subsidiary public utility to parent company did not impair subsidiary's capital or affect its ability to serve public, in absence of express statutory authority, Public Utilities Commission could not prescribe terms on which subsidiary contracted for services. Gen.Laws, Act 6386, §§ 32, 48, 51, 52, 60, 75; Corporations Code, § 1500.

11. Public service commissions ¶6.8

Where parent utility apportioned cost of service rendered by it to its subsidiaries, contract embodying method cannot be differentiated from contracts by which utilities secured labor, materials and services except on theory that judgment of management was suspect on reasonableness of expenditures in contracts with affiliated corporations. Gen.Laws, Act 6386.

Arthur T. George, Eugene M. Prince, Eugene D. Bennett and Pillsbury, Madison & Sutro, San Francisco, for petitioner.

Everett C. McKeage, Roderick B. Cassidy, Boris H. Lakusta, Hal F. Wiggins, J. Thomason Phelps, Harold J. McCarthy, San Francisco, Emuel J. Forman, Ray L. Chesebro, City Attorney, Los Angeles, Roger Arnebergh, Assistant City Attorney, Los Angeles, Dion R. Holm, City Attorney, San Francisco, John W. Collier, City Attorney, Oakland, and Archer Bowden, Assistant City Attorney, Oakland, for respondents.

TRAYNOR, Justice.

In two petitions for writs of review the Pacific Telephone and Telegraph Company attacks two virtually identical orders of the Public Utilities Commission prescribing the

terms on which Pacific may contract with the American Telephone and Telegraph Company for certain services. Although the two orders grew out of separate rate proceedings, they involve identical issues and may be treated as one.

American owns 87.93 percent of the capital stock of Pacific. The commission found that American dominates Pacific and that the contract between the two, whereby Pacific paid one percent of its gross receipts for the services of American, was not in fact a contract but an arbitrary exaction from Pacific by its controlling parent company. It therefore entered its orders specifying the terms upon which Pacific could continue its service contract with American. They provide: "It Is Hereby Further Ordered that, as applied to its California intrastate operations, applicant, the Pacific Telephone and Telegraph Company, hereafter, shall pay to the American Telephone and Telegraph Company, for services rendered by it or any of its affiliates to applicant, no more than the reasonable cost incurred in the rendition of such services or the reasonable value of said services, whichever is the lesser. That in determining the reasonable value of any services rendered, consideration shall be given, among other things, to what it would reasonably cost applicant to perform such service with its own organization. Services rendered to applicant, which, in the judgment of the Commission, are not reasonably required by applicant shall not be paid for by applicant. Neither applicant nor any officer, agent or servant of applicant, by any device whatsoever or under any pretense or guise, directly or indirectly, shall commit any act or engage in any conduct which shall be calculated to circumvent or evade the intent of this order.

"It Is Hereby Further Ordered that applicant shall file with this Commission, bi-monthly, a verified report showing for the immediately preceding two-calendar-month period all payments made by applicant to the American Telephone and Telegraph Company for services rendered to applicant by said American Telephone and Telegraph Company and/or any of its affiliates, together with an itemization of said services

and the amount paid by applicant for each type of service rendered, such report to be filed not later than forty (40) days after the close of the period which it covers. Said verified report shall show, for each type of service rendered, the total cost incurred by the American Telephone and Telegraph Company or its affiliates in the rendition of said service to applicant, and the payment therefor by applicant on an allocated basis, segregated as to company-wide, total California and California intrastate operations. The first report shall be for the months of January and February, 1949 and shall be filed on or before April 9, 1949.

"It is Hereby Further Ordered that, as applied to its California intrastate operations, the amount of \$2,250,000, on an annual basis, shall be adopted by applicant as the base and starting point for the program and procedure prescribed by this order and applicant shall be entitled to pay, on an annual basis, to American Telephone and Telegraph Company said amount for services rendered to applicant by American Telephone and Telegraph Company and/or its affiliates pursuant to the license contract; provided, however, that said amount shall be adjusted to a lesser or greater amount as the facts and circumstances may warrant, but, in no event, shall applicant pay more than \$2,250,000 on an annual basis without first seeking and receiving the authority of this Commission so to do."

When these orders were entered the difference between the amount Pacific was to pay on the basis of one percent of gross revenue as provided in the license contract and the amount allowed by the commission on an allocated cost basis was approximately \$250,000. The commission was willing to allow payment of \$2,250,000; one percent of gross revenue was approximately \$2,500,000. In these proceedings Pacific is not challenging the power of the Public

Utilities Commission to disallow, for rate fixing purposes, payments to American that it finds excessive.* Pacific contends, however, that the commission has no jurisdiction to prescribe the terms on which it may contract with American.

[1] It is settled that commissions have power to prevent a utility from passing on to the rate-payers unreasonable costs for materials and services. *United Fuel Gas Co. v. R. R. Comm'n*, 278 U.S. 300, 320, 49 S.Ct. 150, 73 L.Ed. 390; *Chicago & Grand Trunk Railway Co. v. Wellman*, 143 U.S. 339, 345-346, 12 S.Ct. 400, 36 L.Ed. 176. To the extent that utilities secure materials and services necessary to their business through contracts made by arms-length bargaining in the open market, the contract price is ordinarily accepted as the proper cost to the utility of the materials and services. Since the advent of the holding company, however, that both controls and provides services for a network of operating utilities, new problems in regulation have arisen. When services are rendered to an operating utility by an affiliated company that owns a controlling fraction of the stock of the operating company, the safeguards provided by arms-length bargaining are absent, and commissions have been vigilant to protect the rate-payers from excessive rates reflecting excessive payments by operating companies to their parents. See, *Western Distributing Co. v. Public Service Comm.*, 285 U.S. 119, 126-127, 52 S.Ct. 283, 76 L.Ed. 655; *Dayton Power & Light Co. v. Public Utilities Comm.*, 292 U.S. 290, 295, 54 S.Ct. 647, 78 L.Ed. 1267. Many state legislatures, not satisfied that the indirect control of payments between affiliated utility corporations through rate regulation was adequate to protect the consumer and investor from the possible abuses that could arise out of contracts between the affiliated corporations, enacted statutes specifically granting to their commissions power to reg-

Co. v. Railroad Comm., 24 Cal.2d 378, 405, 150 P.2d 196; *American Toll Bridge Co. v. Railroad Commission*, 12 Cal.2d 184, 193-194, 83 P.2d 1; *San Joaquin Light & Power Corp. v. Railroad Commission*, 175 Cal. 74, 76-77, 165 P. 16.

* Pacific does not concede that disallowance of any part of the payments was proper; it does not attack the disallowance, however, believing that the court would not consider it in reviewing a rate-fixing order unless the rate finally fixed was confiscatory. See, *Market Street Ry.*

ulate payments under such contracts. See, 49 Harv.L.Rev. 957, 982-989. Similar powers over gas and electric utilities have been given to the Securities and Exchange Commission by the federal Public Utility Holding Company Act of 1935, 15 U.S.C.A. § 79 et seq. See, 49 Harv.L.Rev. 957, 989-993. California, however, has not expressly granted such power to the commission, and it is therefore necessary to determine whether the power may be fairly implied from the powers that have been granted.

The primary purpose of the Public Utilities Act, Gen.Laws, Act 6386, is to insure the public adequate service at reasonable rates without discrimination. *Pacific Telephone & Telegraph Co. v. Eshleman*, 166 Cal. 640, 663, 137 P. 1119, 50 L.R.A., N.S., 652, Ann.Cas.1915C, 882; *Atchison, T. & S. F. Ry. Co. v. Railroad Comm.*, 173 Cal. 577, 582, 160 P. 828, 2 A.L.R. 975; *Southern Pac. Co. v. Railroad Comm.*, 13 Cal.2d 89, 118, 87 P.2d 1055. The Act grants to the commission broad regulatory powers, which may conveniently be divided into two classes. The commission has been given broad powers to regulate the relationship of the utility to the consumer; thus it can determine the services that must be provided by the utility and the rates therefor. It has also been given certain specific powers to regulate the manner in which the utility provides the required services to safeguard the utility's ability to serve the public efficiently at reasonable rates; thus the commission must approve the sale or encumbrance of operative property necessary or useful to the utility in the performance of its duties, § 51, and it must approve the issue of securities and may specify the manner in which funds so raised may be spent. § 52. The Act does not, however, specifically grant to the commission power to regulate the contracts by which the utility secures the labor, materials, and services necessary for the conduct of its business, whether such contracts are made with affiliated corporations or others.

[2] The commission contends that jurisdiction may be implied from the provisions of section 48 of the Act empowering the commission to prescribe uniform systems of accounts. This power, however, relates,

not to what transactions are to be made, but to how they are to be recorded. It enables the commission to keep informed of the financial management of the utility and increases the effectiveness of its other powers. It cannot reasonably be held, however, to include by implication the power to prescribe the terms and conditions of any transaction that will be reflected in the accounts.

[3] The commission contends that jurisdiction may be implied from the provisions of section 52 of the Act requiring commission approval of securities issues. It bases this contention on the premise that, by approval of the securities that Pacific issues, it provides Pacific with a defense to any action a shareholder might bring to prevent abuse of his interests by the management, and that therefore it must have the power to protect minority shareholders from abuses arising out of contracts made with the majority shareholder, American. There is nothing in section 52, however, to indicate that commission approval of securities issues operates to deprive minority shareholders of remedies they would otherwise have. Section 52 provides the extent to which the commission may control expenditures under its terms, and this control is limited to the use to be made of funds raised by securities issues. Pacific, however, is not making these payments from funds so raised.

[4] Section 32 of the Act provides that "Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that the rates * * * charged or collected by any public utility * * * or that the rules, regulations, practices or contracts, or any of them, affecting such rates * * * are unjust, unreasonable, discriminatory or preferential, or in anywise in violation of any provision of law * * * the commission shall determine the just, reasonable or sufficient rates * * * practices or contracts to be thereafter observed and in force, and shall fix the same by order as hereinafter provided * * *." Section 35 of the Act provides for similar powers over practices of a utility relating to the services it renders. Section 31 of the

Act provides that "The railroad commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in the state and to do all things, whether herein specifically designated or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction." It is contended that the grants of regulatory power under these sections give the commission jurisdiction to determine the terms on which Pacific may contract with American and that the license contract has so much effect on the rates and services of Pacific that it may be regulated directly by the commission.

[5] Almost every contract a utility makes is bound to affect its rates and services. Moreover, the question whether a contract or practice is reasonable is one on which, except in clear cases, there is bound to be conflicting evidence and considerable leeway for conflicting opinions. The determination of what is reasonable in conducting the business of the utility is the primary responsibility of management. If the commission is empowered to prescribe the terms of contracts and the practices of utilities and thus substitute its judgment as to what is reasonable for that of the management, it is empowered to undertake the management of all utilities subject to its jurisdiction. It has been repeatedly held, however, that the commission does not have such power. "And, finally, it may not be amiss to point out that the devotion to a public use by a person or corporation of property held by them in ownership does not destroy their ownership, and does not vest title to the property in the public as to justify, under the exercise of the police power, the taking away of the management and control of the property from its owners without compensation, upon the ground that public convenience would better be served thereby, or that the owners themselves have proven false or derelict in the performance of their public duty. Any law or order seeking to do this passes beyond the ultimate limits of the police power, however vague and undefined those limits may be." *Pacific Telephone & Telegraph Co. v. Eshleman*, 166 Cal. 640, 665, 137 P. 1128; *Atchison T. & S. F. Ry. Co. v. Railroad Comm.*, 173 Cal.

577, 583, 160 P. 828, 2 A.L.R. 975; *Hollywood Chamber of Commerce v. Railroad Comm.*, 192 Cal. 307, 310, 219 P. 983, 30 A.L.R. 68; *Southern Pac. Co. v. Railroad Comm.*, 13 Cal.2d 89, 118, 87 P.2d 1055.

[6,7] It might, for example, be wise business judgment to divert profits from the payment of dividends to finance expansion into fields that the utility has not theretofore entered. In the absence of an enabling statute meeting the requirements of due process, however, the commission cannot require management to make such choices. *Hollywood Chamber of Commerce v. Railroad Comm.*, 192 Cal. 307, 219 P. 983. Similarly, in the absence of a statute granting the commission the power to fix minimum rates to prevent injurious competition, both this court and the commission have recognized a "zone of reasonableness" within which a carrier can fix its own rates. It is for the management to decide what rates within that zone are likely to prove most beneficial to the carrier. *Southern Pac. Co. v. Railroad Comm.*, 13 Cal.2d 89, 118-119, 87 P.2d 1055.

Again, there is great public interest in the relations between labor and management, for wages invariably affect rates, and disputes over them or other matters are bound to affect services. Accordingly there has been considerable state and federal legislation to diminish economic warfare between labor and management. In the absence of statutory authorization, however, it would hardly be contended that the commission has power to formulate the labor policies of utilities, to fix wages or to arbitrate labor disputes.

In other jurisdictions the courts have generally held in interpreting statutes essentially like that of California that the commission's control over contracts affecting rates and services is limited to regulation of contracts that directly affect the service rate-payer will receive at a particular rate. *Illinois Commerce Commission ex rel. East St. Louis, C. & W. Ry. v. East St. Louis & C. Ry. Co.*, 361 Ill. 606, 198 N.E. 716, 719; *Philadelphia City Passenger Ry. Co. v. Public Service Commission*, 271 Pa. 39, 114 A. 642, 647-648. Thus,

the division of a city into various zones by a transit company to fix fares directly affects rates. Contracts whereby the rate drops as consumption increases or whereby the liability of a carrier for loss or damage is limited to a declared value of the goods shipped in consideration of a lower rate directly affect rates. Such contracts and practices affect the relationship of the utility to the consumer, not its relationship to those who supply it with materials and services.

It is contended, however, that the license contract between Pacific and American is not like ordinary contracts through which utilities secure materials and services; that because Pacific and American are affiliated corporations and because American dominates Pacific, the commission may prescribe the terms of the contract between them.

[8] In the absence of express statutory authority it has generally been held that a commission's control over contracts between affiliated corporations is limited to disallowance of excessive payments for the purpose of fixing rates. *Philadelphia City Passenger Ry. Co. v. Public Service Commission*, 271 Pa. 39, 114 A. 642, 647-648; *State ex rel. City of St. Joseph v. Public Service Commission*, 325 Mo. 209, 30 S.W. 2d 8, 14; *Lone Star Gas Co. v. Corporation Commission of Oklahoma*, 170 Okl. 292, 39 P.2d 547, 553-554; see also, *Columbus Gas & Fuel Co. v. Public Utilities Commission*, 292 U.S. 398, 414-415, 54 S.Ct. 763, 78 L.Ed. 1327, 91 A.L.R. 1403; 49 Harv.L. Rev. 957, 985; 48 Yale L.J. 1015, 1020. In the past the California commission has recognized similar limitations upon its powers. "All this Commission is able to do is to regulate the amount that is to be allowed in operating expenses as payment to the parent company for services rendered, and this amount should be in direct proportion to the value of the services received." (In re *Southern California Telephone Co.*, 21 C.R.C. 274, 282.) In *San Diego v. San Diego Consolidated Gas and Electric Company*, 39 C.R.C. 261, where the operating company was admittedly dominated by its parent, the commission disallowed part of

the intercompany payments in fixing new rates, but did not order the cessation of such payments. In *Re Pickwick Stages System*, 31 C.R.C. 746, the commission under section 52 of the Act limited the amount an operating company could pay its holding company out of funds derived from a new securities issue for equipment manufactured by the holding company, but did not prevent larger payments, requiring only that anything exceeding the limits it set be charged to surplus.

The commission has thus long been conversant with the problems presented by affiliated corporations in the field of utility regulation. The instant case is apparently the first in which it has attempted to prescribe the terms and conditions of contracts between affiliates. The policy of the commission in the past not to prescribe the terms of contracts between affiliated corporations is consistent with the provisions of the Public Utilities Act. There is nothing in the Act to suggest that the contracts of public utilities affecting rates and services are subject to greater regulation when they are between affiliated corporations than when they are not.

Moreover, there is no basis for such broad jurisdiction in the principles governing the disregard of a corporate entity. In the present case the commission is not disregarding completely the separate entities of Pacific and American. It does not seek to exercise regulatory jurisdiction directly over American, under the theory that American is in fact the operating utility subject to its jurisdiction. It recognizes that American provides Pacific with valuable services for which Pacific should pay. It would disregard only the terms of the contract by which it is determined how much Pacific should pay for the services it receives, and thus substitute its judgment for that of the management as to the reasonable amount and the method of its computation. Thus the commission is seeking to disregard the separate corporate entities, not to exercise more effectively its existing jurisdiction, but to extend its jurisdiction.

[9,10] By contracting with American, Pacific is not attempting to evade the juris-

diction of the commission. It is not making these payments from funds derived from securities issues, or attempting to evade the commission's regulatory powers over the expenditures of such funds. (See, *In re Pickwick Stages System*, 31 C.R.C. 746, 753-754.) Nor is it attempting to evade the prohibition of section 1500 of the Corporations Code against the impairment of capital by the payment of illegal dividends disguised as contract payments. Under sections 60 and 75 of the Act the commission is empowered to stop illegal practices of utilities. If by the device of a contract for services, American were exacting excessive payments that impaired Pacific's capital and thus weakened its ability to serve the public, the commission could disregard the separate corporate entities and treat the excessive payments as an illegal dividend. *Ohio Central Telephone Corp. v. Public Utilities Com'n*, 127 Ohio St. 556, 189 N.E. 650; see, *Ballantine on Corporations* (Rev.Ed.) § 142, p. 330; cf., *Western Canal Co. v. Railroad Commission*, 216 Cal. 639, 652, 15 P.2d 853. We do not have such a case before us, however, for the payments under the license contract are not impairing Pacific's capital or affecting its ability to serve the public. Moreover, in fixing Pacific's rates the commission may disallow expenditures that it finds unreasonable, thus insuring that any excessive costs will be met from Pacific's profits. The effect of the payments on rates and services is no greater than in any other case where the commission and management disagree on the reasonableness of an expenditure, and the management concludes that it is good business judgment to make such payments from its profits despite the fact that it cannot recoup them from its rate payers.

[11] In developing a nationwide telephone service, American has adopted the legally sanctioned practice of conducting its local operations through subsidiary operating companies. It employs a method it considers reasonable in apportioning the costs of the services rendered by it to its subsidiaries among them. The contract embodying that method cannot be differentiated from other contracts by which utilities secure labor, materials, and services, except

on the theory that the judgment of management is suspect on the reasonableness of expenditures in contracts with affiliated corporations as it is not in other contracts. There is no public policy against affiliated corporations, however, and the commission can treat them differently only to the extent the Legislature so provides or to the extent that they are used as a device to defeat the exercise of powers the commission has been granted. The Public Utilities Act is silent on the question of affiliated corporations, and only the Legislature can properly decide whether they present such dangers of abuse that the commission should have broader regulatory powers over them than it now has.

The order in S.F. 17952 and those parts of the order brought here for review in S.F. 17953 are annulled.

GIBSON, -C. J., and EDMONDS, SCHAUER and SPENCE, JJ., concur.

SHENK, Justice.

I dissent.

Under the plenary power granted to the legislature by Section 22 of Article XII of the Constitution it was certainly competent by appropriate legislation to confer upon the commission the authority to supervise contractual relationships such as existed between The Pacific Telephone and Telegraph Company and its owner and corporate master, The American Telephone and Telegraph Company, especially insofar as contracts affecting rates are concerned. The legislature has effectively conferred such power on the commission by section 32 of the Public Utilities Act. By that section the commission was expressly authorized to find any existing contract affecting rates to be unreasonable. This power could be exercised as to expenditures under existing contracts in excess of payments properly allowable as part of the rate base. But more pertinently, that section also expressly authorized the commission to determine the reasonableness of contracts affecting rates thereafter to be observed by the utilities under its jurisdiction. It is this power that the commission is seeking to exercise by the orders under review; and in this respect it

is reinforced by the general provisions of section 31.

It may be assumed that the commission would be without power to prescribe in advance the terms and conditions of a contract and payments thereunder entered into between the petitioner and another in the normal course of business in which both parties are acting independently and at arm's length. But the contract here required to be observed by the petitioner is not of that character. The independence of action which is essential in the execution of contracts known to the law is not present. The real question as I see it is whether the commission has exceeded its jurisdiction in making the particular orders and not, as petitioner contends, whether it was wholly without power to make them.

The facts do not show the exercise of broader regulatory power than the commission possesses. Nor is this a case where the petitioner is deprived of the management and control of its property. We have here nothing more than a regulation guarding against future excessive payments affecting rates which could otherwise be imposed upon the petitioner without its voluntary bargaining participation. By its order the commission is not exceeding its jurisdiction but is merely making its jurisdiction effective. In my opinion the particular contract here ordered to be observed is just such a contract as is contemplated by our law and sound public policy to be subject to supervision by the commission in the manner proposed. I would affirm the orders.

CARTER, Justice.

I dissent.

The question here presented is not complex. The Pacific Telephone and Telegraph Co., an operating communications utility in California, is completely dominated and controlled by the American Telephone and Telegraph Company, a New York corporation, whose main function is to hold stock in and furnish various services to local telephone operating corporations throughout the country, most of which are controlled by it through stock ownership. American

enters into purported license fee contracts with its numerous affiliates, including Pacific, under which the affiliates pay a percentage of their gross revenue for the services to be rendered by American. It is conceded that in fixing rates for Pacific, our Public Utilities Commission may ignore the percentage basis of compensation under those contracts and allow only so much as is the reasonable value of such services or the cost thereof to American. The sole question is whether the commission has authority to approve or disapprove such contracts. I believe there can be no doubt of such power. It arises (1) by necessary implication, and (2) by the wording of the Public Utilities Act.

On the first proposition, there are several important considerations which must be weighed. It has been aptly said: "Contracts with operating companies range in subject from a single activity to a comprehensive scheme giving virtual domination over the policies of the subsidiary utility. But the services, even when enumerated at length, are commonly described in such general terms that no clear picture of those actually rendered can be obtained from examination of the contracts * * *

"The profits accruing from the servicing relationship invite inquiry into the possibilities of abuse inherent in the holding company structure. In the control possessed by the holding company, often exercised through common officers or interlocking directorates, lies the power to dictate terms and the consequent danger of unreasonable exactions. The modern super-holding company system itself furnishes a strong incentive for such exactions. Control over operating companies through a relatively small investment may be effected by the interposition of subholding units, the financing of which can be facilitated by the issuance of bonds and preferred stock * *

"Exploitation of operating companies is detrimental to both consumer and investor. Although it is seemingly immaterial to the consumer whether the parent obtains income through high service charges or through dividends resulting from more economical operations, in fact excessive charges, unless disallowed by public utility

commissions, may adversely affect him. Overpayments for management services result in the swelling of operating expenses. When resorted to as a screen for profits beyond a fair return, they can prevent a rate reduction, or, by so minimizing the return that only small profits or none at all are shown, can result in an increase. And the sums exacted may be so great as to impair service to the public through lack of funds for maintenance or additions. Furthermore, overcharges for construction or engineering services, reflected in the operating company's capital account, have a dual effect upon rates: they broaden the base upon which a fair return must be earned, and enhance costs of operations by enlarging the amount annually charged to depreciation, thereby increasing the rate required to yield an adequate return * * *

"The disallowance of operating expenses increases the net operating revenue for the purposes of determining the fairness of the return in a rate case. This increase tends to subject the utility to lower rates, with the possible consequence of an ultimate decrease in income that may force a comparable reduction in expenditures." (Harv. Law Rev. 957, 959, 978-981, 986.)

It has also been said: "It may be asked why should the commission, as representative of the consumers be concerned over a 'raid on the treasury of the operating utility.' Directly the consumers will not be affected whether the utility is solvent or insolvent. Their rates are based upon a fair return on a fair value and it should not matter to them who gets it. Unfortunately, this argument overlooks the simple facts that an insolvent utility has no credit with which to obtain the capital necessary for the continuous expansion of service demanded from a utility under modern conditions and that operation of a utility by receivers seems usually to be thought to result in higher operating expenses than would ordinarily be incurred." (Regulation of Utility Contracts, 20 St. Louis Law Rev. 1, 58.) Those considerations point up the vital importance of the power of the commission to disapprove such contracts as a part of rate regulation and of the necessity that the ability of the utility to serve the

consumers be not impaired. I cannot believe that the Legislature intended to leave the commission impotent to cope with those conditions. It may be that some measure of protection is afforded by the power to refuse to recognize the license fee contract when fixing rates, but having that power, it of necessity follows that they may lock the door before the horse is stolen. If they may affect the utility management indirectly by subsequent action, surely they may take precautionary measures in advance. The Alabama Utilities Commission has pertinently observed in this connection: "We cannot conceive that it will be contended that a Commission is without authority to halt a raid on the treasury of the operating utility on the plea that it has no right in law to manage the property. From our point of view, it is not an assertion of management, but rather an assertion of reasonable control over practices which the Commission has a right to prevent and should prevent before the injury has been done if it is possible for us to arrive there in time." (See, *Re Southern Bell Tel. & Tel. Co.*, P.U.R. 1932E, 207.) Certainly it was intended that the commission would have the power incident, and indeed vital, to protect the consumer from improvident waste of funds to the detriment of the service. They surely have the power to accomplish directly that which they may do by indirection. While it may be that there is no showing in the case at bar that the payments to American here involved will seriously jeopardize Pacific's consumer service capacity, that is not necessary, for the situation is so fraught with potential and inherent dangers that this court should not overrule the commission's judgment that preventive advance action is necessary. It must be remembered that these license fee contracts are not true contracts made at arm's length or on an open market. They are between corporations, one of which is controlled by the other. As such they are subject to suspicion and therefore present dangerous potentialities. It seems plainly obvious to me that if payments for such services are regularly supervised by the commission, it will not only inure to the consumer's benefit, but will also put the utility in the advantageous po-

sition of knowing where it stands, thus escaping the risk of making excessive payments which will not be allowed in its rate base. That the commission has such implied power is squarely declared by the Public Utilities Act. "The railroad commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in the state and to do all things, whether herein specifically designated or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction." Public Utilities Act, Stats. 1915, p. 115, sec. 31, Deering's Cal.Gen. Laws No. 6386.

Secondly, it is clear that section 32 of the Public Utilities Act, quoted in the majority opinion, must be interpreted as empowering the commission to regulate the purported contracts here considered. The literal wording thereof requires it.

Fear is expressed that if the instant contract is subject to approval by the commission, all other contracts or expenditures of a utility may be scrutinized in advance. Whether or not that fear is well founded is not necessary to consider. I say only that the license fee purported contract between the operating utility and its dominating father, Pacific and American, may be so treated. There is a clear difference between such arrangements and others. They are not true contracts made at arm's length. They are definitely subject to suspicion and potent with possibilities adverse to the interests of the consumers.

It must be conceded that the contract here in question was executed by officials of Pacific who were elected by American as the principal stockholder of Pacific and owe their allegiance to American. To say that such a contract is beyond the regulatory power of the Public Utilities Commission, when it may endanger the ability of Pacific to serve its customers, is a step backward in the public utility regulation and may open the door to abuses seriously detrimental to those dependent upon service from public utilities. While I think it is clear that the Public Utilities Act expressly empowers the commission to regulate such contracts in the public interest, there can be no question that it was the intention of the Legislature

to confer upon the commission all the power necessary to protect the public interest. This, the majority overlooks in placing a strict and strained construction upon the provisions of the act in order to arrive at the conclusion reached.

I would deny the writs and affirm the orders under review.

Rehearing denied; SHENK and CARTER, JJ., dissenting.



34 Cal.2d 858

SMITH v. LAGERSTROM et al.

L. A. 21207.

Supreme Court of California, in Bank.

March 10, 1950.

Action by Allen Dale Smith against Russ Lagerstrom and another, to recover on a promissory note. From a judgment upon a directed verdict of the Superior Court, Santa Barbara County, Ernest D. Wagner, J., in favor of the plaintiff, the defendants appealed. The Supreme Court, Edmonds, J., held that parol evidence was admissible to establish restrictions upon the authority of the plaintiff, as payee, to complete the note, which was incomplete when delivered.

Judgment reversed.

Schauer, J., dissented.

For prior opinion see 208 P.2d 387.

1. Alteration of instruments ⇨20

A promissory note to which terms have been added in excess of authority is void in the hands of a holder not in due course. Civ.Code, § 3095.

2. Evidence ⇨428

In action on note which was incomplete when delivered, parol evidence was admissible to establish restrictions upon authority of payee to complete the note, and that note had not been completed in accordance with the authority given. Civ.Code, § 3095.

J. Vincent Wood, Santa Barbara, and Gordon M. Snyder, Los Angeles, for appellants.

Canfield & Westwick, Santa Barbara, for respondent.

EDMONDS, Presiding Justice.

The appeal from a judgment upon a directed verdict in favor of Dale Smith, the payee of a promissory note, presents for decision only the question as to the admissibility of certain excluded evidence offered by the makers of the instrument.

Admittedly, when the note was delivered, it was in the following form:

"\$6,000.00 January 3, 1947
_____after date we promise
to pay to the order of Allen Dale Smith Six
Thousand no/100 Dollars at_____.
Value received with interest at the rate
of _____ per annum.
 /s/ Russ Lagerstrom
 /s/ Marjorie Lagerstrom"

Smith testified that when he received the note he filled in the three blanks with the following words, respectively: "On demand"; "Santa Barbara, California"; and "seven per cent".

By answer to a complaint upon a cause of action for failure to pay the amount due upon the note, the Lagerstroms generally denied the allegations of Smith and also set up the affirmative defense that he had no authority to add to it the words "on demand". They assert that Smith was authorized only to make the note payable from the profits of the "Seven Seas Restaurant" and they unsuccessfully offered evidence in support of the issue tendered by their pleading. The adverse ruling sustained the objection of Smith that such evidence would violate the parol evidence rule.

The Lagerstroms seek a reversal of the judgment against them upon the grounds that the trial court abused its discretion in denying the motion made during the trial for leave to amend their answer to plead an affirmative defense of fraud in the procurement of the note. They also contend that under sec. 3095 of the Civil Code, sec. 14 of the Negotiable Instrument Law, they were entitled to introduce evidence as to the limited authority of Smith to add to the terms of the note as executed by them.

Another point urged is that there is a fatal variance between the incomplete note pleaded in *haec verba* and the completed one introduced in evidence.

In support of the judgment, Smith argues that the trial court acted within its discretion in denying the motion to amend during the trial. His position is that the terms of a promissory note can no more be varied by parol evidence than the terms of any other written agreement. As he analyzes the rights of the parties, the differences between the note pleaded in *haec verba* in the complaint and the note introduced in evidence do not constitute a material variance. He declares that if he had left the instrument in the form in which it was delivered to him he could have recovered upon it. For that reason, he says, the effect of the note was not changed by the additions in the blank spaces of the place and time of payment and the rate of interest to be charged.

Section 3095 of the Civil Code, N.I.L. sec. 14, provides:

"Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time."

[1] A promissory note to which terms have been added in excess of authority is void in the hands of a holder not in due course. *Stout v. Eastern Rock Island Plow Co.*, 202 Ind. 517, 176 N.E. 844, 75 A.L.R. 1386; *Britton, Bills & Notes*, sec. 84, pp. 331, 332. "The law is established in California that when an instrument is delivered which contains a blank, the person in possession thereof has *prima facie* authority to complete it by filling in the blank. Such an instrument, however, when completed

may be enforced against any person who became a party thereto prior to its completion only when the blank had been filled in strictly in accordance with any authority given and within a reasonable time." *White v. White*, 39 Cal.App.2d 57, 60, 102 P.2d 432, 434, citing Civ.Code, sec. 3095; 1 Cal.Jur. (1921), sec. 18, p. 1084, and 1 Cal.Jur. Ten-year Supp. (1936), p. 259, sec. 18. "A blank in a negotiable instrument must be completed within a reasonable time, sec. 3095, Civ.Code. The determination of the question what is a reasonable time depends upon the facts of each particular case * * * and the trial court's determination * * * will not be disturbed on appeal if there is substantial evidence to sustain such finding. * * *" *White v. White*, supra, 39 Cal.App.2d at page 61, 102 P.2d at page 434.

[2] In accordance with that rule, the parol evidence offered by the Lagerstroms would, if believed by the trier of fact, render the note unenforceable by Smith. To that extent, therefore, evidence as to restrictions upon the authority of the payee to complete a note by specifying terms or conditions not placed in it by the maker is admissible for the purpose of showing the extent of that authority, regardless of the fact that such evidence may tend to contradict the terms implied in the instrument by law. *White v. White*, supra; *Dolan v. Carmel Canning Co.*, 71 Cal.App. 197, 202, 234 P. 926; *Equitable Trust Co. v. Lyons*, 72 Misc. 49, 129 N.Y.S. 79; *Tremont Trust Co. v. Noyes*, 246 Mass. 197, 206, 141 N.E. 93.

If the proffered evidence showed that Smith was authorized only to make the note payable from profits of the "Seven Seas Restaurant", he cannot recover upon the ground that he might have enforced the note in its original form. If by the agreement of the parties, the time and manner of payment of the note was restricted to the proceeds of a particular fund, their failure expressly to state that requirement gave Smith no right to place a different condition in a blank space in the instrument.

It would be anomalous to hold that a maker is prevented by the parol evidence

rule from introducing evidence tending to show lack of authority to add to a note, where the statute, Civil Code, sec. 3095, expressly provides that the delivery of the instrument in incomplete form is only " * * * prima facie authority to complete [a note] by filling up the blanks * * *." The use of the term "prima facie" contemplates the admission of evidence tending to prove the contrary. Were it otherwise, the statute would have used the words "conclusive presumption" or some similar term. The Legislature further qualified the power to add terms or conditions by providing that the payee has prima facie permission to complete the note only if he acts "strictly in accordance with the authority given and within a reasonable time." Only by evidence directed to the issue as to the extent of the authority given can a trial court determine whether the blanks were filled "strictly in accordance with the authority given * * *."

The judgment is reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concur.

SCHAUER, Justice (dissenting).

On its face the instrument was a complete and unconditional contract; it does not appear to have been "wanting in any material particular" (see Civil Code, § 3095) when it was delivered. The respondent, therefore, was not authorized to fill in any blanks or to alter such instrument in any way. The additions made by him were entirely immaterial and, being both unauthorized and immaterial, should be disregarded.

The majority holding, reduced to head-note concision, means this: the maker of a promissory note when sued for payment may plead and prove that, notwithstanding its prima facie unconditional terms, the instrument is in truth payable only from a special fund; i. e., even though the instrument on its face is a complete and unconditional contract to pay money, the maker may show that there was an oral agreement by the payee to add to the note a provision making it payable only from a particular fund.

This ruling, like that of the majority in *Simmons v. Calif. Institute of Technology* (1949), 34 Cal.2d 264, 209 P.2d 581, is inconsistent with the earlier views on parol evidence exemplified by *Lindemann v. Coryell* (1922), 59 Cal.App. 788, 212 P. 47. See also the dissent in the *Simmons* case, 209 P.2d 597.

In my opinion the trial court properly excluded the oral evidence offered to alter the written instrument in the particular above related, and I would affirm the judgment.



34 Cal.2d 782

In re WILLIS' ESTATE.

KUCHEL, Controller, v. WILLIS.

L. A. 20696.

Supreme Court of California, in Bank.

Feb. 28, 1950.

Rehearing Denied March 27, 1950.

Proceeding in the matter of the estate of Charles Golden Willis, also known as Charles G. Willis, and as C. G. Willis, deceased, on petition filed by Bertram Paul Willis, as executor of decedent's estate, against Thomas H. Kuchell, Controller of the State of California, for refund of a portion of inheritance tax paid on bequest on shares of corporate stock. The Superior Court, Los Angeles County, Kurtz Kauffman, J., entered an order directing a refund as prayed and the controller appealed. The Supreme Court, Edmonds, J., held that under statute providing if any tax has been paid to county treasurer on a transfer subject to a contingent incumbrance or any contingency which might diminish estate or interest of transferee, and gift was valued without allowance for incumbrance or contingency, on taking effect of incumbrance or happening of contingency person who paid tax is entitled to refund, federal income tax deficiency levied against corporation after state inheritance tax on transferred stock in corporation, passing under will, had been fixed did not constitute a "contingency" which burdened transferee's interest in corporation.

Order reversed.

Carter, Schauer and Shenk, JJ., dissented.
Prior opinion, see 203 P.2d 91.

1. Taxation ☞904

Under statute providing for inheritance tax refund where gift is valued without allowance for incumbrance or "contingency" which subsequently happens, burdening or diminishing interest of transferee, quoted word means a technical contingency of type which may divest or diminish an estate as in case of contingent remainder. Revenue and Taxation Code, § 14401.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Contingency".

2. Taxation ☞904

Under statute providing for inheritance tax refund where gift is valued without allowance for a "contingency" which subsequently happened burdening or diminishing interest of transferee, refund is allowed only on contingency effecting quantum of an estate rather than pecuniary value of estate. Revenue and Taxation Code, § 14401.

3. Taxation ☞904

Statute providing for inheritance tax refund where gift was valued without allowance for a contingency which subsequently happened burdening or diminishing interest of transferee does not state a broad equitable policy but lays down a narrowly limited rule and a specific time limit within which a tax refund may be obtained under specified circumstances. Revenue and Taxation Code, § 14401.

4. Taxation ☞904

Federal income tax deficiency levied against corporation after state inheritance tax on transfer of stock in corporation passing under will had been fixed and paid did not constitute a "contingency" which "burdened" and "diminished" legatee's interest in corporation under statute providing for inheritance tax refund. Revenue and Taxation Code, §§ 14361, 14401, 14506 et seq., 14672.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Burdened" and "Diminished".

James W. Hickey, Chief Inheritance Tax Attorney, Sacramento, Morton L. Barker, Los Angeles, and Raymond G. LaNoue, Deputy Inheritance Tax Attorneys, and Joseph D. Lear, Assistant Inheritance Tax Attorney, Sacramento, for appellant.

Arnold Praeger, Los Angeles, and Laura O. Coffield, San Luis Obispo, for respondent.

EDMONDS, Justice.

The appeal of the Controller of the State of California from an order granting a refund of inheritance tax is based upon an agreed statement of facts and presents for decision only a question of statutory interpretation.

Bertram Paul Willis was bequeathed 691 shares of common stock of C. G. Willis & Sons. The inheritance tax appraiser fixed the value of the stock according to a balance sheet submitted by the corporation showing its assets and liabilities as of the date of testator's death and Willis paid the tax found to be due upon the property bequeathed to him.

A few months later, the Commissioner of Internal Revenue levied against C. G. Willis & Sons a deficiency income tax for previous years and it was paid. It is agreed that if this had been determined at, or prior to, the time the inheritance tax appraiser made his appraisal, he would have taken such deficiency into consideration in determining the value of the stock and the inheritance tax due from Willis would have been \$1,335.22 less than the amount which he paid.

Upon learning these facts, Willis filed a petition for a refund of the amount of the asserted overpayment. The petition was granted and the appeal is from that order.

Section 14401 of the Revenue and Taxation Code provides: "If any tax has been paid to the county treasurer on a transfer subject to a contingent incumbrance or any contingency which might burden, abridge, defeat, or diminish the estate or interest of the transferee, and the gift was valued without allowance for the incumbrance or contingency, upon the the taking effect of the incumbrance or the happening

of the contingency the person who paid the tax is entitled to a refund * * *." The controller contends that this section is inapplicable to the facts of the present case because the taxable transfer of the shares of stock was of the entire interest of the testator and there was no contingency or contingent incumbrance restricting the legatee's full enjoyment and ownership of such shares. Willis argues that the income tax assessment was an unknown contingency which necessarily affected the intrinsic value of the shares and that the equitable basis of the code section authorizes a refund to correct the valuation of the stock.

Section 14401 is based upon a statute enacted in 1893, Stats.1893, ch. 168, sec. 2, p. 193, which provided: "When any grant, gift, legacy, or succession upon which a tax is imposed * * * shall be an estate, income, or interest for a term of years, or for life, or determinable upon any future or contingent event, or shall be a remainder, reversion, or other expectancy, real or personal, the entire property or fund by which such estate, income, or interest is supported * * * shall be appraised * * * at what was the market value thereof * * * provided, that the person or persons * * * beneficially interested * * * may elect not to pay the same until they shall come into the actual possession or enjoyment of such property [in the event a bond is posted]." Obviously, this section was designed to regulate the taxation of presently enjoyed interests and contingent remainders or future estates. If the interest subject to a tax was determinable by a contingent event, the assessee might withhold payment of it until that event occurred.

The same language was carried into the amendment of the section made in 1895, Stats.1895, ch. 28, sec. 1, p. 33. Each of these statutes was entitled "An act to * * * establish a tax on collateral inheritances, bequests, and devises." Considering the purpose and scope of the legislation, unquestionably the term "collateral" was used to call attention to the fact that it applied to present and future estates including, in the later category, a contingent interest.

The quoted language was retained by the legislature in 1905, Stats.1905, ch. 314, secs. 5, 27, pp. 343, 250, and again in 1911, Stats. 1911, ch. 395, secs. 5, 28, pp. 716, 727. In each of these years the statute was re-enacted. The 1911 version of it, *supra*, at page 720 et seq., reads: "In estimating the value of any estate or interest in property, to the beneficial enjoyment or possession whereof there are persons * * * presently entitled thereto, no allowance shall be made on account of any contingent incumbrance thereon, nor on account of any contingency upon the happening of which the estate or property or some part thereof or interest therein might be abridged, defeated or diminished; *provided, however*, that in the event of such incumbrance taking effect *as an actual burden* upon the interest of the beneficiary, or in the event of the abridgement, defeat or diminution of said estate or property or interest * * * a return shall be made to the person properly entitled thereto of a proportionate amount of such tax * * * or so much as will reduce the same to the amount which would have been assessed on account of the actual duration or extent of the estate or interest enjoyed. * * * [When] the rights, interest or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible * * *."

It is manifest that the legislature, in using the word "contingencies," was referring to a contingent interest in property which might affect " * * * the actual duration or extent of the estate of interest enjoyed. * * *" by the one presently having possession or enjoyment. The word was used in its technical meaning, and described something by which rights, interests or estates might be " * * * created, defeated, extended or abridged," as in the case of a contingent remainder.

When the Act was repealed and re-enacted in 1913, Stats.1913, ch. 595, secs.

9, 26, pp. 1071, 1083, the provisions last quoted were left intact. Once again, the legislature provided, in effect, that one presently enjoying an estate would not be permitted a tax allowance because of the existence of a contingent interest in another, but that in the event the contingency occurred and effected " * * * the abridgement, defeat or diminution of said estate or property or interest * * *", the taxpayer would receive a proportionate return of the tax paid upon the market value of the whole estate.

A 1915 amendment, Stats.1915, ch. 198, sec. 2, p. 436, retained the same language as did re-enactments made in 1917, Stats. 1917, ch. 589, secs. 8, 25, pp. 887, 901; in 1921, Stats.1921, ch. 821, secs. 8, 25, pp. 1507, 1522; in 1927, Stats.1927 ch. 646, sec. 4, p. 1097; in 1929, Stats.1929, ch. 844, sec. 9½, p. 1842, and in 1935, Stats. 1935, ch. 358, secs. 8, 25, pp. 1276, 1292. Subsequent amendments, Stats.1937, ch. 296, sec. 2, p. 651 and Stats.1941, ch. 833, sec. 2, p. 2390, continued the same provisions.

Effective July 1, 1945, these provisions were transferred into the Revenue and Taxation Code, Stats.1943, ch. 658, sec. 1, p. 2308. Section 13956 of that code includes some of the former statute. It provides: "In determining the value of any estate or interest to the beneficial enjoyment or possession of which there is a person presently entitled, no allowance is made on account of any contingent incumbrance on the estate or interest, nor on account of any contingency upon the happening of which the estate or interest, or some part of it, might be abridged, defeated, or diminished." This is a part of the statute of 1911 retained as Section Eight of the 1935 Act.

That part of Section Eight commencing with the words, "provided however," is now included in Section 14401 of the Revenue and Taxation Code, which is the basis of the present controversy. In essence, that section provides, as it has since 1911, that one who has paid taxes upon a transfer subject to a " * * * contingent incumbrance or any contingency which might burden, abridge, defeat, or diminish the estate

or interest of the transferee * * * is entitled to a refund upon the happening of the contingency.

[1] The provisions of the Revenue and Taxation Code "in so far as they are substantially the same as existing statutory provisions relating to the same subject matter shall be construed as restatements and continuations, and not as new enactments." Revenue and Taxation Code, sec. 2. Also, Section 14401, which is the second portion of Section Eight of the 1935, Act, must be read in conjunction with Section 13956; also a part of the old section. When considered together, and in the light of the historical development of the legislation, it becomes clear that the "contingency" applicable under Section 14401, is the technical contingency of the type which may vest, divest or diminish an estate, as in the case of the contingent remainder.

Clearly, since 1893 when the legislature undertook to specify the tax obligations of one succeeding to an estate subject to divestment upon the occurrence of an event, it used the word "contingency" in the sense usually employed in conveyancing, and with reference to the divesting or diminution of a presently vested or enjoyed estate by the vesting or coming into enjoyment of a contingent future estate. This is apparent from the use of the term "collateral estates" in the early statutory title, and by the general context of the legislation which repeatedly spoke of "beneficial enjoyment of possession of which there is a person presently entitled." Under such circumstances, "no allowance [was made] on account of any contingent incumbrance on the estate or interest, nor on account of any contingency upon the happening of which the estate or interest, or some part of it, might be abridged, defeated, or diminished." The words "abridged, defeated, or diminished" are traditional terms utilized by a conveyancer or testator in the creation of a contingent estate or the reservation of a reversionary interest. Of interest, if not authority, is the marginal heading, "Life Estates," opposite the text of the early statutes beginning with that of 1893.

Considering the text of the legislative declaration in the light of its long statutory

history, obviously the word "contingency" should be construed as applying to the *quantum* of the taxable estate, which is its time of continuance, or degree of interest, as in fee, during life or for years (See Bouvier's Law Dictionary, Rawle's Third Revision, p. 655), rather than the *pecuniary value* of the estate. It is the occurrence of a contingency abridging, defeating, or diminishing the *quantum* of the estate, which warrants a refund of a part of the tax paid, rather than the occurrence of some contingency which reduces the pecuniary value of the property in which, it develops, the taxpayer does not own the absolute estate.

This construction of Section 14401 is supported by the New York decisions, which are persuasive in view of the fact that the first Inheritance Tax Law of California, Stats. 1893, Chap. 168, was modeled on the New York Act of 1887, Dos Passos on Inheritance Tax Law, 2d Ed. 1895, p. 23. The early New York Statutes have been " * * * criticized as being imperfect and impracticable of enforcement in many instances, and especially with respect to the taxation of contingent remainders or future estates. * * * " Dos Passos, *supra*, p. 23. The courts recognized the early statute of that state as involving problems connected with contingent remainders, *In re Curtis*, 142 N.Y. 219, 223, 36 N.E. 887 *In re Roosevelt's Estate*, 143 N.Y. 120, 38 N.E. 281, 25 L.R.A. 695, and Justice Cardozo explained provisions similar to those in the California statutes as designed " * * * to put at once into the treasury of the state the largest sum which in any contingency the remaindermen may have to pay * * * ." *Matter of Parker's Estate*, 226 N.Y. 260, 123 N.E. 366, 367.

[2] The practical aspect of the problem also compels the conclusion, that Section 14401 allows a refund only upon a contingency affecting the *quantum* of an estate. If it were construed as applicable to any contingency which might simply affect the pecuniary value of property passing by inheritance, few valuations would be final. For example, if prior to the appraisal of the Willis Company's stock a person had a cause of action against the corporation, the

recovery of a substantial amount of damages would adversely affect the value of the shares. Again, if it subsequently developed that an embezzlement of corporation funds had likewise reduced its assets, the shareholder should not be permitted to seek a refund under Section 14401 because the loss was unknown at the time the stock was appraised.

On the other hand, as often occurs, after the value of stock is fixed in a probate proceeding, real or other property owned by the corporation may be found to have doubled or trebled in value. Certainly the stockholder should not be liable for an additional tax based upon the increased value of his shares.

[3] There is no equitable basis for the code section. It does not state a broad equitable policy, but lays down a narrowly limited rule and a specific time limit within which a tax refund may be obtained under specified circumstances. To change an assessment of property after its value has been fixed by a determination of the probate court because of either an increase or decrease in its pecuniary value would do away with finality in tax liability. That would be unfair to the state as well as to the taxpayer.

[4] The rule plainly stated by the statutes of this state is that after an order determining tax liability has become final, it is conclusive and has the same force and effect as a judgment in a civil action, Revenue and Taxation Code, Sec. 14672; see Secs. 14361, 14506 et seq. The respondent admits that the order fixing the tax which he paid has become final, and "unless relief can be granted under the provisions of Section 14401 of the Revenue and Taxation Code, no other remedy is available." For the reasons which have been stated, that section is inapplicable to the facts shown in the present record and it was error for the court to have allowed the refund.

The order is reversed.

GIBSON, C. J., and TRAYNOR and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

It is impossible for me to agree with the strained and restricted construction of section 14401 of the Revenue and Taxation Code as enunciated by a majority of this court. The effect of such an interpretation is to make nugatory, by a process resembling sleight of hand, the beneficial purpose obviously intended by the Legislature. We are given a lesson in the legislative history of the section and then we are asked to believe that because of this lesson, the words "any contingency" found there do not really mean what they say but refer to something akin to a contingent remainder. We are also asked to believe that because the words "abridge, defeat, or diminish" are commonly used by conveyancers that they must be construed in any situation as they would be where the subject matter of the action was real property; and that the word "quantum" does not mean "quantity" or "amount" but must be given its technical meaning as used in the law of real property, that is, the length of time an estate endures. There is no reason in law, equity or common sense why the perfectly plain words of the statute should be read in the light of ancient history. This court should derive the meaning of the section from the section itself when there is no ambiguity in the language used. As Mr. Justice Holmes said in *Towne v. Eisner*, 245 U.S. 418, 425, 38 S.Ct. 158, 159, 62 L.Ed. 372, L.R.A.1918D, 254: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

Section 14401 of the Revenue and Taxation Code provides as follows: "If any tax has been paid to the county treasurer on a transfer subject to a contingent incumbrance or any contingency which might burden, abridge, defeat, or diminish the estate or interest of the transferee, and the gift was valued without allowance for the incumbrance or contingency, upon the taking effect of the incumbrance or the happening of the contingency the person

who paid the tax is entitled to a refund in an amount equal to the difference between the tax paid and *any smaller tax that would have been paid on a valuation of the estate or interest actually enjoyed or of the estate or interest remaining after the taking effect of the incumbrance or the happening of the contingency.*" [Emphasis added.]

It seems clear from the language used that the purpose of the Legislature was to provide for any unknown contingencies which might burden, abridge, defeat, or diminish an estate or interest, and to allow the gift to be taxed subject to a refund if and when such a contingency occurred. If the framers of the section had intended the section to apply only where the gift was subject to a contingent remainder, why was the word "burden" used? The words "abridge, defeat, or diminish" are applicable to such a gift, but how can such a contingent remainder burden the estate which precedes it? A burden is defined: "To load, encumber with weight, lay a heavy load upon; to oppress with anything grievous or trying; to overload; as to burden a nation with taxes." Webster's New Int. Dict., 2d Ed. And the word has been frequently used with reference to taxes. *Hewitt v. Dean*, 91 Cal. 5, 13, 27 P. 423; *Pioneer Express Co. v. Riley*, 208 Cal. 677, 687, 284 P. 663; 24 Cal.Jur., sec. 9, p. 25. In *Wells v. City of Savannah*, 181 U.S. 531, 541, 21 S.Ct. 697, 701, 45 L.Ed. 986, the court said: "The word 'burthen,' * * * is certainly sufficiently comprehensive to include municipal taxes." In the instant case, the income tax deficiency levy was certainly a burden to the corporation—a debt owing by it to the Federal Government. Further, it was a debt owing by operation of law—the only thing that was lacking at the time the appraisal was made was notice to the corporation of the debt owed by it. It is agreed that had the appraiser known of this debt, he would have taken it into consideration in determining the value of the stock as of the date of death of Charles Golden Willis, and the amount of tax payable by respondent would have been \$1,335.-22 less than that actually paid. Because this debt is a burden upon the assets of the corporation, because the payment of the

debt diminishes the value of each share of stock in the closed corporation to be enjoyed by respondent, and consequently reduces the "valuation of the estate or interest actually enjoyed" by him, he is entitled, under the very terms of the statute, to a refund of the excess tax paid by him.

It is difficult to conceive of a word with any broader meaning than the one used in the statute. "Any" is defined at length by Webster, New Int. Dict., 2d Ed., and to give a few illustrations, we find that it means "One indifferently out of a number; one indiscriminately of whatever kind; * * * Indicating a person, thing, event, etc., as not a particular or determinate individual of the given category but whichever one chance may select; this, that, or the other; one or another; * * * Indicating a person, thing, etc., as one selected without restriction or limitation of choice, with the implication that every one is open to selection without exception; one, no matter what one; * * *." Had the Legislature intended that the contingency must be one that effects a change in the *duration* of time the estate was to continue in the donee, why was the word "valuation" used in the latter part of the section? That sentence provides that when the incumbrance takes effect, or the contingency happens, the person who paid the tax is entitled to a refund in an amount equal to the difference between the tax paid and any smaller tax that would have been paid "*on a valuation of the estate or interest actually enjoyed*". Because of the contingency of the income tax deficiency levy upon the assets of the corporation, respondent is actually enjoying an interest which is less valuable than it would have been had the levy not been made and paid. Had the Legislature intended to refer only to a contingent remainder there would be absolutely no reason for the latter part of the sentence just quoted. That part of the sentence reads: "* * * or of the estate or interest remaining after the taking effect of the incumbrance or the happening of the contingency." Since the statute provides for the taxation of the estate or interest *remaining* after the taking effect of the incumbrance or the happening of the

contingency, how is it possible to say, as do the majority, that the section provides for a refund only "upon a contingency affecting the *quantum* of an estate" and that it is not to be construed as applicable "to any contingency which might simply affect the pecuniary value of property passing by inheritance * * *" but that the "quantum of the taxable estate * * * is its time of continuance, or degree of interest, as in fee, during life, or for years * * *."

Under the construction placed on the section by the majority, it is possible for a tax to be paid on an estate which turns out to be absolutely worthless with no refund available to the taxpayer. Suppose, due to any contingency imaginable, respondent paid a tax on these shares of stock and that due to an error made by the appraiser, they were worth only the paper on which they were printed. Respondent may keep the paper forever if he so chooses, but their pecuniary value is nothing. Is he then entitled to no refund because the *length of time* his ownership in them continues is not involved? It is possible, of course, for the time an estate endures to have an effect on its value because a life estate is obviously less valuable than an estate in fee, but there is absolutely no reason to restrict the meaning of "valuation" to this one possibility, or the word "contingency" to one affecting only the duration of an estate or interest.

We are informed that before the codification of the Inheritance Tax Law, effective July 1, 1945, the provisions of both sections, 13956 and 14401, were contained in a single sentence of the prior statute, which read, *in full*, as follows: "In estimating the value of any estate or interest in property, to the beneficial enjoyment or possession whereof there are persons or corporations presently entitled thereto, no allowance shall be made on account of any contingent incumbrance thereon, nor on account of any contingency upon the happening of which the estate or property or some part thereof or interest therein might be abridged, defeated or diminished; provided, however, that in the event of such incumbrance taking effect as an actual

burden upon the interest of the beneficiary, or in the event of the abridgement, defeat or diminution of said estate or property or interest therein as aforesaid, a return shall be made to the person properly entitled thereto of a proportionate amount of such tax on account of the incumbrance when taking effect, or so much as will reduce the same to the amount which would have been assessed on account of the actual duration or extent of the estate or interest enjoyed. Such return of tax shall be made in the manner provided by subdivision 4 of section 11 hereof upon order of the court having jurisdiction. Said application for return of tax must be made within six months of the happening of said contingency." Inheritance Act of 1935, Sec. 8(2), Stats. 1935, Ch. 358.

Note that in Section 14401, the word "burden" has been added to the words "abridge, defeat or diminish", and note, also, that the earlier section provided for the "duration" of the estate actually enjoyed, while the section *presently* in effect specifically points out that the taxpayer is entitled to a refund equal to the difference between the tax paid and any smaller tax that would have been paid on a *valuation* of the estate or interest actually enjoyed. Another point to be considered is that we now have two sections rather than one. To hold that we are to construe the present statute as it previously read is to hold that the Legislature intended to accomplish nothing by the change in the language used.

If the section is to be construed so that the words "any contingency" mean only something "akin to a contingent remainder", there is no relief for a taxpayer who has paid a tax based on a mistake made by an appraiser when that mistake affects merely the pecuniary valuation of an interest. It is impossible for me to agree with such a construction, and I am of the opinion that the order should be affirmed.

SCHAUER, Justice.

I dissent.

It is my view that the provisions of the Revenue and Taxation Code clearly evidence an intent by the Legislature to deal fairly with taxpayers by providing for a

refund in the event of just such a contingency as arose in this case. It further appears to me that the result set forth in the majority opinion is unjust to the taxpayer, and has been reached by strained and unrealistic interpretation of the statutes involved.

For a more detailed analysis and discussion of the points involved, I refer to the unanimous opinion of the District Court of Appeal, Second Appellate District, Division Three prepared for that court by Mr. Justice Vallee (reported in 203 P.2d 91), which I adopt as a part of this dissent.

SHENK, J., concurs.

Rehearing denied; SHENK, CARTER, and SCHAUER, JJ., dissenting.



34 Cal.2d 854

CITY OF BEVERLY HILLS v. BRADY.

L. A. 20871.

Supreme Court of California, in Bank.

March 10, 1950.

The City of Beverly Hills, a municipal corporation, sued William Brady to enjoin defendant from using premises in a residential zone for purposes allegedly in violation of city ordinance zoning the premises as residential. The Superior Court, Los Angeles County, Stanley Mosk, J., rendered a judgment adverse to plaintiff and plaintiff appealed. The Supreme Court, Shenk, J., held that defendant's activities were not violative of the zoning ordinance.

Judgment affirmed.

For prior opinion see 205 P.2d 1088.

Municipal corporations ☞631(2)

A licensed physician whose home was in district zoned as residential, did not violate zoning ordinance, where, in addition to writing a syndicated newspaper column on premises, defendant employed secretaries to take dictation, address envelopes, and enclose pamphlets relating to

health problems which were requested by readers of column, some of which were supplied to readers on payment of specified charge, where pamphlets were advertised only in syndicated column, and pamphlets were not sold at a profit, and complained of activities did not interfere with primarily residential character and aesthetic harmonies of the district.

Richard C. Waltz, City Attorney, and Richard L. Sieg, Jr., Assistant City Attorney, Beverly Hills, for appellant.

Reed & Kirtland and Robert E. Moore, Jr., Los Angeles, for respondent.

SHENK, Presiding Justice.

Appeal by the plaintiff from an adverse judgment in an action to enjoin the defendant's alleged violation of zoning restrictions. The appeal is on the judgment roll.

Ordinance No. 443 of the city of Beverly Hills, adopted December 8, 1936, prohibits the establishment or conduct of any business in Zone R-1.5, classified as residential. The establishment or conduct of any business therein is declared unlawful. The word "business", in so far as material here, is defined as the purchase, sale or other transaction involving the handling or disposition of any article, substance or commodity for profit or livelihood, or the ownership or management of office buildings or offices. Under the heading "Use Restrictions" it is provided that no property may be used for any purpose other than that permitted for the zone in which it is located except that the City Council may after notice and public hearing allow such variance as is deemed in harmony with the general purpose of the ordinance, the protection of the property, and the character of the district upon conditions consistent therewith. In the consideration of the grounds of appeal it will be assumed that the foregoing provisions of the ordinance or their equivalent were in force prior to and during the period of the defendant's ownership and occupancy of his home which is located in Zone R-1.5.

The defendant is a licensed physician and acquired his present home in 1932. During all of the times here involved he was the author of a syndicated column devoted to discussion of health problems which is published in 130 newspapers in the United States and Canada. In the syndicated article he offers free, or for the ten or twenty-five cent cost of printing and mailing, various pamphlets containing further information on subjects discussed. Each day he receives one bag of mailed requests for pamphlets and sends out daily one mail bag of pamphlets which aggregate about 150,000 pamphlets annually. The dictation and writing of his syndicated article, and the receipt and mailing of pamphlets are conducted with the help of secretaries in a room over the garage which is fitted with shelves, filing cabinets, desks and typewriters. The total annual receipts for the requested pamphlets amounts to approximately \$16,400, and the total annual printing, mailing and salary cost exceeds that sum by about \$300. These activities, as conducted by the defendant, do not interfere with the use or appearance of his home or premises as a residence, nor do they affect the residential or aesthetic character of the district.

The trial court assumed constitutional validity of the ordinance and concluded that the defendant was not engaged in a business within the meaning thereof. Denial of the prayer for injunctive relief followed.

The plaintiff concedes that the defendant's writing of his syndicated column is not prohibited by the use restrictions of the ordinance; but contends that the additional activities amount to the conduct of a publishing business and the sale or other transaction involving the handling or disposition of a commodity which is in violation of the ordinance; that such is the case although no profit is derived or expected therefrom; and that therefore the court's conclusion and judgment are not supported by the admitted facts.

Where the questioned activities amount to the conduct of a business depends upon the adopted definition of that word and

the primary intent of the zoning restrictions. Obviously the conduct of industry pursued for profit was prohibited because of the general tendency to interfere with the residential character assigned to the district. The zoning restrictions are intended to retain the highest residential and aesthetic value to the property owners and the district. They are general protective measures for the benefit of the residents of the district and of the community as a whole. However, a protective measure for the individual owner was also included to insure that a home-maker would not be deprived of the reasonable use of his premises.

The mere statement of the facts as they relate to the general purpose of the restrictions would appear to be a sufficient answer to the plaintiff's contentions. Unquestionably an author may answer his mail and include requested literature. Here the mailing of pamphlets is merely incidental to the writing and publication of the syndicated article, which is conceded to be a permissive use. The pamphlets are not independently advertised, nor is the defendant in the business of publishing or selling the pamphlets at a profit. His livelihood is derived from the authoring of the syndicated articles. It is not contended that the activities interfere with the general character and aesthetic harmonies of the district. It must follow that there is support for the trial court's conclusion that the defendant is not conducting a business within the meaning of the ordinance.

Furthermore, assuming that there is involved the sale or handling of a commodity although no profit is derived or expected, or that such activities constitute a non-residential and prohibited use, the question then is whether the defendant could be deprived of the right, pursuant to the protective provision of the ordinance or otherwise, to pursue on his premises activities incidental to an unrestricted use when such activities do not interfere with the primarily residential character of the district or affect the aesthetic values sought to be preserved. The question may be largely one of degree. On the record

the ordinance may not operate so as to deprive the defendant of the normal activities incidental to a use not prohibited by the ordinance. The correct answer is indicated by the present factual situation. Whether that condition may conceivably be affected by extensive future increase in the volume of activity in connection with the defendant's proper use of his residence premises is not now a matter for consideration. Application of zoning restrictions to particular facts is subject to investigation by the courts and each case is determinable on its individual merits. *People v. Hawley*, 207 Cal. 395, 411, 279 P. 136; *McKay Jewelers, Inc., v. Bowron*, 19 Cal. 2d 595, 603, 122 P.2d 543, 139 A.L.R. 1188. The conclusion of the trial court is warranted by a consideration of the particular factual situation and requires no further citation of authority to justify it.

The judgment is affirmed.

EDMONDS, CARTER, SCHAUER
and SPENCE, JJ., concur.



34 Cal.2d 845

**CENTRAL CONTRA COSTA SANITARY
DIST. v. SUPERIOR COURT IN AND
FOR CONTRA COSTA COUNTY et al.**
S. F. 18029.

Supreme Court of California.

March 3, 1950.

Original petition for a writ of mandate by Central Contra Costa Sanitary District against Superior Court in and for the Contra Costa County and Anne Fish Burgess to direct respondent court to fix amount of sum reasonably adequate to secure Anne Fish Burgess payment of just compensation for condemnation of her realty, and to give petitioner immediate possession and use of easements.

The Supreme Court, Edmonds, J., held that a sanitary district was a similar public corporation under statute granting specifically

enumerated public corporations power to acquire and construct storm water drains and disposal systems and that sanitary district was within constitutional provision specifically extending drainage, irrigation, levy and reclamation district privilege of immediate occupancy of condemned realty, pending final judgment in an eminent domain proceeding.

Writ of mandate issued.

Carter and Schauer, JJ., dissented.

1. Eminent domain ⇨253(1)

In condemnation proceedings, ruling denying petitioner's motion for immediate possession was not an appealable order. Code Civ.Proc. § 963.

**2. Eminent domain ⇨187
Mandamus ⇨51**

In condemnation proceedings, fact that sanitary district seeking to condemn realty eventually would obtain possession of realty by a judgment was no substitute for right to immediate occupancy, and district was entitled to immediate possession and use of easements and to writ of mandate directing lower court to fix amount of deposit necessary to secure to owner of realty payment of just compensation for condemnation of her realty.

3. Eminent domain ⇨187

Under constitutional provision that private property shall not be taken without just compensation and that no right of way or lands to be used for reservoir purposes shall be appropriated to use of any corporation, except a municipal corporation, etc., or similar public corporations until full compensation therefor be first made, purpose of named agencies was protection of public health, and necessity for occupancy was sufficient to bring sanitary district within words "similar public corporation" and entitle it to an order of immediate possession upon deposit of an amount fixed by court. Const. art. 1, § 14.

Wagener & Brailsford, W. H. Brailsford, Jr., Oakland, and Robert W. Harrison, San Francisco, for petitioner.

Tinning & DeLap and Archibald B. Tinning, Martinez, for respondents.

EDMONDS, Justice.

The Central Contra Costa Sanitary District operates a sanitary sewage system in Contra Costa County, embracing an area of approximately 30,000 acres with a population of about 43,000. The facilities now in use include a treatment plant which daily handles some 3,000,000 gallons of sewage and a main trunk pipe line 24 miles in length. Presently under construction are 115 miles of collecting sewer systems.

In connection with the construction in the Walnut Creek area, the Health Officer of Contra Costa County certified to the governing board of the Sanitary District that investigation had disclosed unsanitary, unhealthful, and dangerous conditions. On the basis of that report, the local district, in accordance with section 5000 et seq. of the Streets & Highways Code, awarded a contract for the construction of a network of sewer pipes.

Through negotiation, perpetual and temporary easements or rights of way were obtained across more than 90 per cent of the land in private ownership under which it is necessary to lay the pipes. In connection with the construction work, easements or rights of way over the land of Anne Fish Burgess are required. The present controversy has arisen in connection with the action to condemn such easements.

Following the commencement of the action, the Sanitary District filed a notice of a motion for an order of immediate possession upon the deposit of an amount to be fixed by the court. In support of the motion, an affidavit of an appraiser was filed in which he declared that \$607 is the reasonable market value of the easement sought. There is no controversy as to the sufficiency of this proposed deposit. The motion was denied upon the ground that the Sanitary District is not one of the public corporations specifically named in Article I, section 14, of the Constitution of the State of California, or a "similar public corporation" within the meaning of that section. The decision was also placed upon the ground that the use for which the real property is sought to be taken is not one for which immediate possession of an owner's

land may be had, it not being required for a right of way, or for use as a reservoir, by a corporation authorized by law to obtain immediate possession.

Article I, section 14, of the Constitution, provides: "Private property shall not be taken or damaged for public use without just compensation having first been made * * * and no right of way or lands to be used for reservoir purposes shall be appropriated to the use of any corporation, except a municipal corporation or a county or the State or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conversation district, or similar public corporation until full compensation therefor be first made * * * in any proceeding in eminent domain brought by [one of the above corporations ' * * or similar public corporation'] * * * the aforesaid * * * may take immediate possession and use of any right of way or lands to be used for reservoir purposes * * * upon * * * giving such security * * * as the court in which such proceedings are pending may direct * * *."

By the present proceeding, the Sanitary District seeks a writ of mandate directing the superior court to make an order (1) fixing the amount of the sum reasonably adequate to secure Anne Fish Burgess payment of just compensation for the condemnation of her property; and (2) giving petitioner the immediate possession and use of the easements. The ground relied upon as justifying such relief is that immediate possession of the easement is required in order to correct a dangerously unsanitary condition as soon as possible.

In response to the petition, Anne Fish Burgess, the real party in interest, filed a demurrer and answer pleading: (1) that the Sanitary District has an adequate remedy at law and does not need immediate possession of the easement; (2) that it does not have a legal right to such possession, since it is neither one of the public corporations specified in Article I, section 14, nor is it " * * * a similar public corporation * * *"; (3) that there are no un-

healthful or unsanitary conditions requiring abatement; and (4) that adequate drainage facilities now exist.

The allegations as to the lack of unsanitary conditions and the adequacy of present drainage facilities are irrelevant in this proceeding. These questions will be determined by the trial court in the condemnation action. The value of the easement as stated by the appraiser has not been challenged, and in the event of "* * * an adjudication that there is no necessity for taking the property * * *", Const., Art. I, sec. 14, the land owner will be protected by the deposit required of the Sanitary District.

[1,2] The ruling denying the motion for immediate possession is not an appealable order, Code Civ.Proc. sec. 963, and the fact that eventually the Sanitary District may obtain possession of the Burgess land by a judgment is no substitute for the right to immediate occupancy. For that reason, the petitioner has no adequate remedy other than this proceeding.

The essence of the Sanitary District's position is that it is entitled to the immediate possession of property which is the subject of a condemnation action because it shares in common with the specifically enumerated public corporations the power to "* * * acquire [and] construct * * * storm water drains and storm water collection, outfall and disposal systems * * *." Health & Safety Code, sec. 6512. It may construct a sewage system [municipal utility districts], provide for drainage [irrigation districts], and generally protect the public health. A further point relied upon is that an easement for a sewer pipe is a "* * * right of way * * *" within the meaning of those words as used in Article I, section 14, of the Constitution.

The argument of Miss Burgess is that under the principle of *ejusdem generis* a sanitary district is not "* * * a similar public corporation * * *" because the one factor common to those enumerated in the Constitution is the control, development and supply of water. The Sani-

tary District, she asserts, does not have this power.

[3] The constitutional provision, as amended, specifically includes drainage, irrigation, levee and reclamation districts, extending to them the privilege of immediate occupancy of condemned land pending the final judgment in an eminent domain proceeding. The powers of municipal corporations, counties and reclamation districts are not limited to the control of water; the general purpose of all of these agencies is the protection of the public health. As to such districts, it has been recognized that there is a need for immediate occupancy of land which is being condemned. Under the rule of *ejusdem generis*, the necessity for such occupancy is enough to bring sanitary districts within the words "* * * similar public corporation * * *."

But if the public health factor is not sufficient, a sanitary district is also specifically empowered to construct storm water drains and storm water collection, outfall and disposal systems, Health & Safety Code, sec. 6512, while the municipal utility districts share in common with it the power to construct sewer systems. It would indeed be a narrow construction of the words "* * * similar public corporation * * *" to distinguish, by so fine a line, between the authority of a sanitary district which controls storm water in order to avoid pollution of drinking water and that of a water conservation district, which guards against the damage of storm waters by the maintenance of irrigation facilities. To accomplish their purposes, all of the public corporations named must construct pipes across private lands, and all of them equally need to expedite construction by immediate occupancy of property upon which facilities are being built.

Much reliance is placed upon the argument sent to the voters in support of the proposed amendment. This statement enumerated metropolitan water districts, municipal utility districts, municipal water districts and water conservation districts, but did not specifically mention sanitary dis-

tricts. From this analysis of the measure, it is contended that a sanitary district was not intended to be a "similar public corporation". But this omission is no basis for reasoning that the right of immediate possession was not to be extended to a district not expressly named.

Moreover, some of the argument to the voters supports the construction of the amendment as including a sanitary district. The voters were told: "Since the sovereign agency must be entitled to eventually obtain the required property, it has long been recognized that the practical and sensible thing was to allow the public agency to take possession at once so that construction work and development would not be delayed." And a further statement of the purposes of the amendment reads: "This amendment does away with the unfair discrimination which now exists between districts performing the same functions."

For these reasons a writ of mandate will issue requiring the superior court to vacate its previous order and to fix the amount of the deposit necessary to secure to Anne Fish Burgess the prompt payment of just compensation upon the condemnation of her property. Upon such deposit, the court shall make an order giving the petitioner the immediate possession and use of the easement or right of way sought to be condemned.

GIBSON, C. J., and SHENK, TRAYNOR and SPENCE, JJ., concur.

CARTER, Justice.

I dissent. The majority opinion reads words into a constitutional provision when there is no justification therefor on any ground of statutory construction. The constitutional provision is meticulous in specifying by name those public agencies which may be given immediate possession of property sought in eminent domain proceedings. A sanitary district is not one of such agencies.

Prior to its amendment in 1918, there was no provision for immediate possession in the Constitution. In 1918, the provision was added which authorized such posses-

sion where the action was by the state, county, municipal corporation, or a drainage, irrigation, levee, or reclamation district, and a right of way was sought. The amendment in 1934 retained the above specified agencies and added: "metropolitan water district, municipal utility district, municipal water district and water conservation district" and the general clause "similar public corporation". Thus the consistent practice has been to *specifically name* or describe the public agencies that have such power. For this court to add another distinctly named and constituted agency is manifestly out of harmony with that practice and the clear intent of the electorate.

The argument to the voters in favor of the 1934 amendment expressly stresses the limited character of the agencies and the essential factor that they must be agencies having to do with water resources. It was then urged: "1. To extend to metropolitan water districts, municipal utility districts, municipal water districts and water conservation districts the same privilege and authority as now vested in irrigation districts, drainage districts, levee districts, reclamation districts, municipalities, counties and the State—namely, the right to take possession of property sought for rights of way immediately upon payment into court of the amount fixed by the court as compensation. * * *

"The recent development of the State, especially in the way of *water resources*, has brought about types of districts which are especially designed for their particular purpose and which handle projects for irrigation, reclamation, levee protection, water conservation, etc., that can not well be handled by the city or even by the county. These districts in some instances embrace parts of several counties and appear to be the only suitable agency for handling their particular projects.

"It has long been the policy of this State, approved by the people of California, that sovereign agencies such as the State itself, or counties or cities, should have the right, when lands are required for rights of way such as roads and highways to take im-

mediate possession upon payment into court of the amount fixed by the judge to cover any award by the jury as the value of the land. This same authority, so far as concerns land for rights of way, also now exists in the case of irrigation, drainage, levee and reclamation districts. * * *

"Likewise, the authority which is found necessary for irrigation, drainage, levee and reclamation districts should obviously likewise be available to the *new and recently created* types of districts, such as metropolitan water districts, municipal utility districts, municipal water districts and water conservation districts.

"This amendment does away with the unfair discrimination which now exists between districts *performing the same functions*.

"This amendment simply extends the policy that has long been recognized, not only as desirable, but as absolutely necessary in order that government may carry on its functions. Unless this amendment is adopted it will be possible for one individual to hold up in litigation for many years the construction of essential works for the public's development or utilization of water." [Emphasis added.]

The purported "catch-all" phrase, "similar public corporation", cannot extend to sanitary districts for the agencies specifically listed either do not possess attributes similar to such districts or are concerned with serving a different purpose. It is conceded that the general phrase may embrace only such agencies as have characteristics common with the ones named. It is not contended that a sanitary district is similar to or belongs in the same class as the State, a county or municipal corporation. The common quality of all of the other named agencies, with the possible exception of municipal utility districts, has to do with the conservation and distribution for use of water, a vital resource of the state. A sanitary district, on the other hand, is primarily concerned with the disposal of sewage, a subject pertaining to the public health. Only incidentally is it interested in water control, that is, disposal of drainage

waters which is naturally pertinent to its function for it may use the same facilities for both sewage and flood waters.

It is spurious thinking to reason, as does the majority, that all the agencies above named have the common general factor of public health. In a very general way there may be a connection with health, but at most it is remote. The main and primary function still remains—the conservation and use of water.

Further, in connection with storm or drainage waters, the majority opinion refers to the fact that municipal utility districts may, like sanitary districts, maintain sewage systems, but that is a similarity common as between only *one* of the named agencies and such district. The rule requires a common primary similarity applicable to all. The control of storm waters by the named agencies is for the purpose of conserving and using water. That is the chief purpose. Even if protection of property is also a purpose, we have no similarity in sanitary districts whose *main* function is sewage disposal, the storm water factor being only incidental and not with the aim of conserving or utilizing water.

There are other public agencies which deal with the disposal of water. One of these is a mosquito abatement district, as it is a well known fact that mosquitoes breed in pools of stagnant water. It is the function of such a district to drain such pools or inoculate the water therein so as to eradicate the mosquito larvæ. The obvious purpose of destroying mosquitoes is the conservation of public health—a very important function. Yet I seriously doubt if even the majority of this court would go the absurd length of holding that the framers of the amendment to the Constitution intended that a mosquito abatement district be given the power to take immediate possession of property it sought to acquire in connection with its abatement program. I can see no basis for distinction between such a district and the sanitary district here involved.

In addition to the obvious objection to amending the Constitution by judicial edict as the majority are doing in this case by in-

cluding a sanitary district within the ambit of Section 14 of Article I of the Constitution, there are other reasons why public agencies not specifically empowered by the Constitution to do so should not be given the power to take immediate possession of private property before obtaining a final order of condemnation in an eminent domain proceeding and paying the amount of compensation and damages awarded by a jury. In this connection, we may take judicial notice that there are many public agencies which are limited in the amount of money available to them in the performance of the functions which they are authorized to perform. It is, therefore, not beyond the realm of probability that such an agency may take immediate possession of property upon a preliminary showing of value and not be able to respond in the amount of compensation and damages which will subsequently be awarded by the jury in the trial of the eminent domain proceeding. In such event, the public agency would have the property without the payment of the just compensation and damages to which the owner is entitled under both the federal and state Constitutions. In this connection, cases have come under my observation where the amount awarded by a jury as compensation and damages for property taken has exceeded by many thousands of dollars the amount paid into court upon the granting of an order authorizing the taking of immediate possession. For this reason, it is obvious that the people of this state should have the opportunity to decide what public agencies should be given the power to take immediate possession of private property to be devoted to a public use under the supervision of such agencies. I think it is clear that the people of this state have not thus far expressed their willingness to confer such power upon a sanitary district and the holding of the majority to the contrary is a palpable distortion of the plain language used to express the intention of those who drafted the 1934 amendment and the voters who adopted it.

While I believe in liberal construction of constitutional and statutory provisions which seek to promote the public interest

and welfare, I do not believe in resorting to judicial legislation to accomplish this result.

I would, therefore, deny the writ of mandate sought in this proceeding.

SCHAUER, J., concurs.



**DAVENPORT et al. v. DAVENPORT
FOUNDATION et al.**

Civ. 17082.

District Court of Appeal, Second District,
Division 2, California.

March 7, 1950.

Rehearing Denied March 24, 1950.

Hearing Granted May 4, 1950.*

Action by Ralph M. Davenport, as administrator of the estate of Levi M. Davenport, deceased, and others, against Davenport Foundation, a corporation, and others, to have a declaration of trust declared invalid, and a bank account held to be the property of the heirs of decedent. The Superior Court for Los Angeles County, David Coleman, Judge of the Municipal Court of the City of Los Angeles, County of Los Angeles, presiding as Judge of the Superior Court under designation of the Chief Justice as Chairman of the Judicial Council, rendered a judgment in favor of defendants, and plaintiffs appealed. The District Court of Appeal, McComb, J., held inter alia that a gift to trustees to distribute income to a college to establish a department of philosophy and religion, and to distribute income in other ways created a valid charitable trust.

Judgment modified, and as modified affirmed.

I. Trusts ¶112

In interpreting a declaration of trust, court must determine intention of settlor from instrument read as a whole and give effect thereto if possible.

* Subsequent opinion 222 P.2d 11.

2. Charities Ⓒ31

A gift for a charitable purpose is favored; and language in an instrument will be liberally construed in support of trust established for such a purpose.

3. Charities Ⓒ21(2)

Grant of authority to trustees of a charitable trust to choose beneficiaries is valid.

4. Charities Ⓒ4

Creation in one instrument of a trust for charitable and noncharitable purposes does not invalidate the charitable trust, providing that the noncharitable part does not violate the rule against perpetuities or restraint on alienation.

5. Perpetuities Ⓒ9(1)

Provision for withholding or accumulating income in an otherwise valid trust does not invalidate it. Civ.Code, § 2220.

6. Courts Ⓒ97(1)

Decisions of the United States Supreme Court based on provisions of federal tax laws are not binding upon state courts where other than tax questions are involved.

7. Trusts Ⓒ9

A settlor may name himself as a trustee of an express trust.

8. Charities Ⓒ4

An instrument which conveyed property to a corporation as trustee with ministerial duties, and which vested management in a foundation to distribute a stated amount of income to settlor for life, and a stated amount for certain annuities with balance payable to college to establish a department of philosophy and religion, and which permitted trustees under certain circumstances to select beneficiaries consistent with purposes of the trust, created a valid charitable trust notwithstanding inclusion of noncharitable purposes. Civ. Code, § 2220; Const. art. 20, § 9.

9. Charities Ⓒ4

Where an otherwise valid charitable trust permitted trustees to distribute portion of income to payment of annuities in amount agreed upon between trustees and annuitants who might add to the trust,

mere fact that some trustee or person in connection therewith might enter into an invalid or illegal agreement would not destroy validity of the trust as created by the settlor. Civ.Code, § 2220; Const. art. 20, § 9.

10. Charities Ⓒ4

The fact that settlor provided that before distribution of trust income reserves should be set aside out of gross income for taxes, supervision and upkeep and for replacements and betterments did not invalidate an otherwise valid charitable trust. Civ.Code, § 2220; Const. art. 20, § 9.

11. Courts Ⓒ97(1)

Fact that in determining taxability of funds of a foundation federal tax court held that funds were not exempt under provisions of the Internal Revenue Code was not binding upon state court in passing upon question of whether instrument providing for the foundation created a valid charitable trust. Civ.Code, § 2220; 26 U.S.C.A. § 101(4, 6).

12. Charities Ⓒ4

Where instrument created an otherwise valid charitable trust, the fact that settlor reserved to himself right to manage trust or exercise an influence and, direction in consultation with named trustees did not invalidate the trust. Civ. Code, § 2220.

13. Trusts Ⓒ52

Where trust provided that if any provisions were adjudged unenforceable remainder should be carried into effect, a provision for support and maintenance of settlor's brother and settlor's children, if invalid under the rule against perpetuities, did not render remainder of trust invalid.

14. Trusts Ⓒ34(1)

Where depositor placed funds from personal bank account in joint account with another, and at the same time issued a directive that joint account should be held in trust for benefit of persons named should they be in special need, and second person accepted the trust, joint account created a valid trust upon death of original depositor.

R. R. Colby and Joseph D. Taylor, Los Angeles, for appellants.

Allard, Brownsberger, Shelton & O'Connor and Joseph A. Allard, Jr., L. A. Shelton, Pomona, Brady & Nossaman and Walter L. Nossaman, Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before the court without a jury

in an action to have (1) a declaration of trust declared invalid and (2) a bank account held to be the property of the heirs of Levi M. Davenport, plaintiffs appeal.

Facts

On May 23, 1939, Levi M. Davenport executed a declaration of trust¹ by which he conveyed certain property to La Verne College, a corporation, as trustee. The trustee was given only ministerial duties. The

I. The declaration of trust read as follows:

"Declaration of Trust

"No. 1

"Know All Men By These Presents:

"This Agreement made and entered into this 23rd day of May, 1939, by and between Levi M. Davenport of 674 Elliot Drive, Pasadena, California, hereinafter referred to as Trustor, and La Verne College, a corporation, incorporated under Title XVII Part 4, Division 1 (Sections 649 to 651) Civil Code of the State of California, hereinafter referred to as Trustee, and C. Ernest Davis, Lucile Davenport Weller, J. E. Steinour, Fred A. Flora and L. E. Miller, constituting a Board of Directors, hereinafter referred to as the Board.

"Witnesseth: That

"Whereas, the Trustor is desirous of establishing a permanent foundation to be known as 'The Davenport Foundation' for the purposes hereinafter provided.

"Now Therefore, the Trustee hereby declares that the Trustor has transferred and delivered to it without consideration moving from the Trustee all his right, title and interest in and to the property described in Schedule 'A' hereto attached and by this reference made a part hereof.

"All property now, or hereafter, subject to this Trust shall constitute the 'Trust Estate.'

"The only duty, or obligation of the Trustee shall be to hold Title to the Trust Estate in Trust, subject to the management, control and direction of the Board. Its duties shall be entirely Ministerial, that is to say, it shall perform such acts as shall be necessary to carry out the orders and directions of the Board.

"The Board shall act as and constitute the Board of Trustees of the *Foundation* and shall have complete control, management, and operation of the property forming the Trust Estate, and shall receive and collect the principal and the income of the Trust Estate, and after

the payments and deductions hereinafter mentioned, shall pay and/or accumulate, and/or use and invest, hold, apply and distribute the same to, or for the purposes hereinafter stated, and shall cause the Trustee to convey and transfer the corpus or principal, or portions of the Trust Estate, together with accumulations, if any, as hereinafter provided.

"Reserves

"Before distribution is made of any of the net income reserves shall be set aside as follows to-wit:

"(1) 25% of the gross income for taxes, supervision and upkeep.

"(2) 12% of the gross income for replacements and betterments.

"Distribution of Income

"All the net income available for distribution shall be paid in monthly installments, as follows:

"(1) To the Trustor, Levi M. Davenport, the sum of Four Hundred Dollars (\$400.00) per month, for and during the term of his natural life.

"(2) To LaVerne College, a corporation, the sum of Three Hundred Dollars (\$300.00) per month for the purpose of establishing a department of Philosophy and Religion, which department shall be established at the beginning of the school year 1939-1940.

"(3) To make suitable and proper provision for the support and maintenance of J. R. Davenport, my brother, as his needs may require, not to exceed however, One Hundred Dollars (\$100.00) per month, all of which shall be at the sole discretion of the Board of Trustees. In the event that any of my children should come to want, the Board of Trustees shall use a portion of the income to care for them in so far as their needs may require, all of which shall also be solely within the discretion of the Board of Trustees.

"(4) To American Bible Society, with its principal office at Bible House, New York City, the sum of Three Hundred Dollars (\$300.00), per annum, payable

management of the trust, to be known as the "Davenport Foundation", was committed to a board of directors of five named persons who were to constitute the board of trustees of the foundation. The trust provided:

"Reserves

"Before distribution is made of any of the net income reserves shall be set aside as follows, to-wit:

annually at the discretion of the Board.

"(5) To the payment of annuities in such amounts as may be agreed upon between the Board of Trustees and the annuitants, who may add to this Trust.

"(6) All of the rest and residue of undistributed income shall be used by the Board of Trustees for such purposes consistent with the purposes of this trust as may be determined in the sole discretion of said Board of Trustees.

"The courses to be given and taught by said department of Philosophy and Religion, shall be along the general line of the following suggested program:

"Orientation

"Chapel lectures and services designed to help the student adjust himself in a Christian manner to life in the school and in the world.

History of

"The Church,

"The Church of the Brethren,

"Religion,

"Religious Education, all of which shall be taught from the Christian point of view.

"Bible

"Sound courses in the Word of God shall be the basis of the work in the whole department and should be regarded as a basic part of one's education at LaVerne College.

"Philosophy

"Strong courses that will give the student an evangelical, theistic point of view and unify his ideas into a harmonious Christian faith. Such courses as Ethics, the Psychology of religion, Philosophy of Religion, and the Philosophy of the Christian Religion will be included.

"Religious Education

"Courses that will help one to become an intelligent, capable worker in the Church's great program of Christian instruction.

"Sociology

"Religion applied to life, to help the student to think through the practical application of the principles and teach-

"(1) 25% of the gross income for taxes, supervision and upkeep.

"(2) 12% of the gross income for replacements and betterments.

"Distribution of Income.

"All the net income available for distribution shall be paid in monthly installments as follows:

"(1) To the Trustor, Levi M. Davenport,

ings of the word of God as exemplified in Scriptures to the problem of our modern world, one particular addition that we desire to be made to our present offerings in this field is a good course of Rural Sociology. We need this because we have so many country churches in our brotherhood. The country is suffering throughout America today. Something needs to be done for rural life and it is a problem in which even our State and National governments are interested.

"A Practical Work Program

"To give opportunity for selected students to serve as Sunday School teachers, club leaders for boys and girls, mission workers, etc., in a program of church work and home missions, this program to be developed perhaps in cooperation with our District Mission Board or other agencies. All teaching shall be in harmony with the philosophy of creation, according to the account in the Book of Genesis, Chapters 1 and 2.

"Vacancies on Board of Trustees

"It is my desire that one of my children, and after they have passed on to their reward, one of my grandchildren, shall serve on the Board of Trustees, and any vacancy on said Board caused by the death of my daughter, Lucile, or any of my children, or grandchildren, shall be filled by the Board from among my surviving children and grandchildren. The Elders body of the Church of the Brethren of the District of Southern California and Arizona shall pass upon and determine the qualifications and fitness of any of my children or grandchildren, for service on said Board of Trustees, and none of my children or grandchildren shall serve upon said Board unless said Elders body shall determine that he or she is a fit and qualified person for such service. After the death of all of my children and grandchildren, such vacancies shall be filled in the same manner as provided herein for the election of the other members of the Board, and the person appointed as herein pro-

the sum of Four Hundred Dollars (\$400.00) per month, for and during the term of his natural life,

"(2) To La Verne College, a corporation, the sum of Three Hundred Dollars (\$300.00) per month for the purpose of es-

vided shall be a member of the Church of the Brethren.

"All other vacancies on said Board shall be filled by nominations made by the Board of Trustees and submitted to the Elders Body of the Church of the Brethren of the District of Southern California and Arizona, from which nominations the Elders body shall fill said vacancies unless said body should determine that none of the nominees are qualified, in which event the Board of Trustees shall make further and additional nominations, from which the Elders body may fill such vacancies. All the persons elected by the Elders Body as aforesaid to said Board of Trustees, or appointed as herein provided, shall be persons who can by their life and conduct subscribe to the following:

"1. The Divine Authority and the full and complete inspiration of the whole of the Old and New Testament Scriptures.

"2. The Deity of our Lord Jesus Christ.

"3. The Doctrine of the Trinity.

"4. The Fall of Man and his consequent depravity and the necessity of the New Birth.

"5. The sinless life of Jesus Christ, Atonement in His blood which was shed for sin, and His personal Resurrection.

"6. Justification by faith in our Lord Jesus Christ.

"7. Regeneration by the Word and the agency of the Holy Spirit.

"8. The personality of the Holy Spirit and as the Divine Paraclete, the Comforter and the Guide of the people of God.

"9. Sanctification through the Word and Spirit.

"10. The Personal and Visible Return of our Lord Jesus Christ, the Resurrection of the Dead, and the last judgment.

"11. That the Scriptures of the Old and New Testaments are inspired of God, and are inerrant in the original writings, and that they are the supreme and final authority in faith and life, and who believe in one God, eternally existing in three persons, Father, Son, and Holy Spirit; that Jesus was begotten by the Holy Spirit, and born of the Virgin Mary, and is true God and true Man, ~~that man was created in the image of God,~~ that he sinned and thereby incurred not only physical death, but also that spiri-

tual death which is separation from God; that the Lord Jesus Christ atoned for our sins according to the Scriptures, and all that believe on him, and are Baptised by Water and of the Spirit are justified by the blood that He shed on the Cross of Calvary; that Jesus was crucified, rose from the dead, and is now seated at the right hand of the Father interceding for us as our High priest and advocate; who believe in the personal and imminent return of our Lord and Saviour Jesus Christ according to the Scriptures; and believe in the bodily resurrection of the just and the unjust.

"Removal from the Board of Trustees

"Should any of the members of the Board of Trustees for any cause or reason become unfit to serve on the Board or become ethically, or scripturally embroiled in the evil things of this world, the remaining members of the Board may file a complaint with the Elders Body of the Church of the Brethren of the District of Southern California and Arizona. A time and place for hearing the complaint shall be set and the decision of said Elders bodies shall be final. The procedure in matters of removal shall be established by the Elders body.

"Reservations

"It is understood and agreed that during the lifetime of the Trustor, Levi M. Davenport, that the Trustor shall have the right to the use and occupation, rent free, of the home now occupied by him at 674 Elliot Drive, Pasadena, California, or some other home of similar rental value.

"Compensation of Trustees

"The members of the Board of Trustees shall be paid for their services at the same rate as is paid at the time for comparable services and actual expenses incurred. The amount shall be fixed by the Board.

"We hope and pray that all those having to do with the management of this Foundation will have the sacrificial Spirit. Thus the work will grow and prosper, God will be glorified and our Lord will be lifted up before a dying world.

"Additions to the Foundation

"Others may add to this Foundation, provided the additional income shall be used in maintaining the Doctrines and Principles of our church, as herein set forth, provided however, that the donor

tablishing a department of Philosophy and Religion, which department shall be established at the beginning of the school year 1939-1940.

may reserve a portion of such income for himself or herself, or for relatives during his, her, or their lifetime.

"Change of Beneficiary

"Should LaVerne College fail to establish such department of Philosophy and Religion, and to carry out the teachings as herein enunciated, or should it be merged into or consolidated with any other Educational or Charitable Institution, or cease to exist as an institution of learning, the Trustees shall pay the income herein provided to be paid to it, to some other institution, or institutions, within our denomination as determined by said Board, and in such event the Board of Trustees shall designate some other Trustee, or Trustees to hold title to the Trust Estate and LaVerne College, or its last Board of Trustees, shall convey the title of the Trust Estate to such new Trustee so designated by said Board.

"Powers of Trustees

"To carry out the express purposes of this trust and in aid of its execution and the proper administration, management and disposition of the trust estate, the Board of Trustees is vested with the following additional powers and discretions.

"At its option and as long as it may deem advisable, to retain any property which it may receive hereunder. To manage, control, sell, convey, partition, divide, subdivide, exchange, improve, repair and to encumber by mortgage, trust deed or otherwise and in such manner and in accordance with such procedure as it may deem advisable, the trust estate or any part thereof. To lease the trust estate, or any part thereof, and to grant the right to mine or drill for and remove therefrom gas, oil, and/or any other minerals. To invest the principal (and income if accumulated) in any property, whether or not permissible by law as investment for trust funds. To determine, in its discretion, what is principal of the trust estate, gross income, or net distributable income therefrom; except that all bonuses, royalties and recoveries from mines, gas or oil leases and/or wells, all stock dividends and stock rights, and all gain or loss realized on payment, retirement or sale of stocks, notes, bonds or other securities shall inure to or fall upon principal, and all cash dividends (other than liquidating dividends stated in writing to be such by the corporation

"(3) To make suitable and proper provisions for the support and maintenance of J. R. Davenport, my brother, as his needs may require, not to exceed however, One

paying the same) shall go to income of the trust estate. To have respecting bonds, shares of stock and other securities, all the rights, powers and privileges of an owner, including, though without limiting the foregoing, voting, giving proxies, payment of calls, assessments and other sums deemed by the Board expedient for the protection of the interests of the trust estate, exchanging securities, selling or exercising stock subscription or conversion rights, participating in foreclosures, reorganizations, consolidations, mergers, liquidations, pooling agreements, voting trusts, assenting to corporate sales, leases and encumbrances. All discretions in this trust conferred upon the Board of Trustees shall, unless specifically limited, be absolute and uncontrolled and their exercise conclusive on all persons interested in this trust or the trust estate. The powers and discretions of the Board enumerated herein are not to be construed as a limitation upon its general powers and discretions but the Board of Trustees in addition thereto is hereby vested with and shall have, for the full duration of this trust, as to the trust estate, the income therefrom, and in the execution of this trust, the same and all the powers and discretions that an absolute owner of property has or may have. The right to encumber the trust estate shall be limited to 10% of the gross value thereof.

"The whole title, legal and equitable, in fee, to the trust estate is and shall be vested in the Trustee as such title in the Trustee is necessary for the due execution of this trust by the Board of Trustees as herein provided. The beneficiaries, except as herein provided take no estate or interest therein and their interests hereunder are personal property only, consisting of the right to enforce the due performance of this trust.

"Each beneficiary hereunder is hereby restrained from anticipating, encumbering, alienating or in any other manner assigning his or her, or its interest or estate in either principal or income, and is without power so to do, nor shall such interest or estate be subject to any beneficiary's obligations or liabilities, nor to judgment or other legal process, bankruptcy proceedings or claims of creditors or others.

"The Board of Trustees in its sole dis-

Hundred Dollars (\$100.00) per month, all of which shall be at the sole discretion of the Board of Trustees. In the event that any of my children should come to want, the Board of Trustees shall use a portion of the income to care for them in so far as their needs may require, all of which shall also be solely within the discretion of the Board of Trustees.

"(4) To American Bible Society, with its principal office at Bible House, New York City, the sum of Three Hundred Dollars (\$300.00), per annum, payable annually at the discretion of the Board.

"(5) To the payment of annuities in such amounts as may be agreed upon between the Board of Trustees and the annuitants, who may add to this Trust.

cretion may advise or consult with the Trustor regarding the sale or retention of properties belonging to the trust estate and the investment of sums of money constituting a part thereof, or the exercise of any of its other powers or discretions as such Board of Trustees has hereunder, and in following in whole or in part any requests, recommendations or approvals of such Trustor, the Board of Trustees shall be free from responsibility for any losses or liabilities which may result to the trust estate, the Board of Trustees, and/or any beneficiary hereunder by reason thereof. Such request, recommendation or approval shall be deemed to be duly authorized by the Trustor if contained in written instrument executed on behalf of the Trustor.

"After the death of the Trustor and the individual beneficiaries herein named, the Board of Trustees is hereby authorized to incorporate the Foundation if in its sole discretion it seems best and advantageous so to do, and in such event LaVerne College shall convey all of its title in the Trust Estate to such corporation upon request of the Board.

"In the event that any provision or provisions of this instrument are or are adjudged to be for any reason unenforceable the remainder hereof, disregarding such provisions, shall subsist and be carried into effect.

"This trust may not be revoked nor, except as otherwise herein provided may any of the corpus of the trust estate be withdrawn.

"Executed in Triplicate.

"In Witness Whereof the Trustor has

"(6) All of the rest and residue of undistributed income shall be used by the Board of Trustees for such purposes consistent with the purposes of this trust as may be determined in the sole discretion of said Board of Trustees.

"The courses to be given and taught by said department of Philosophy and Religion, shall be along the general line of the following suggested program: * * *"
[Here follows a list of proposed subjects to be taught in the department of Philosophy and Religion—orientation of students to the life of the school, church history, the Bible as a basic part of education, evangelical philosophy, ethics, psychology and philosophy of religion, all of

hereunto set his hands and seal, and LaVerne College as Trustee has caused these presents to be subscribed by its President and Secretary thereunto duly authorized this 23rd day of May, 1939.

"Levi M. Davenport

"Trustor

"La Verne College

"By Edgar Rothrock

"President

"By J. C. Brandt

"(Corporate Seal) Secretary

"The undersigned Trustor does hereby certify that said Declaration of Trust fully and correctly sets out the terms and trusts under which the Trust Estate is to be held, managed and disposed of by the Board of Trustees therein named, and does hereby consent to approve, ratify and confirm the same in all particulars.

"Levi M. Davenport

"Trustor

"I, Barbara N. Davenport, wife of the Trustor, Levi M. Davenport, do hereby certify that I have read the above Declaration of Trust and I hereby agree, consent to, approve and ratify the same in all particulars.

"Barbara N. Davenport

"The undersigned designated as the Board of Trustees to manage, control and operate the Foundation and the Trust Estate, do hereby each agree to act as a member of said Board and to be bound by the terms and provisions of said Declaration of Trust.

"C. Ernest Davis, Lucile Davenport
Weller, Fred A. Flora, J. E. Steinour,
L. E. Miller"

which are described in detail in the Declaration of Trust, footnote 1.]

After expressing the trustor's desire that one of his children or grandchildren should serve on the board, the trust continued:

"The Elders body of the Church of the Brethren of the District of Southern California and Arizona shall pass upon and determine the qualifications and fitness of any of my children or grandchildren, for service on said Board of Trustees, and none of my children or grandchildren shall serve upon said Board unless said Elders body shall determine that he or she is a fit and qualified person for such service. After the death of all of my children and grandchildren, such vacancies shall be filled in the same manner as provided herein for the election of the other members of the Board, and the person appointed as herein provided shall be a member of the Church of the Brethren.

"All other vacancies on said Board shall be filled by nominations made by the Board of Trustees and submitted to the Elders Body of the Church of the Brethren of the District of Southern California and Arizona, from which nominations the Elders body shall fill said vacancies unless said body should determine that none of the nominees are qualified, in which event the Board of Trustees shall make further and additional nominations, from which the Elders body may fill such vacancies. All the persons elected by the Elders Body as aforesaid to said Board of Trustees, or appointed as herein provided, shall be persons who can by their life and conduct subscribe to the following: * * *" [Then follow paragraphs numbered 1 to 11, inclusive, in the Declaration of Trust, footnote 1.]

"Removal from the Board of Trustees

"Should any of the members of the Board of Trustees for any cause or reason become unfit to serve on the Board or become ethically, or scripturally embroiled in the evil things of this world, the remaining members of the Board may file a complaint with the Elders Body of the Church of the Brethren of the District of Southern California and Arizona. A time and

place for hearing the complaint shall be set and the decisions of said Elders bodies shall be final. The procedure in matters of removal shall be established by the Elders body."

The trustor reserved for life the use of his home property and made provisions for compensating the trustees for their services. The agreement then proceeded:

"We hope and pray that all those having to do with the management of this Foundation will have the sacrificial Spirit. Thus the work will grow and prosper, God will be glorified and our Lord will be lifted up before a dying world.

"Additions to the Foundation

"Others may add to this Foundation, provided the additional income shall be used in maintaining the Doctrines and Principles of our church, as herein set forth, provided however, that the donor may reserve a portion of such income for himself or herself, or for relatives during his, her, or their lifetime.

"Change of Beneficiary

"Should La Verne College fail to establish such department of Philosophy and Religion, and to carry out the teachings as herein enunciated, or should it be merged into or consolidated with any other Educational or Charitable Institution, or cease to exist as an institution of learning, the Trustees shall pay the income herein provided to be paid to it, to some other institution, or institutions, within our denomination as determined by said Board, and in such event the Board of Trustees shall designate some other Trustee, or Trustees to hold title to the Trust Estate and La Verne College, or its last Board of Trustees, shall convey the title of the Trust Estate to such new Trustee so designated by said Board."

Customary administrative powers were conferred on the Board of Trustees. It was authorized to consult with the trustor with regard to the extent of its power and exonerated from liability if it followed his instructions. The board was authorized to incorporate the foundation after the death of the trustor and the individual bene-

ficiaries named, in which event the board was to convey the trust estate to the corporation. The agreement concludes:

"In the event that any provision or provisions of this instrument are or are adjudged to be for any reason unenforceable the remainder hereof, disregarding such provisions, shall subsist and be carried into effect.

"This trust may not be revoked nor, except as otherwise herein provided may any of the corpus of the trust estate be withdrawn."

After the declaration of trust had been executed the trustor conveyed various parcels of real property to La Verne College. July 8, 1940, the Davenport Foundation was incorporated under Division 1, Part IV, Title XII, Article I of the Civil Code. Thereafter the title to the property held by La Verne College which had been conveyed to it by the trustor was deeded to the Davenport Foundation.

On November 23, 1946, the trustor transferred money in a personal bank account amounting to \$9,123.61 to a joint account with defendant J. E. Steinour. At this time the trustor signed a document entitled "Directive"² which directed the Davenport

Foundation to set aside sufficient funds to hold \$1,000 each in the interest of twelve named relatives from the money in his personal bank account, the purpose being to have the foundation allot to each person a portion of the \$1,000 if needed. The balance in the account on the date of the trustor's death January 6, 1947, was \$7,509.39.

Findings

The trial court found that (1) the trust agreement created a valid charitable trust, (2) the joint tenancy bank account between the trustor and defendant Steinour created a valid trust of which defendant Steinour was the trustee, and (3) the beneficiaries of the trust were the individuals named in the directive and that the remainder after the death of the trustor should go to the Davenport Foundation.³

Questions

First: *Did the agreement of May 23, 1939 create a charitable trust?*

This question must be answered in the affirmative and is governed by these pertinent rules of law:

[1] (1) The duty of the court in interpreting a declaration of trust is to de-

2. The directive read as follows:

"11-23-46. I am directing the Davenport Foundation Inc. to set apart sums

Will Davenport
Martha Prue
Dora Jones
Grace Leatherman
Bertha Le Fever
Alva Duthie
Flossie Moulton
Clyde Fuller
Clara Truax
Vesta Howell
Katherine Fuller
John Davenport

sufficient to hold \$1000.00 in the interest of the following:

Son of Noah
Daughter of Noah
" "
Daughter of Sarah
" "
" "
" "
Son of Katherine
Daughter of Katherine
" of John

"This \$1000.00 for each shall be set apart from funds derived from a personal bank account now in the Security First National Bank at 230 Ea. Colorado St. Pasadena Calif.

"The purpose is to have this, \$1000.00 to be a part of the Foundation except that if any of these above named persons are in special need, he or she shall appeal for a portion of the \$1000. to their interest, and the Foundation may allot to

such person for their need from this personal fund.

"L. M. Davenport"

3. It is to be noted that all the defendants with the exception of defendant Steinour disclaimed all right, title and interest in and to the bank account or any of the proceeds thereof, and defendant Steinour disclaimed all personal right, title or interest in and to such account.

termine the intention of the trustor from the instrument read as a whole, and to give effect thereto if possible. (Brock v. Hall, 33 Cal.2d 885, 887, 206 P.2d 360; Dumaine v. Dumaine, 301 Mass. 214, 16 N.E.2d 625, 629, 118 A.L.R. 834.)

[2] (2) A gift for a charitable purpose is favored and the language in an instrument will be liberally construed in support of a trust established for such a purpose. (In re Estate of Hood, 57 Cal.App.2d 782, 786, 135 P.2d 383; see also, In re Estate of McDole, 215 Cal. 328, 334, 10 P.2d 75; In re Estate of Henderson, 17 Cal.2d 853, 857, 112 P.2d 605; Collier v. Lindley, 203 Cal. 641, 655, 266 P. 526; In re Durbrow's Estate, 245 N.Y. 469, 157 N.E. 747, 748.)

[3] (3) A grant of authority to trustees of a charitable trust to choose the beneficiaries is valid. (In re Estate of Bunn, 33 Cal.2d 897, 901, 206 P.2d 635.)

[4] (4) The creation in one instrument of a trust for charitable and noncharitable purposes does not invalidate the charitable trust providing that the noncharitable part does not violate the rule against perpetuities or restraint on alienation. (Dingwell v. Seymour, 91 Cal.App. 483, 499, 297 P. 327. See Restatement of the Law of Trusts (1935) Vol. 2, p. 1229, section 401.)

[5] (5) A provision for the withholding or accumulating of income in an otherwise valid trust does not invalidate it (Sec. 2220, Civil Code; Hutchins v. Security Trust and Savings Bank, 208 Cal. 463, 468 et seq., 281 P. 1026, 65 A.L.R. 1059; Frazier v. Merchants National Bank, 296 Mass. 298, 5 N. E.2d 550, 551; Perkins v. Citizens & Southern National Bank, 190 Ga. 29, 8 S.E.2d 28, 36.)

[6] (6) Decisions based on provisions of federal tax laws are not binding upon state courts where other than tax questions are involved. (Commissioner v. Tower, 327 U.S. 280, 287, 66 S.Ct. 532, 90 L.Ed. 670, 164 A.L.R. 1135.)

[7] (7) A trustor may name himself as a trustee of an express trust. (Noble v. Learned, 153 Cal. 245, 251, 94 P. 1047. Cf. Restatement of the Law of Trusts (1935) Vol. 1, p. 120, sec. 37, comment a; Reinecke

v. Northern Trust Co., 278 U.S. 339, 346, 49 S.Ct. 123, 73 L.Ed. 410, 66 A.L.R. 397.)

[8] Applying the foregoing rules to the facts of the instant case it is perfectly clear from a reading of the declaration of trust that the trustor intended to create a charitable trust reserving unto himself a life estate in his residence and an annuity of \$400 a month. If the instrument therefore creates a charitable trust it does not violate the rule against perpetuities since Article 20, section 9, of the constitution expressly excepts charitable trusts from the inhibitions of such rule. The fact that the trust permitted the trustees under certain circumstances to select the beneficiaries did not invalidate it. (See rule 3, supra.)

[9] Since a charitable trust may be created even though there are certain non-charitable purposes included in the trust (see rule 4, supra) the question is then presented as to whether the noncharitable uses are specific. We believe they are: (a) the reservation of an annuity to the trustor of \$400 per month for his life is clear and specific; (b) the provision in the trust agreement reading, "All the net income available for distribution shall be paid in monthly installments as follows: (5) To the payment of annuities in such amounts as may be agreed upon between the Board of Trustees and the annuitants, who may add to this Trust," must be read in conjunction with the further provision of the trust agreement, "Others may add to this Foundation, provided the additional income shall be used in maintaining the Doctrines and Principles of our church, as herein set forth, provided however, that the donor may reserve a portion of such income for himself or herself, or for relatives during his, her, or their lifetime." The last quoted provision is a definite limitation on the annuity provisions previously set forth, it being evident that the trustor intended and so stated in the declaration of trust that others who might add to the Foundation could reserve from the donation which they made a valid annuity and did not destroy the charitable character of the trust. The mere fact that some trustee or some person in connection with the trust might enter into

an invalid or illegal agreement would not destroy the validity of the trust as created by the trustor.

The possibility that contributions might be made at some very distant date by which an annuity would be reserved to the donor likewise would not invalidate the trust as created because such contributions and any annuity would have to comply with the law in existence at the time of the contribution and agreement for an annuity.

[10] There is likewise no merit in the contention that the trust is not a charitable one because it provides: "Before distribution is made of any of the net income reserves shall be set aside as follows to-wit: (1) 25% of the gross income for taxes, supervision and upkeep. (2) 12% of the gross income for replacements and betterments." Under rule 5, *supra*, the trustees under a charitable trust may be authorized to accumulate income from a trust fund without destroying the charitable nature of the trust. This is perfectly logical since the absolute power of alienation may be suspended in perpetuity in the case of a charitable trust. There is no difference in principle in permitting the accumulation of trust funds indefinitely so long as it is for a charitable purpose.

[11] The fact that in determining the taxability of the funds of the Foundation for the years 1940-1944, the Federal Tax Court held that they were not exempt under sections 101(6) and 101(4) of the Internal Revenue Code, 26 U.S.C.A. § 101 (4, 6), is not binding upon the state courts. (See rule 6, *supra*.)

[12] There is no merit in the contention of appellants that since the trustor consulted with and exercised power and influence over the trustees so as to direct the management of the trust it was not in effect a trust, and that the transfers which he made were merely colorable. Under rule 7, *supra*, it is evident that the trustor might have even gone further and named himself as a trustee thereby having the absolute management and control of the property, and that such fact would not have destroyed the charitable character of the trust. If the instrument as in the present case legally conveyed title

to the property in trust for the benefit of a named beneficiary a valid trust was created and the fact that the trustor reserved to himself the right to manage the trust or exercised an influence and direction in consultation with the named trustees did not destroy the character of the trust as a valid charitable trust. (*Tennant v. John Tennant Memorial Home*, 167 Cal. 570, 579, 140 P. 242.)

[13] Finally appellants contend that the provisions reading, "To make suitable and proper provision for the support and maintenance of J. R. Davenport, my brother, as his needs may require, not to exceed however, One Hundred Dollars (\$100.00) per month, all of which shall be at the sole discretion of the Board of Trustees. In the event that any of my children should come to want, the Board of Trustees shall use a portion of the income to care for them in so far as their needs may require, all of which shall also be solely within the discretion of the Board of Trustees," violates the rule against perpetuities because the trustor, a man seventy-seven years of age, could have intended to provide for his needy children not then in being, is devoid of merit for the reason that even though we concede this construction, such provision would have to be disregarded under the very terms of the trust which reads, "In the event that any provision or provisions of this instrument are of are adjudged to be for any reason unenforceable the remainder hereof, disregarding such provisions, shall subsist and be carried into effect." (See also, *In re Estate of Troy*, 214 Cal. 53, 59, 3 P.2d 930; *In re Estate of Gump*, 16 Cal.2d 535, 547, 107 P.2d 17.)

Authorities of Appellant. In *re Estate of Sutro*, 155 Cal. 727, 730, 102 P. 920, 921, is distinguishable from the present case for the reason that the trust created in the cited case was for "such charities, institutions of learning and science and for premiums to be set apart of distinguished scholarships and scientific discovery and inventions as shall be directed by my executors." Clearly as pointed out by the court there was nothing in the will creating the trust to show that the purposes for which the trust fund was to be used were charitable excepting the

use of the words, "religious", "educational" and "eleemosynary". This of itself distinguishes the case from the present one where a reading of the declaration of trust shows an overwhelming desire on the part of the trustor to create a charitable trust.

In *re Estate of Vance*, 118 Cal.App. 163, at page 164, 4 P.2d 977; at page 978 is likewise inapplicable as is shown by this statement of the court: "There is not one word to indicate an object of the distribution, which would serve as a guide and check on its character; nor a hint as to the class of beneficiaries, which would serve to limit the distribution to persons or institutions serving a charitable purpose."

In *re Estate of Kline*, 138 Cal.App. 514, 32 P.2d 677, was decided upon the finding by the court that the trust was ambiguous. The trust in the instant case is free from ambiguity. Therefore this case is not here in point.

Second: *Was the trial court in error in holding that the joint bank account opened by Mr. Davenport and defendant Steinour created a valid trust upon the death of Mr. Davenport?*

[14] This question must be answered in the negative. The evidence disclosed that Mr. Davenport desired to have this bank account held in trust for the benefit of the persons named in his directive of November 23, 1946, should they be in special need, and that Mr. Steinour accepted this trust. Therefore we have a factual situation where the trustor intended to create a trust, the subject of which was identified with certainty, as were the beneficiaries and the purpose of the trust, also that the trustee accepted the trust. Hence the trial court's finding in accordance with these facts was proper.

In *re Estate of Alberts*, 38 Cal.App.2d 42, 100 P.2d 538, is not here applicable because in the Alberts case the court found that at the time the funds in question were transferred the grantors' intent was to make a gift rather than to create a trust. In the present case the trial court's finding was that the trustor intended to create a trust.

Since, however, defendant Davenport Foundation filed a disclaimer of any interest in the fund, the judgment should be modified to award the remainder interest in the joint bank account to the heirs at law of Levi M. Davenport.

As thus modified the judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.



96 Cal.App.2d 371

THOMAS v. ANDERSON et al.

Civ. 4008.

District Court of Appeal, Fourth District,
California.

March 7, 1950.

Rehearing Denied March 29, 1950.

Hearing Denied May 4, 1950.

Anthony J. Thomas, administrator of the estate of John F. Thomas, deceased, sued Alice Anderson, administratrix of the estate of Rhomus C. Sturgeon, deceased, and others to quiet title to real and personal property owned by decedents as joint tenants. Defendants filed a cross-complaint. From a judgment of the Superior Court of Fresno County, Arthur C. Shepard, J., for defendants and cross-complainants, plaintiff and cross-defendant appealed. The District Court of Appeal, Mussell, J., held that the evidence supported the trial court's finding that decedents did not die simultaneously, but that decedent Thomas predeceased decedent Sturgeon, so that title to the property vested in decedent Sturgeon and his heirs.

Judgment affirmed.

1. Death ☞6

Evidence supported trial court's finding that owners of real and personal property as joint tenants did not die simultaneously, but that one of them pre-deceased the other, so that title to the property vested in the survivor and his heirs. Probate Code, § 296.2.

2. Appeal and error ☞1008(1)

In action to quiet title to real and personal property owned by plaintiff adminis-

trator's and defendant administratrix' intestates as joint tenants, which of intestates, who died during same hour on same evening, died first, was fact question for trial court, whose finding, supported by substantial evidence, that plaintiff's intestate pre-deceased defendant's intestate is binding on District Court of Appeal on appeal from judgment for defendants. Probate Code, § 296.2.

3. Joint tenancy ⚡6

Deaths of two joint tenants are not "simultaneous," within statute requiring distribution of half of their property to heirs of each, in absence of sufficient evidence that decedents died otherwise than simultaneously, because their deaths occurred substantially or approximately at same time. Probate Code, § 296.2.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Simultaneous".

4. Death ⚡4

"Death" is cessation of life, ceasing to exist, total stoppage of circulation of blood and consequent cessation of animal and vital functions, such as respiration, pulsation, etc., and is not continuing event, but event taking place at a precise time.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Death".

C. Ray Robinson, W. Eugene Craven, Margaret A. Flynn, Merced, for appellant.

Crossland & Crossland, Wm. C. Crossland, Robert S. Crossland, Fresno, for respondents.

MUSSELL, Justice.

This action to quiet title arose out of the circumstances attending the deaths of John F. Thomas and Rhomus C. Sturgeon, who, as joint tenants, owned the real and personal property herein involved. Both men died between the hours of Nine and Ten o'clock on the evening of September 2, 1947, and plaintiff appeals from the judgment in which it was decreed that Rhomus C. Sturgeon survived John F. Thomas; that upon his death his joint tenancy interest termi-

nated and the title to the property vested in Rhomus C. Sturgeon.

The controversy involves the application of the provisions of section 296.2 of the Probate Code, which are as follows: "Where there is no sufficient evidence that two joint tenants have died otherwise than simultaneously the property so held shall be distributed one-half as if one had survived and one-half as if the other had survived."

Plaintiff contends (1) that the evidence is not sufficient to support the finding of the trial court that the two deaths in this instance did not occur simultaneously; and (2) that under section 296.2 of the Probate Code, deaths are simultaneous if they occur substantially or approximately at the same time.

[1] Mr. Thomas and Mr. Sturgeon were elderly gentlemen with heart ailments and were living in a home owned by them in the city of Fresno, and on the evening of September 2nd, at about 9:00 o'clock, they were observed sitting together on the front porch of their home. Shortly thereafter, Mrs. Sanders, who lived next door, heard Sturgeon, who was in the backyard, say "What is the matter, John, what is the matter". She ran outside and Sturgeon asked her to call the doctor. She called Mr. and Mrs. Shattuck, who lived next door, and Mr. Shattuck ran over while Mrs. Sanders went inside to use the phone.

Mr. Shattuck testified that when called by Mrs. Sanders, he went over to the house and saw Mr. Thomas lying on the ground on his back, face up; that Sturgeon was leaning over and had his head lowered to Mr. Thomas' chest; that Sturgeon was feeling or handling Thomas' wrist and that Sturgeon asked him to call a priest; that Shattuck turned Thomas over, got him in position and gave him artificial respiration for a few minutes until Thomas took about three or four gasping breaths; that they were "gasping breaths like he was fighting to get air, that is the way I'd say, gasping, striving, he was fighting for air". Mr. Shattuck further testified that he had been required to take first aid in the Army and also for the company for which he worked and was familiar with the locations of the

pulse, both from the head and the wrist; that he was present and had taken pulses of people who had passed away; that he felt Thomas' temple for a pulse and did not feel any; that at about the precise moment when he was feeling for a pulse, he heard a thump or falling sound in the house; that after he felt for the pulse at the temple, he felt for a pulse at the wrist; that he could not feel any pulse at the wrist at all and that Thomas started to turn and discolor very readily; that he put his face down to Thomas' chest and to his mouth; that there was absolutely no breathing; that he then proceeded into the house and found Sturgeon lying with his head on the piano pedals; that Sturgeon was then breathing; that he proceeded to turn Sturgeon over on his back, straighten him out on the floor and to give him artificial respiration; that he continued to give artificial respiration until he could no longer hear or see breathing; that he was still working over Sturgeon when the fire department arrived and that Sturgeon appeared to be still alive; that he was breathing, his breaths were far apart, or were not natural but he was alive.

The fire chief of the city of Fresno, who was experienced in rescue work and in first aid, testified that he arrived at the scene at about 9:36 P.M. and saw Thomas lying on the ground, back of the house; that he could not find any pulse beat; that Thomas' face had become discolored and that the body was cool; that "if the body is warm, there is a faint hope of reviving a person; if it is cold, there is no hope"; that they had just started to set up their resuscitating machine, when "they" were informed that there was another man in the house that "they" thought was still alive; that they then went to work on Mr. Sturgeon, who was lying on the floor; that he examined him, felt his wrist; that Sturgeon was warm and had good color; that he detected a slight pulse.

A fire department captain, who was also experienced in first aid and rescue work, testified that he examined a man lying on the ground in the backyard, picked up his hand and that when he could detect no pulse, he took his flashlight out, opened the eyes and flashed the light into them; that

he could get no movement in the eyes; that the face started to turn a dark, ruddy color; that he was not breathing as far as the witness could determine; that he then sent the squad into the house and went in himself, where he saw Sturgeon on the floor. Sturgeon was warm and his color was good; that they put the resuscitator on Sturgeon and started to work on him and that he could detect a pulse beat, a throb in his wrist.

A sister of Mr. Sturgeon testified that about 9:30 on the night of the tragedy, Sturgeon called her on the 'phone and that his first words were "Della, John is dead".

Dr. Katz, the physician who was called to the scene by the police department, was not present in court at the trial but it was stipulated that if present, he would testify that he is a duly licensed, practicing and qualified physician and surgeon in the city of Fresno; that on the evening of September 2, 1947, he was notified by the police department to go to 1427 La Salle Street in Fresno in answer to an emergency call; that when he arrived at the house, he found two bodies; one being that of Rhomus Clare Sturgeon and the other that of John F. Thomas; that the body identified to him as the body of Mr. Thomas was in the yard and the one identified to him as the body of Mr. Sturgeon was in the house; that he immediately examined both bodies; that he found both men dead and that he, as a physician and surgeon, was not able to determine medically, or otherwise, the exact hour or minute of the death of either of them.

Dr. William J. Reynolds, who was not present at the scene on September 2, 1947, testified that he had attended Mr. Sturgeon prior to his death and had last seen him approximately a week before he died; that he signed a medical certificate in which the cause of death was given as coronary occlusion, and that he also attended Mr. Thomas during his lifetime and signed the certificate that the cause of death of Mr. Thomas was cardiac failure, possibly ventricular fibrillation, rheumatic heart disease with aortic insufficiency, etc.; that he did not know the exact hour of the death of either man and that he knew of no means

by which that could be determined. He further testified that the fact that one body might be a little cooler than the other would not be a determining factor in ascertaining which man had died first; that he did not think that there would be perceptibly enough change in temperature in a few minutes to be able to determine correctly; that the coolness would depend greatly on the amount of moisture that was on the skin.

We conclude that there was substantial evidence to support the trial court's finding that John F. Thomas predeceased Rhomus C. Sturgeon and that Rhomus C. Sturgeon survived the death of John F. Thomas.

In *Re Estate of Loucks*, 160 Cal. 551, at page 554, 117 P. 673, at page 675, Ann. Cas.1913A, 868, in a proceeding for the distribution of the estate of a deceased person which involved the determination of the question of survivorship of two persons who were killed in a collision between a railway train and the automobile in which they were passengers, the court held that the fact of survivorship must be established by a preponderance of the evidence, and stated: "In the case at bar there was a conflict of evidence, and the court, after hearing all of the testimony, found the essential fact to be that the child Thelma survived her father. We do not see that this differs from the ordinary case wherein conflicting testimony has been given; and unless we find, upon a study of the record, that in no rational view of the evidence was the court below justified in the conclusion reached, we must sustain the findings of that court."

[2] In the instant case the question as to which of the two men died first was a question of fact for the determination of the trial court, and where, as here, it was supported by substantial evidence, the finding is binding upon us. *Dillard v. McKnight*, 34 Cal.2d 209, 209 P.2d 387.

[3] The contention of the plaintiff that under section 296.2 of the Probate Code deaths are simultaneous if they occur substantially or approximately at the same time is untenable. The word "simultaneously" has been defined as follows: "Simultane-

ously. In a strict sense, at precisely the same instant; but in a broader sense, at the same time; not at the same instant but at substantially the same time."

And the word "simultaneous" has been defined as: "Simultaneous. A word of comparison meaning that two or more occurrences or happenings are identical in time."

Appellant cites *American Surety Co. of New York v. Mosher*, 1936, 48 Ariz. 552, 64 P.2d 1025, 1030, as holding as follows: "The word 'simultaneously,' * * * is not always construed to require absolute synchronism from beginning to end. The events may be substantially or relatively simultaneous without being absolutely so. * * * so long as the two acts required are performed so that they will not be considered as separate in time as a matter of law, the actions are simultaneous * * *. Practically speaking, it means that the acts are done on the same day, since the law ordinarily does not separate a day into parts."

And the case of *Westinghouse Mach. Co. v. C. & G. Cooper Co.*, 6 Cir., 1917, 245 F. 463, 468, wherein it is stated: "It could hardly be denied that racing horses go around the track simultaneously, although a stop watch may show slight differences between them on the way and at the finish."

The first case cited involved a construction of the word "simultaneously" used in connection with a rule of court which required that a formal judgment be rendered and filed by the court. It was held that if the two acts were done on the same day, they were performed "simultaneously" as the law does not ordinarily divide a day into parts.

As to the last case, it no doubt is a fact that racing horses do go around the track simultaneously, when they are running at the same time. However, if one horse reaches the finish line before another, it cannot be said that they finish simultaneously.

[4] As defined in *Black's Law Dictionary*, 3d Edition, death is the cessation of life; the ceasing to exist; defined by physicians as a total stoppage of the circula-

tion of the blood, and a cessation of the animal and vital functions consequent thereon, such as respiration, pulsation, etc.

While it may be said that persons who are alive at the same time are living simultaneously, death occurs precisely when life ceases and does not occur until the heart stops beating and respiration ends. Death is not a continuing event and is an event that takes place at a precise time.

We conclude that there was sufficient evidence to support the court's finding that there was an interval of time between the deaths of Mr. Thomas and Mr. Sturgeon and that they did not die "simultaneously" within the meaning of section 296.2 of the Probate Code.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



96 Cal.App.2d 363

FORKNER v. FORKNER.

Civ. 4005.

District Court of Appeal, Fourth District,
California.

March 7, 1950.

Action by James S. Forkner against Gladys K. Forkner for divorce, wherein defendant cross-complained for divorce and for custody of child as provided for in property settlement agreement.

From an order of the Superior Court of Fresno County, Ernest Klette, J., denying a motion by defendant to strike from interlocutory decree of divorce in her favor a provision awarding custody of the child, the defendant appealed.

The District Court of Appeal, Griffin, J., held that defendant having obtained the decree which she sought could not, two years later, have the provision for custody of child

stricken out on ground that child was not domiciled in state at time action was brought.

Order affirmed.

1. Divorce ☞290

In divorce action, child of parties must be either domiciled in the state or physically present therein before court has jurisdiction to make an award of its custody.

2. Divorce ☞301

In divorce action, property settlement agreement justified conclusion that at time action for divorce was filed, wife and minor child were domiciled in California so as to give court jurisdiction to make an award of the child's custody.

3. Domicile ☞2

There is a legal distinction between domicile or residence and the place where one lives. Civ. Code, § 129.

4. Appeal and error ☞151(5)

Interlocutory decree of divorce granting wife on her cross-complaint all the relief for which she prayed was not an appealable order as far as wife was concerned. Code Civ.Proc. § 938.

5. Appeal and error ☞151(5)

A party who asks for certain relief and secures it should not thereafter be heard to claim that the relief secured was wrong and be permitted to take further time of the court to correct that which he asked for and received. Code Civ.Proc. § 938.

6. Divorce ☞302

Wife whose cross-complaint for divorce and for custody of child as provided in property settlement agreement was granted could not two years later have provision awarding custody of child stricken out on ground that child was not domiciled in state at time action was instituted and that court therefore had no jurisdiction. Civ.Code, § 129; Code Civ.Proc. § 938.

Jack G. McBride, San Francisco, Backlund, Meux & Gallagher, Fresno, for appellant.

H. A. Savage, Fresno, for respondent.

GRIFFIN, Justice.

This is an appeal from an order denying defendant's motion to strike a provision from an interlocutory decree of divorce awarding custody of a minor child, which decree was obtained by defendant on her cross-complaint. It comes to us on an "Agreed Statement On Appeal". This statement recites generally that on April 26, 1946, plaintiff, defendant and their minor child, Christian, then four years of age, all resided in Fresno County, California; that on that date plaintiff and defendant entered into a property settlement agreement in writing which is attached to the Agreed Statement On Appeal. This agreement recites generally that plaintiff and defendant are husband and wife and are living separate and apart; that defendant "desires to go to France" and both parties desire to enter into a property settlement agreement and to make provision for the support and education of their minor child. They agreed that the home in Fresno, owned by the parties, shall be "owned by each of them share and share alike" and that "the home shall remain in this form for a period of two years"; that "either party who is in California may occupy the home;" that "if the home be rented, the rent shall be divided equally between the parties"; that the personal property "will be divided between Mr. and Mrs. Forkner equally upon Mrs. Forkner's return from France; and she expects to return and agrees to return within approximately two years from date hereof". (Italics ours.) Provision is then made for the payment of \$50 per month by each party in trust, at a bank in Fresno, to be used for the support and education of the minor child. The parties then agreed that the minor child, "for the next nine years, shall go with his mother to France and be in her custody" and that "he shall be brought back with his mother in approximately nine years from date hereof". They then agreed that "when Christian returns with his mother approximately nine years from now, that he is to stay with his father until he becomes of age", and that "either party may visit the said child at all reasonable hours" and that "while Christian is in the care of his mother he is

to spend three months each summer of each year with his father, and after he comes into the care of his father he is to spend three months each summer of each year with his mother". Each party released the other from obligations of support and agreed that "should either party bring an action of divorce, such party shall pay all costs and attorney's fees connected therewith". The statement on appeal then recites that shortly after April 26, 1946, defendant and the minor child left the State of California and went to Paris, France, "where appellant and said minor child have resided and still reside".

On April 8, 1947, the father of the minor child filed a complaint for divorce against defendant, the mother, charging extreme cruelty, requested the court to award the custody of the minor child in accordance with the property settlement agreement, and asked to have such agreement incorporated and made a part of the interlocutory decree of divorce. Thereafter, defendant employed attorneys to represent her in the divorce action. They filed a denial to the allegation of extreme cruelty only, and also filed a cross-complaint for divorce on behalf of defendant, charging extreme cruelty and particularly alleging that there was one minor child the issue of said marriage; that the parties settled all of their property rights by a written agreement, "which agreement also provides for the care, custody and maintenance of the minor child of plaintiff and defendant". In the prayer of the cross-complaint defendant seeks a divorce, sets up the property settlement agreement, and asks that it be confirmed and incorporated in the interlocutory decree and specifically asks "that the custody of the said minor child * * * be granted to defendant and cross-complainant as provided in said property settlement agreement, and that the custody of said child be awarded with the right of visitation on the part of the plaintiff and cross-defendant as provided in said property settlement agreement".

Plaintiff filed a denial to the cross-complaint, denying extreme cruelty but admitting the other allegations. Pursuant to stipulation of the attorneys the action was

tried before the same judge who determined the motion herein involved. Plaintiff offered no evidence. Defendant introduced evidence to prove her cross-complaint and offered in evidence the property settlement agreement. After the hearing the court entered its interlocutory decree on April 29, 1947, and incorporated therein, as requested, the property settlement agreement above mentioned and specifically provided therein "that the defendant and cross-complainant shall have the care, custody and control of the minor child of the parties hereto * * * as provided in the said property settlement agreement hereto attached".

The final judgment of divorce was entered on April 30, 1948. It should be here noted that nothing appears in the complaint of cross-complaint indicating that the plaintiff, the defendant or the minor child were not residents of or domiciled within the state of California at the time the original action or cross-complaint were filed, or at the time the decree was granted.

On January 24, 1949, defendant wife filed a notice of motion to strike from the interlocutory decree of divorce the paragraph relating to the custody and control of the minor child "as provided in the said property settlement agreement" on the ground that the court had no jurisdiction to make any award concerning the custody of the child for the reason that said child, at the time the complaint in the action was filed, was not a resident of the State of California, nor had said child, at any time subsequent to the filing of said action, been a resident of California. This motion came on for hearing and was denied by the court on February 3, 1949. The reasons for the denial of the motion are not specified therein. This appeal is from this order.

[1] The claim of defendant is now that at the time the interlocutory decree was granted the Superior Court did not have jurisdiction to make a custody award of the minor child when the child was a resident of a foreign country prior to the commencement of the action and has ever since been and still is a resident thereof. It is argued that the parties to an action may

not, by agreement or stipulation, confer jurisdiction upon the court, citing *Vaughan v. Roberts*, 45 Cal.App.2d 246, 113 P.2d 884; *Gillespie v. Andrews*, 78 Cal.App. 595, 248 P. 715; and *Bacigalupi v. Bacigalupi*, 72 Cal.App. 654, 238 P. 93. It is likewise contended that defendant's appearance in the instant case and the granting of relief in accordance with the prayer of her cross-complaint did not confer jurisdiction upon the court over the subject matter of the custody provision, citing *Sampsell v. Superior Court*, 32 Cal.2d 763, 197 P.2d 739; 9 Cal.Jur. p. 786, sec. 130; *Boens v. Bennett*, 20 Cal.App.2d 477, 67 P.2d 715; and Vol. 2 Beale, *Conflict of Laws*, p. 717. From the cases and the texts above cited it appears that before a court has jurisdiction in a divorce action to make an award of the custody of a minor child, such child must be either domiciled in the state or physically present in the state. In support of this contention defendant cites *In re Chandler*, 36 Cal.App.2d 583, 97 P.2d 1048.

[2] Plaintiff and respondent argues that the actual appearance of defendant in the Superior Court, praying the court to take jurisdiction over the custody of the child, gave to the Superior Court jurisdiction as to parenthood and the custody of the child, and cites *Sampsell v. Superior Court*, supra; *Maloney v. Maloney*, 67 Cal.App.2d 278, 154 P.2d 426; *Hughes v. Hughes*, 180 Or. 575, 178 P.2d 170; *Talbot v. Talbot*, Mont., 181 P.2d 148; and *Boone v. Boone*, 76 U.S.App.D.C. 399, 132 F.2d 14.

A mere reading of the so-called property settlement agreement convinces us that both plaintiff and defendant and the minor child were, at the time of the execution of the agreement, domiciled in Fresno County. It further appears to us that under the agreement defendant intended to remain domiciled in this state at all of the times herein mentioned and that she was going to France with the minor child for the purpose of living there temporarily, so that the child might be educated in France; that at the end of that time the child was to be returned by the defendant; and that the mother of the child intended, and in fact agreed, to return to California "within ap-

proximately two years from the date hereof". It is likewise inferred from that agreement that the child would be returned to plaintiff's home in California each year, during three months of the summer, for the purpose of visitation by the father; and that defendant was to return the child to plaintiff in Fresno at the end of nine years so that he might have exclusive custody of him until he became of age. This agreement was part of the evidence received in court at the time of the hearing of the divorce proceedings and was sufficient to lead the court to believe that the parties were, on the date of the execution of the agreement, domiciled in Fresno County with said minor child, and that the absence of defendant and the minor child from the state at the time the action for divorce was filed was merely a temporary absence for the purpose indicated and that at that time and all times subsequent thereto the defendant and the minor child were in fact domiciled in Fresno County. This conclusion is fortified by the fact that the defendant voluntarily appeared in the divorce action, filed her cross-complaint and sought custody of the minor child, who was then in Paris, France. It is only upon the theory that the minor child was then *domiciled* in California that the defendant could seek and the trial court here could have jurisdiction to award his custody to her in this action. We must therefore conclude, in the absence of any other showing, that at the time the trial court awarded custody of the minor child to the defendant and granted her a decree of divorce that it did have jurisdiction not only of the defendant but of the minor child. This decree which defendant sought was granted in the exact form prayed for by her cross-complaint and no appeal could have been nor was there any such appeal taken from such order by defendant. The first indication the trial court had of any contrary facts pertaining to the domicile of the defendant and the minor child appeared in the motion to strike the portion of the interlocutory decree pertaining to the custody of the child, nearly two years after the interlocutory decree was entered. It was then, for the first time, that defendant claimed that both she and the minor

child became residents of France at the time of their arrival there in April or May, 1946. Had the trial court specified in its order that the motion was denied for the reason that defendant and the minor child, at the time the divorce action was filed, were in fact domiciled in the State of California, a determination of the question here presented would have been simple and the evidence would have clearly supported such a finding. However, the agreed statement on appeal states that "shortly after April 26, 1946, appellant and said minor child left the State of California and went to Paris, France, where appellant and said minor child have *resided and still reside*."

[3] It may be problematical whether counsel for plaintiff intended that this agreed statement on appeal was intended to convey the idea that defendant and the minor child actually took up a legal and qualified domicile in France on that date, or whether it was intended to convey the thought that they lived in France during that period but still intended to maintain their domicile in California. There is a recognized legal distinction between a domicile or residence under section 129 of the Civil Code, as distinguished from the term "a place where one *lives*". In *Sampsell v. Superior Court*, supra, 32 Cal.2d at page 779, 197 P.2d at page 749, the Supreme Court of this state held that if a child is *living* in one state but is *domiciled* in another, the courts of both states may have jurisdiction over the question of its custody.

Assuming that we are bound by the agreed statement on appeal that the defendant and the minor child "resided and still reside" in Paris, France, during the times mentioned, and by this agreed statement the legal definition of the term "reside" was intended to be applied, we still are of the opinion that defendant should be precluded from setting aside the decree which she herself obtained, under the signed property settlement agreement which she entered into in reference to the custody of the minor child.

[4] In this connection plaintiff argues, with merit, that since defendant subjected herself to the jurisdiction of the court by

filing a cross-complaint, he brought herself within its jurisdiction and she was bound by any order which the court made in the divorce proceeding in any controversy concerning which the trial court had jurisdiction. By her cross-complaint she sought a divorce. She asked that the property settlement agreement be made a part of the interlocutory decree, as agreed upon, and that the custody of the child be awarded as therein set forth. No other or further relief was sought. When plaintiff found that defendant sought no further relief than that which he sought by his complaint, particularly in reference to the custody of the minor child, he defaulted and did not contest the prayer of her cross-complaint. She obtained the decree in accordance with that prayer. Under these circumstances, as far as she was concerned, this interlocutory decree was not an appealable order because it granted her all of the relief for which she prayed.

[5] Section 938 of the Code of Civil Procedure provides that "Any party *aggrieved* may appeal in the cases prescribed in this title." It is a fundamental principle of jurisprudence that a party who asks for certain relief and secures it should not thereafter be heard to claim that the relief secured was wrong and take further time of the court to correct that which he asked for and received.

In *Cook v. Stewart McKee & Co.*, 68 Cal. App.2d 758, at page 762, 157 P.2d 868, at page 870, the court held that a judgment of dismissal, as prayed for by the plaintiff, was not subject to appeal by him because he had obtained the total relief he had asked for, and said: "The party whose total demands are granted in a judicial proceeding has no right of appeal." (Citing cases.)

In *Widener v. Hartnett*, 12 Cal.2d 287, at page 290, 83 P.2d 718, at page 720, the Supreme Court said: "A party cannot appeal from a judgment in his favor. This is the general rule and although it may have exceptions, the present case does not fall within that category." (Citing cases.)

In *Hall v. Imperial Water Company*, 200 Cal 77, at page 80, 251 P. 912, the court said that under the general rule an order

refusing to vacate and set aside a judgment is likewise not an appealable order, citing cases. Then follows an exception to this latter rule where the record on an appeal from the judgment would not disclose the ground of the motion.

Defendant claims that the facts in the instant case do fall within the exception, and cites 2 Cal.Jur. p. 167, sec. 31; *Ratliff v. Ratliff*, 100 Cal.App. 556, 280 P. 554; *Helbush v. Superior Court*, 99 Cal.App. 501, 278 P. 1062; 15 Cal.Jur. 49, sec. 140; 15 Cal.Jur. 61, sec. 146; *Hill v. City Cab & Transfer Co.*, 79 Cal. 188, 191, 21 P. 728; *Akley v. Bassett*, 189 Cal. 625, 639, 209 P. 576; and *Thompson v. Cook*, 20 Cal.2d 564, 127 P.2d 909.

This same contention was made in *Maxwell Hardware Co. v. Foster*, 207 Cal. 167, 277 P. 327, 328. That was an action for the foreclosure of a materialman's lien for building materials furnished the defendant Foster in the construction of a building on real property belonging to the defendant Kates. The court gave judgment in favor of defendant Kates. Plaintiff appealed. While the court gave judgment denying plaintiff the right to foreclose its lien against the defendant Kates' property, it did render a personal judgment against the defendant Foster for the value of the materials furnished the latter. The plaintiff there claimed that the judgment was void for the reason that no process was ever served upon the defendant Foster. The Supreme Court, speaking through Mr. Justice Curtis, said: "The judgment, however, was in favor of the plaintiff, and *even if the same were void*, that fact cannot be taken advantage of on an appeal therefrom by the plaintiff in whose favor the judgment was rendered. An appeal from a judgment can only be taken by an aggrieved party thereto, and the plaintiff herein does not sustain that relation to said judgment. A party cannot appeal from a judgment in his favor." (Citing cases.) (Italics ours.)

[6] We conclude, therefore, that to grant the relief sought by defendant would not only operate as a fraud upon the plaintiff, in view of the solemn written agreement entered into by defendant, but would

also operate as a fraud upon the court in permitting it to enter its decree under the representation that all the parties, including the child, were within the jurisdiction of the court when the order was made, and then, two years later, making a contrary claim for the purpose of setting aside that judgment.

Order affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.



96 Cal.App.2d 380

RENFER et al. v. SKAGGS.

Civ. 17041.

District Court of Appeal, Second District,
Division 3, California.

March 8, 1950.

Action by Jules E. Renfer and Morton Hunt against E. C. Skaggs to rescind a contract on the grounds of fraud. Defendant filed a cross-complaint for recovery of balance due under terms of contract. The Superior Court of Los Angeles County, Leo Freund, J., entered judgment for plaintiffs, granted defendant's motion for new trial, and plaintiffs appealed. The District Court of Appeal, Vallee, J., held that evidence was sufficient to support findings and that order granting new trial on grounds that decision was against law was erroneous.

Order reversed.

1. New trial ⚡66, 68

The causes for granting a motion for a new trial on grounds that decision is "against law" and that evidence is insufficient to justify decision are objections of an entirely different order stated in the disjunctive, and are distinct causes for granting new trial. Code Civ.Proc. § 657.

2. New trial ⚡66

An order granting a new trial, on the ground that verdict is against law, cannot

be sustained by merely showing that verdict is unsupported by evidence. Code Civ. Proc. § 657.

3. New trial ⚡66

Under statute providing grounds for new trial, phrase "against law" refers to a situation furnishing a reason for a re-examination of an issue of fact, and if trial court fails to find on material issues created by pleadings, and as to which evidence was introduced, decision is against law, and a re-examination of facts would be necessary to determine issues of fact. Code Civ.Proc. § 657.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Against Law".

4. New trial ⚡79

Where findings are so inconsistent, ambiguous, and uncertain, that they are incapable of being reconciled, and it is impossible to tell how a material issue is determined, decision is "against law" within meaning of statute enumerating grounds for new trial. Code Civ.Proc. § 657.

5. New trial ⚡79

If findings necessarily dispose of case, or conclusions of law or judgment is supported by findings, or there has been no error in determining an issue of fact or effecting determination of any question of fact, there is no ground for a new trial under statute on ground that decision is against law. Code Civ.Proc. § 657.

6. Appeal and error ⚡933(4)

Where order granting a new trial did not specify that it was granted on a ground of insufficiency of evidence to sustain decision, District Court of Appeal would conclusively presume that it was not based on that ground. Code Civ.Proc. § 657.

7. New trial ⚡79

Under statute naming grounds for new trial, only three situations exist in which a new trial may be granted on the grounds that a decision is against law, and include situations where court fails to find on a material issue, where findings are inconsistent, ambiguous, and uncertain, and evidence is insufficient in law and without

conflict in any material point. Code Civ. Proc. § 657.

8. New trial 79

Where court did not fail to find on any issue of fact, and findings were consistent, unambiguous and certain, and evidence was sufficient in law to support findings, decision was not against law, and order granting new trial could not be sustained on that ground. Code Civ. Proc. § 657.

Harvey, Rimel & Harvey, and Milford W. Dahl, Santa Ana, for appellants.

Charles E. Hobart, Los Angeles, for respondent.

VALLÉE Justice.

Appeal from an order granting a motion for a new trial. The order reads as follows: "Motion for a new trial, argued and submitted on September 29, 1948, is now by the Court granted."

The action is for the recovery of \$1,000 paid by plaintiffs to defendant on the purchase price of property hereafter described. The complaint alleged the making of a written contract for the sale by defendant to plaintiffs of a machine shop, its equipment, and the right to use the defendant's name, priority, and all contracts made by him to the date of the contract, for \$3,000. It was alleged that plaintiffs were induced to make the contract by reason of false and fraudulent representations made to them by the defendant. The alleged false representations were: 1. The business was profitable and had a regular gross monthly income averaging between \$4,000 and \$5,000. 2. Defendant had existing incomplete contracts to produce processed war materials which would be included in the sale. 3. Certain machinery and jigs were then located in the machine shop. 4. The machine shop and its equipment had a fair market value of \$3,245. The complaint also alleged that plaintiffs promptly rescinded the contract upon discovering the alleged fraud and a common count for money had and received.

The answer admitted the contract and denied the fraud and rescission. The defendant filed a cross-complaint for recovery of the balance of the purchase price. Plaintiffs answered the cross-complaint denying there was any balance due and realleging the fraud and rescission. The court found generally in accord with the allegations of the complaint and against the allegations of the cross-complaint and rendered judgment for plaintiffs. Defendant moved for a new trial which, as stated, was granted. Plaintiffs appeal from the order.

Appellants' specification of error is that since the order granting a new trial does not specify insufficiency of the evidence to sustain the verdict as a ground on which the new trial was granted, it must be conclusively presumed that it was not based on that ground, Code Civ. Proc., sec. 657; that there was no other valid ground upon which it could be based; hence the order must be reversed. Respondent asserts that the order was based upon the ground that the decision was "against law."

[1,2] The phrase "against law" used in section 657 of the Code of Civil Procedure as one of the causes for granting a new trial is not entirely clear. *Mosekian v. Ginsberg*, 122 Cal.App. 774, 776, 10 P.2d 525. In a general sense a decision is "against law" if there is any valid legal cause whatsoever for a new trial. The statute, however, in authorizing the granting of a new trial on the ground that the decision is "against law" does not include in that phrase all, or any, of the other several distinct and separate causes of the motion which are specified in section 657. *Brumagim v. Bradshaw*, 39 Cal. 24, 35. The statute makes the cause that the decision is "against law" a distinct cause of a motion for a new trial. It is nonetheless a distinct cause because of the circumstance that it is found in the same subdivision of the section as another cause of a motion, the "insufficiency of the evidence" to justify the decision. The two are stated in the disjunctive. They are alternatives. They are objections of an entirely different order. When we say that the evidence is

insufficient to justify the decision, we mean that there is an absence of evidence or that the evidence received is lacking in probative force to establish the proposition of fact to which it is addressed. In *re Estate of Bainbridge*, 169 Cal. 166, 170, 146 P. 427. "An order granting a new trial on the ground that the verdict [decision] is against law cannot be sustained by merely showing that it is unsupported by the evidence." *Hawkinson v. Oesdean*, 61 Cal.App.2d 712, 716, 143 P.2d 967, 969.

[3, 4] The phrase "‘against law’ refers to a situation furnishing a reason ‘for a re-examination of an issue of fact.’" In *re Estate of Keating*, 162 Cal. 406, 410, 122 P. 1079, 1081. If the court fails to find on material issues made by the pleadings—issues as to which a finding would have the effect to countervail or destroy the effect of the other findings—and as to which evidence was introduced, the decision is "against law." In such a case, a re-examination of the facts is necessary in order that the issues of fact may be determined. *Swift v. Occidental Mining, etc., Co.*, 141 Cal. 161, 167, 74 P. 700; *Kaiser v. Dalto*, 140 Cal. 167, 169-170, 73 P. 828. This rule, of course, does not apply where the fact is implied by law, where the fact is immaterial, where the fact is admitted by the pleadings, where the situation is such that it can be said that if the court had found on a material issue it would have been in such a way as to support the judgment, or where the correction of defective or omitted findings, or findings outside the issue, would not change the result. Where the findings are so inconsistent, ambiguous, and uncertain that they are incapable of being reconciled and it is impossible to tell how a material issue is determined, the decision is "against law." *Nuttall v. Lovejoy*, 90 Cal. 163, 167, 27 P. 69. We find an intimation in *Biaggi v. Ramont*, 189 Cal. 675, 677, 209 P. 892 and in *Will v. Southern Pacific Co.*, 18 Cal.2d 468, 474, 116 P.2d 44, that a decision is "against law" if the evidence is "insufficient in law, and without conflict in any material point." 189 Cal. at page 677, 209 P. at page 894. There is no contention in the present case

and could not be, that the evidence is insufficient in law or without conflict.

[5] If the findings which are made necessarily dispose of the case, the decision is not "against law." *Brisson v. Brisson*, 90 Cal. 323, 328, 27 P. 186; *Sharp v. Pitnam*, 166 Cal. 501, 505, 137 P. 234; *Chamberlain v. Abeles*, 88 Cal.App.2d 291, 299, 198 P.2d 927. The decision is not "against law" because the conclusions of law or the judgment are not supported by the findings. *Pierce v. Willis*, 103 Cal. 91, 93, 94, 36 P. 1080; *Churchill v. Flourney*, 127 Cal. 355, 361, 59 P. 791; *Petaluma Pav. Co. v. Singley*, 136 Cal. 616, 618, 69 P. 426; In *re Estate of Keating*, 162 Cal. 406, 410, 122 P. 1079. "Where there has been no error in determining an issue of fact or affecting the determination of any question of fact, there is no ground for a new trial" on the cause that the decision is "against law." *Webb v. Los Angeles Ry. Corp.*, 134 Cal.App. 637, 642, 26 P.2d 26, 28.

Respondent's argument is "that if there had been an erroneous application of the law at the trial to the evidence, the presumption of the sufficiency of the evidence would be overcome and that then the decision is against the law." He says "appellants were making this deal primarily to get the business location of the respondent and his AA-1 priority rating" and refers us to certain evidence which he says supports this statement. In the course of referring us to that evidence he argues its effect. He says it thus appears that the misrepresentations alleged in the complaint were not material representations on which appellants relied; that as they received the business location and the priority, they obtained the very things they were seeking to purchase and there had been no misrepresentations. Continuing, respondent asserts that if the court on the motion for a new trial decided that the priority was what the plaintiffs really wanted to buy, "then its previous findings that the other alleged representations were material and false and relied on by plaintiffs were erroneous, and its conclusions of law and

judgment were also wrong" and the decision is "against law."

The written contract of sale covered not only the location and the priority but also the machine shop complete with all equipment, tools and rights, the right to use respondent's name and all contracts made by him to the date of the contract. The evidence supports the finding that the representations alleged in the complaint were material and the inference therefrom that appellants were seeking to purchase not only the location and the priority but the other items listed in the contract.

The effect of respondent's argument is that because on the motion for a new trial the court may have drawn different conclusions from the evidence than it drew in its findings, the decision—the findings of fact, Code Civ.Proc., sec. 632—is "against law." The argument goes solely to the sufficiency of the evidence to justify the decision. Respondent says that the court should have found originally that the alleged misrepresentations were not material and did not induce plaintiffs to make the purchase. This is saying that the findings are contrary to the evidence; that the evidence is lacking in probative force to establish the allegations of the complaint. This is the meaning of "insufficiency of the evidence" to justify the decision as used in section 657 of the Code of Civil Procedure. In *re Estate of Bainbridge*, 169 Cal. 166, 169-170, 146 P. 427.

[6,7] Since the order granting a new trial did not specify that it was granted on the ground of the insufficiency of the evidence to sustain the decision, it is conclusively presumed that it was not based on that ground. Code Civ.Proc., sec. 657. Our research discloses only three situations in which it has been held that a decision is "against law"; 1. Where the court fails to find on a material issue as previously

explained. 2. Where the findings are so inconsistent, ambiguous, and uncertain that they are incapable of being reconciled and it is impossible to tell how a material issue is determined. 3. The evidence is "insufficient in law and without conflict in any material point." The court did not fail to find on any issue of fact. The findings are consistent, unambiguous and certain. The evidence is sufficient in law to support the findings. The decision is, therefore, not "against law." As we have seen, the contention is without merit that if the court on the motion for a new trial decided that the priority was what the plaintiffs really wanted to buy, its conclusions of law and judgment were "against law." No legal reason is shown for a re-examination of any issue of fact.

[8] The findings made dispose of the case. No error appears in the determination of any question of fact. In accord with *Ballard v. Pacific Greyhound Lines*, 28 Cal.2d 357, 361, 170 P.2d 465, we have considered the entire record on which the order was based to discover whether there is any error which would justify the trial court in making the order, to see if there is any ground—with the exception of insufficiency of the evidence—on which the order can be upheld. We have found none. Respondent does not suggest that the order was made for any cause other than that it was "against law." The decision not having been "against law" the order must be reversed. *Pierce v. Willis*, 103 Cal. 91, 36 P. 1080; *Will v. Southern Pacific Co.*, 18 Cal.2d 468, 116 P.2d 44; *Hawkinson v. Oesdean*, 61 Cal.App.2d 712, 143 P.2d 967; *Webb v. Los Angeles Ry. Corp.*, 134 Cal. App. 637, 26 P.2d 26; *O'Malley v. Carrick*, 60 Cal.App. 48, 212 P. 45.

Order reversed.

SHINN, P. J., and WOOD, J., concur.

**CARTER v. SUPERIOR COURT IN AND
FOR LOS ANGELES COUNTY et al.**

Civ. 17474.

District Court of Appeal, Second District,
Division 3, California.

March 8, 1950.

Austin Carter petitioned for writ of mandate by which it was sought to require the Superior Court of the State of California, in and for the County of Los Angeles, the Honorable Arnold Praeger and the Honorable Julius V. Patrosso, Judges of said court, to proceed to judgment in an action petitioner had pending against Seaboard Finance Company without entertaining and determining issues raised by defendant's amended and supplemental answers. The District Court of Appeal, Shinn, P. J., held that respondents, after reversal of judgment entered by them by Supreme Court with directions, were limited on remand solely to following directions of the Supreme Court.

Writ issued.

1. Appeal and error ⇨1201(1)

Upon judgment of reversal by Supreme Court with direction to court below to render a decree in accordance with views expressed in their opinion court below must follow directions given and cannot allow new issues to be framed by supplemental pleadings.

2. Appeal and error ⇨1198

Where Supreme Court reverses a judgment with direction to court below to render a decree in accordance with views expressed in their opinion, any proceedings had or judgment rendered contrary to such specific directions would be void.

3. Mandamus ⇨58

Prohibition ⇨5(3)

Where trial court is about to exceed its authority by proceeding otherwise than in accordance with directions given by Supreme Court upon reversal of a judgment with respect to issues to be tried, or to judgment to be entered, either mandate or prohibition is proper remedy to compel obedience to such directions.

4. Appeal and error ⇨1201(1)

Where Supreme Court reversed judgment on second cause of action with direction to determine sums due to plaintiff on unenforceable portion of contract relating to two of the four motor vehicles purchased by plaintiff in single transaction, assertion that plaintiff was insolvent, and although he was about to recover judgment against defendant in present action, he would not be able to respond to any judgment defendant might recover against him in a separate action did not broaden powers of trial court on retrial of present action, so as to permit defendant to file amended and supplemental answers, asserting counterclaims against plaintiff arising out of the same transaction.

5. Mandamus ⇨4(1)

Prohibition ⇨3(5)

If in circumstances of a given case it may be clearly discernible that a remedy by appeal will not properly subserve the ends of justice by affording relief to which petitioner may be entitled, the fact that, ordinarily speaking, such remedy is plain, speedy and adequate will not prevent issuance of writ of prohibition or mandamus.

6. Mandamus ⇨4(1)

Prohibition ⇨3(5)

Where relief from unauthorized proceedings is sought by prohibition or mandate and right of appeal exists, court has broad discretion to determine from the facts of the particular case whether remedy by appeal is plain, speedy and adequate.

7. Mandamus ⇨4(1)

Where judgment has been reversed by Supreme Court with explicit directions to the trial court under which party is given a clear right to trial of limited issues or entry of a particular judgment, and it appears that proceedings in trial court are about to be taken which would be burdensome and futile, as well as unauthorized, a writ of mandamus should issue, although action about to be taken would be reviewable on appeal.

A. W. Brunton and Lauren M. Handley, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, William E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondents.

Bromley, Ritter & Lindersmith, Frank E. Carleton, Los Angeles, for Seaboard Finance Co., real party in interest.

SHINN, Presiding Justice.

Austin Carter petitions for a writ of mandate by which it is sought to require the superior court to proceed to judgment in an action he has pending against Seaboard Finance Company without entertaining and determining issues raised by defendant's amended and supplemental answers. The ground upon which he seeks relief is that the Supreme Court heretofore rendered its judgment by which it reversed in part a judgment rendered in favor of defendant and limited the issues to be retried in the superior court. Plaintiff's action is for money. His complaint alleged three causes of action all arising out of a single transaction in which he purchased four motor vehicles and in connection therewith executed to Seaboard his note and chattel mortgage. The facts of the case are considerably involved. They are set out in full in *Carter v. Seaboard Finance Co.*, 33 Cal.2d 564, 203 P.2d 758. Briefly stated, the decision of the Supreme Court was that the chattel mortgage was in law a conditional agreement for the sale of motor vehicles, as defined by section 2981(a) Civil Code; that it was valid as to two of the vehicles and invalid as to the other two. Plaintiff's demand for the recovery of money paid under an allegedly invalid agreement was asserted in the second cause of action of his complaint. The judgment of the Supreme Court, 33 Cal.2d at page 588, 203 P.2d at page 773, reads in part as follows: "The judgment on the second cause of action is reversed with directions to the trial court to determine the sums due to the plaintiff on the unenforceable portion of the contract relating to the Sterling and Freuhauf vehicles and enter judgment accordingly."

Under this direction of the Supreme Court the superior court will be required to determine nothing except the amount that is recoverable by plaintiff in the transaction with respect to his purchase of the Sterling and Freuhauf vehicles. However, defendant has now filed amended and supplemental answers asserting counterclaims against plaintiff arising out of the same transaction, by which it seeks to recover a money judgment from plaintiff. It appears from the answers that are now before the court that with respect to the enforceable portion of the chattel mortgage Seaboard has sold a Cummins truck and a Weber trailer under a power of sale, has applied the amount received upon the amount claimed by it to be allocable to the lien on those two vehicles, and that there remains a large deficiency which plaintiff is obligated by the mortgage to pay. Plaintiff made motions to strike these amended and supplemental answers upon the ground that the superior court must follow the specific directions of the Supreme Court and may not try other issues. The motions have been denied, and the court is proceeding with a purpose to adjudicate all claims of the respective parties arising out of the transaction.

The major question discussed in the briefs is whether the judgment of the Supreme Court should be given literal effect, thereby limiting the powers of the superior court to the ascertainment of the sum that may be found due to plaintiff upon the unenforceable portion of the contract. Seaboard insists that it was not the intention of the Supreme Court to thus limit the issues to be tried and, further, that it will suffer irreparable injury and loss if it is not allowed to offset its claims for the deficiency and other claims against any judgment plaintiff may recover.

The original trial in the superior court ended February 17, 1947, when judgment was entered in favor of defendant. In the supplemental answer it is alleged that on July 2, 1947, defendant sold a Cummins diesel truck and a Weber trailer under power of sale contained in the mortgage for

\$5,000; that \$8,239.17 was the sum attributable to these two vehicles in the loan transaction and was their reasonable value at that time; that the sale of the vehicles left a deficiency in the amount of \$4,631.49 and that said sum remains wholly unpaid. Other special defenses set up counterclaims for money had and received in the amounts of \$3,635.95 and \$4,631.49. It thus appears that defendant's counterclaim for the deficiency did not arise until some months after judgment had been entered in favor of defendant. No counterclaim for money had and received was filed by defendant prior to the judgment granted in February, 1947. Under the original pleadings as they stood during the pendency of the appeal and at the time of the decision by the Supreme Court, the sole issue under the second cause of action of the complaint was whether plaintiff was entitled to recover certain sums of money from defendant. (There were other causes of action as to which the judgment in favor of defendant was affirmed.)

[1,2] In the early case of *Keller v. Lewis*, 56 Cal. 466, it was held that upon a judgment of reversal by the Supreme Court with directions to the court below to render a decree in accordance with the views therein expressed the court below had but to follow the direction thus given and that the trial court properly refused to allow new issues to be framed by supplemental pleadings. The courts have repeatedly adhered strictly to the rule. It was expressed by the Supreme Court in *Rice v. Schmid*, 25 Cal.2d 259, 263, 153 P.2d 313, 315, as follows: "Where a reviewing court reverses a judgment with directions to determine damages in accordance with the rules set forth in its opinion and to enter judgment for the plaintiff, the trial court is bound by the directions given and has no authority to retry any other issue or to make any other findings. Its authority is limited wholly and solely to following the directions of the reviewing court. *Cowdery v. London, etc., Bank*, 139 Cal. 298, 307, 73 P. 196, 96 Am.St. Rep. 115; *Weaver v. San Francisco*, 146 Cal. 728, 732, 81 P. 119; *English v. Olym-*

pic Auditorium, Inc., 10 Cal.App.2d 196, 201, 52 P.2d 267." Any proceedings had or judgment rendered contrary to such specific directions would be void. *Snoffer v. City of Los Angeles*, 14 Cal.App.2d 650, 58 P.2d 961; *Phillips v. Patterson*, 34 Cal.App.2d 481, 93 P.2d 807.

[3] It is equally well settled that when the trial court is about to exceed its authority by proceeding otherwise than in accordance with directions given with respect to the issues to be tried, or judgment to be entered, either mandate or prohibition is a proper remedy to compel obedience to such directions. *Lamb v. Owen*, 98 Cal.App. 106, 276 P. 628; *Lial v. Superior Court*, 133 Cal.App. 31, 23 P.2d 795.

[4] Defendant contends that the present case justifies a departure from these rules. It is asserted that plaintiff is insolvent, and although he is about to recover judgment against defendant in the present action, he will not be able to respond to any judgment defendant may recover against him in a separate action. It appears to be contended that this prospective loss of defendant's claims necessarily broadens the powers of the superior court on a retrial of the present action, and that the judgment of the Supreme Court should be given an effect which will allow a trial of defendant's counterclaims in the present action. We cannot agree. There is no latitude for interpretation of the judgment of the Supreme Court. Neither is there any necessity for broadening the issues to be retried. If plaintiff is insolvent defendant is not without an adequate remedy. *Harrison v. Adams*, 20 Cal.2d 646, 128 P.2d 9, and cases cited.

Defendant's claims, based upon the alleged deficiency following the sale of the two vehicles, or for money had and received, were entirely foreign to the issues that had been litigated and which were under review on the appeal. The judgment of the Supreme Court was a proper and complete disposition of the issues that were presented by the record, it is clear and positive, and there is no reason to doubt that the Court intended to con-

fine further proceedings in the trial court to a determination of those issues. This limitation measures the authority of the superior court upon a retrial. Plaintiff's motion to strike out defendant's amended and supplemental answers should have been granted.

[5] Defendant urges the further point that a writ of mandate should not issue for the reason that plaintiff has a plain, speedy and adequate remedy by appeal from any adverse judgment that may be rendered upon the counterclaims. This objection is not well taken. While ordinarily the remedy by appeal is deemed plain, speedy and adequate, it will not always bar relief by mandate or prohibition. As said in *Chaplin v. Superior Court*, 81 Cal.App. 367, 379, 253 P. 954, 958: "The exception to the rule also is well established that, although the order or the judgment to which exception is taken by the person, upon whom it operates, may be appealable and thus come within the general rule which forbids the issuance of a writ of prohibition, nevertheless, if in the circumstances of a given case it may be clearly discernible that such a remedy will not properly subserve the ends of justice by affording the relief to which the petitioner may be entitled, the fact that, ordinarily speaking, the remedy is 'plain, speedy, and adequate' will present no obstacle to the issuance of the writ." *Hammons v. Superior Court*, 63 Cal.App. 700, 707, 219 P. 1037; *Dept. of Public Works of State of California, Division of Water Rights v. Superior Court*, 197 Cal. 215, 223, 239 P. 1076. See also, *Davis v. Superior Court*, 184 Cal. 691, 195 P. 390; *Kahn v. Smith*, 23 Cal.2d 12, 142 P.2d 13; *LaMar v. Superior Court*, 87 Cal.App.2d 126, 196 P.2d 98; *Glide v. Superior Court*, 147 Cal. 21, 81 P. 225.

[6] Where relief from unauthorized proceedings is sought by prohibition or mandate and a right of appeal exists, the court has a broad discretion to determine from the facts of the particular case whether the remedy by appeal is plain, speedy and adequate. *Fletcher v. Superior Court*, 79 Cal.App. 468, 480, 250 P.

195; *Golden State Glass Corp. v. Superior Court*, 13 Cal.2d 384, 389, 90 P.2d 75. We are satisfied that the remedy of appeal from any judgment in favor of defendant on its counterclaims would not properly subserve the ends of justice.

The situation, however, is anomalous. Should we decline to issue a writ of mandate, thus allowing the superior court to try the issues presented by defendant's amended answers, the result would be a valid adjudication of plaintiff's present claim and an invalid adjudication of those of defendant. If plaintiff should establish his claim, he would have obtained what he desires, namely, a judgment against defendant without any valid offset based upon defendant's counterclaims. Defendant would have accomplished nothing, even though it established the validity of its counterclaims, since a judgment in its favor would be one which the court had no power to render.

It will appear from this analysis of the situation that plaintiff might be better off if no writ were issued. Upon the other hand defendant, notwithstanding its objections to issuance of a writ, may derive advantage through proceeding by independent action instead of prosecuting its claims to a void judgment in the present action. Nevertheless, considerations of policy, as well as the legal principles we have discussed, make a strong appeal for the issuance of a writ of mandate.

[7] If, in the present case, a trial should be had on the issues raised by defendant's amended answers, it would be necessary to try the same issues in another action before a valid judgment could be rendered thereon. While it is to the interests of the parties to avoid this unnecessary expense, it is also a matter of sound policy, in a proper case, to prevent waste of the trial court's time in the trial of two cases, where one would suffice. It would seem, therefore, that in any case where a judgment or order has been reversed with explicit and positive directions to the trial court under which a party is given a clear right to the trial of limited issues or the entry of a particular judg-

ment or order, and it appears that proceedings in the trial court are about to be taken which would be burdensome and futile, as well as unauthorized, one of the extraordinary writs should issue, although the action about to be taken would be reviewable on appeal.

It is ordered that a writ of mandate issue directing the superior court to strike out all amended and supplemental answers and amendments thereto of defendant in so far as they set up counterclaims to which reference has been made herein, and to conduct further proceedings in accordance with the views herein expressed.

WOOD and VALLÉE, JJ., concur.



96 Cal.App.2d 377

THOMAS v. HAWKINS et al.

Civ. 17022.

District Court of Appeal, Second District,
Division 3, California.

March 8, 1950.

Partition action by Peggy C. Thomas against Monroe T. Hawkins and others, wherein defendant, by his guardian ad litem, J. Raymond Medberry filed a cross-complaint seeking to be adjudged sole owner of the realty.

The Superior Court for Los Angeles County, Harold S. Landreth, J., rendered a judgment for the cross-complainant, and the plaintiff appealed.

The District Court of Appeal, Vallée, J., held that the evidence supported findings to the effect that defendant purchased property in his name and in the name of plaintiff in reliance upon plaintiff's false representation that she could and would marry him, and that the court properly concluded that defendant was sole owner subject to liens of record.

Judgment affirmed.

1. Contracts ⇐94(1, 2, 6, 8)

False representations, the wilful suppression of material facts, and the making of a promise without any intention of performing it, if committed by a party to a contract with intent to deceive another party thereto, or to induce him to enter into the contract, constitute fraud; and the fact represented or suppressed is deemed material if it relates to a matter of substance and directly affects the purpose of the party deceived in entering into the contract. Civ.Code, § 1572.

2. Partition ⇐63(3)

In partition action, evidence supported finding that downpayment on realty was made by defendant and that monthly payments thereafter due were made by him and by plaintiff from funds derived from rentals received by plaintiff from the property.

3. Partition ⇐63(3)

In partition action, evidence justified finding to the effect that defendant made purchase of property in name of plaintiff and himself in reliance upon plaintiff's false representation that she would and could marry him, and hence court properly concluded that defendant was sole owner of property subject to liens of record. Civ. Code, § 1572.

4. Fraud ⇐58(4)

An inference of reliance upon fraudulent representations may be drawn from circumstances which have been shown. Civ.Code, § 1572.

Gladys Towles Root, Los Angeles, for appellant.

J. Raymond Medberry, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from a judgment decreeing defendant, Monroe T. Hawkins, to be the sole owner of a parcel of improved real property standing of record in the names of "Monroe T. Hawkins, a single man as to an undivided one half interest and Peggy C. Thomas, an unmarried woman as to an undivided one half interest."

May 14, 1947, plaintiff, Peggy C. Thomas, commenced this action against the defendant, Monroe T. Hawkins, for partition of the property, alleging that she was the owner of an undivided half interest. Hawkins filed an answer and cross-complaint. The first count of the cross-complaint alleged that the property had been placed in the joint names of the parties merely for convenience; that Hawkins had paid \$2,500 on the purchase price, executed two mortgages for \$6,500 for the balance, and thereafter paid \$95 monthly on the mortgages; that the purchase of the property was made upon plaintiff's representation that she was not married and would marry him; that this representation was false, and at the time the representation was made plaintiff was married to another; that the representation was made with the intent to induce him to purchase and record the property in the names of the parties as tenants in common; that plaintiff has collected \$34.50 every week subsequent to the first week in February, 1947, for rental of rooms located on the premises. The second count of the cross-complaint alleged that Hawkins had contributed the money for the purchase of the property, had made the monthly payments due thereon, and had requested plaintiff to execute and deliver a deed to him but that she refused to do so.

The court found substantially in accord with the allegations of the first count of the cross-complaint; and specifically that: May 17, 1946, Hawkins purchased the property in his name and in the name of plaintiff by depositing \$2,500 in escrow; he made the purchase in reliance upon plaintiff's representation that she would marry him; after the purchase plaintiff refused to marry him because she was married to another; plaintiff's representation was false and made with an intent to induce Hawkins to purchase and record the property in his name and in her name as tenants in common; Hawkins requested plaintiff to execute and deliver a deed of the property to him but she refused to do so. The court concluded that Hawkins was sole owner of the property subject to liens of record, and rendered judgment accordingly.

Appellant's contention appears to be that the evidence does not support the findings with respect to the fraud practiced upon respondent. The contention is lacking in merit as even a cursory review of the evidence indicates.

[1] False representations, the wilful suppression of material facts, and the making of a promise without any intention of performing it, if committed by a party to a contract with intent to deceive another party thereto, or to induce him to enter into the contract, constitute fraud. Civ.Code, sec. 1572. The fact represented or suppressed, as the case may be, is deemed material if it relates to a matter of substance and directly affects the purpose of the party deceived in entering into a contract. *Schaub v. Schaub*, 71 Cal.App.2d 467, 475, 162 P.2d 966. The inducement for the purchase of the property in the names of both parties was the promise by plaintiff that she would marry defendant, coupled with the representation that she was an unmarried woman; the fraud consisted in the concealment of the fact that at the time of the promise of marriage and at the time of the purchase of the property she was in fact married to another, which marriage was not dissolved until August 2, 1946. There is evidence that shortly after defendant's discharge from the army December 21, 1945, he asked plaintiff to marry him and she told him she would, but kept putting him off. Defendant testified that, because of this promise, he decided to buy a house (which decision was accelerated by the fact that plaintiff had received an eviction notice where she was then residing); and on May 17, 1946, bought the property.

[2-4] There is a decided conflict in the evidence respecting the funds used in the down payment and in the monthly payments due thereafter; but the court found, and the evidence supports the finding, that the down payment was made by defendant, and the monthly payments thereafter due were made by defendant and by plaintiff from funds derived from rentals received by her from the property. At all times plaintiff concealed from defendant the fact that she was married, and as early as March, 1946,

and throughout the transaction which ultimately culminated in the purchase of the property, falsely represented herself as an unmarried woman, signing escrow instructions and another document as such. Defendant testified that the first inkling he had that plaintiff was married was in July of 1946. Even then plaintiff led defendant to believe this was not true. It was not until the filing of this action in 1947 that defendant learned for a certainty that plaintiff was married at the time she promised to marry him and at the time the property transaction was consummated. Appellant intimates that respondent did not rely upon her promise and representation, but the rule nevertheless prevails that where the evidence justifies it, as it does in this case, an inference of reliance may be drawn from the circumstances which have been shown. *Mathewson v. Naylor*, 18 Cal.App.2d 741, 744, 64 P.2d 979; *Hunter v. McKenzie*, 197 Cal. 176, 185, 239 P. 1090.

Affirmed.

SHINN, P. J., and WOOD, J., concur.



96 Cal.App.2d 255

**CRAMER et al. v. LOS ANGELES
COUNTY et al.**
Civ. 17339.

District Court of Appeal, Second District,
Division 2, California.
Feb. 28, 1950.

Leslie G. Cramer, and others, filed a claim against the County of Los Angeles and E. W. Biscailuz, Sheriff, for damages arising out of a resolution by County Board of Supervisors vacating a public road. The Superior Court, Los Angeles, Paul Nourse, J., granted defendants' motion for judgment on the pleadings and dismissed the action and plaintiffs appealed. The District Court of Ap-

peal, Moore, P. J., held that the evidence was insufficient to justify a finding that board acted arbitrarily or that actual fraud or corruption existed when board adopted resolution.

Affirmed.

1. Highways ⇨76, 78

A resolution of county board of supervisors vacating a road as unnecessary for future or present public use is a valid action, being legislative in character and ordinarily, conclusive both as to the necessity and convenience thereof.

2. Constitutional law ⇨70(1)

Courts cannot validly interfere with a county board of supervisors from exercising the legislative or discretionary functions committed to it by the legislature.

3. Highways ⇨77(11)

Where a finding of public convenience and necessity by county board of supervisors in vacating a road, results from fraud or collusion between the board and private land owners, it is void and may be annulled.

4. Highways ⇨77(11)

In an action in which validity of a resolution by county board of supervisors vacating a road for future public use was in issue, evidence was insufficient to justify a finding that board acted arbitrarily or that actual fraud or corruption existed when board adopted resolution.

5. Counties ⇨200

A claim, against a county board of supervisors for damages arising out of a resolution of board vacating public road, filed more than one year after board adopted resolution, was barred by the statute of limitations. Government Code, § 29702.

6. Estoppel ⇨62(1)

An estoppel may be invoked against a governmental body in certain instances.

7. Limitation of actions ⇨177(2)

Where a claim against a county board of supervisors for damages arising out of a resolution of board vacating a public road, was filed after statute of limitations had run, the failure of plaintiffs to plead

that defendants were estopped to assert statute of limitation, prevented plaintiffs from relying upon such contention as an excuse for noncompliance with the statute. Government Code, § 29702.

8. Limitation of actions 13

Where claim against county board of supervisors for damages arising out of a resolution of board vacating a public road, was filed after statute of limitations had run, although the board indicated that a new road would be provided for, and plaintiffs failed to investigate within one year as to what plans the county authorities had made as to the new proposed road, the board was not estopped from asserting the statute of limitations. Government Code, § 29702.

Harry C. Cogen, Los Angeles, for appellants.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondents.

MOORE, Presiding Justice.

The question for decision is whether the action of the Board of Supervisors of Los Angeles County in vacating a public road was so arbitrary as to constitute fraud. Having granted judgment on the pleadings on the ground that the complaint does not state a cause of action, the judgment of dismissal was entered.

The substance of the complaint is that "Sheriff Road" is a duly dedicated road; it entered plaintiffs' property and was a means of access thereto and has been regularly used by plaintiffs and their predecessors in interest and by the owners of adjacent properties; on July 10, 1941, the board by resolution duly adopted made an order setting aside Sheriff Road for county highway and right of way purposes; April 1, 1944, defendant cut off a portion of the easterly terminus of Sheriff Road thereby excluding access to plaintiffs' property; April 1, 1946, the sheriff without legal right caused to be erected a fence across Sheriff Road effectively excluding and eliminating plaintiffs' means of access to their proper-

ty; November 12, 1946, by resolution adopted at a legal session the board "ordered a portion of said Sheriff Road vacated and abandoned as unnecessary for future or present public use"; such action of the board cut off access to plaintiffs' property and it has ever since been and still is inaccessible from Sheriff Road which was necessary for present and future public use; "the act of the board was without right or authority, contrary to law and constituted an arbitrary and unreasonable exercise of the power of said board and was an abuse of its discretion"; plaintiffs' property had a rental value of \$1000 per month; such value was destroyed by the act of defendants to plaintiffs' damage in that amount from April 1, 1944; January 6, 1948, plaintiffs filed their claims for damages against the county with the board; April 13, 1948, the board rejected such claim.

The complaint was filed June 3, 1948.

[1, 2] Contrary to appellants' contention, the resolution of the board was a valid act. Such an act is legislative in character and "is conclusive both as to the necessity or convenience of the improvement and as to the extent of the district to be benefited." *Beals v. City of Los Angeles*, 23 Cal.2d 381, 385, 144 P.2d 839, 842; *Constantine v. City of Sunnyvale*, 91 Cal.App.2d 278, 204 P.2d 922. Courts cannot validly restrain a board of supervisors from exercising the legislative or discretionary functions committed to it by the legislature. *Nickerson v. San Bernardino*, 179 Cal. 518, 522, 177 P. 465. In *Brown v. Board of Supervisors of the City and County of San Francisco*, 124 Cal. 274, 57 P. 82, it was held that the authority to close a street was conferred by the Act of March 7, 1889, and that the adoption of the order by the board is a determination that the public interest and convenience require the improvement and that the decision of this question by the board is not open for review, citing *Symons v. San Francisco*, 115 Cal. 555, 42 P. 913, 47 P. 453. Section 956.8 of Streets and Highways Code confers upon the board of supervisors of any county on its own motion the power to abandon any county highway. Section 959

(ibid) provides that "if the board finds, from all the evidence submitted, that any county highway described in the petition, or any part of such highway, is unnecessary for present or prospective public use, the board may make its order abandoning such highway, or part thereof."

The cited statutes conferred a broad discretion upon a board of supervisors to abandon any highway which after a hearing of the evidence they may determine to do.

[3] There is one exception to the foregoing rule covering the legislative acts of a board of supervisors. Where the finding of public convenience and necessity results from fraud or collusion between the board and private land owners it is void and may be annulled. *Beals v. City of Los Angeles*, supra. But the complaint in the instant action contains no allegation of a fraudulent act on the part of the board or any member thereof. No private gain for any member or for any owner of property within the community or otherwise is alleged. No evidence was offered for the purpose of showing private gain had accrued or would accrue to anyone. Moreover, the complaint is devoid of any allegation from which it may be inferred that the supervisors abused their discretion. The only offer of proof of an arbitrary action by the board was the testimony of two witnesses before the board that Sheriff Road had no present or future public use; the road had been used as a public highway for from 16 to 50 years; the board's discussion with reference to providing another road and the adoption of a motion that certain county agencies take necessary steps to provide such accesses; testimony by county agents that their opinion as to the use of the land was based on the fact that the road was obstructed by the fence without investigating its origin; the testimony of a member of the county regional planning commission that the commission had investigated the abandonment of Sheriff Road and had recommended against it; testimony of the undersheriff that his office had erected the fence across Sheriff Road without attempting to determine whether such a

step was legal and that after plaintiffs' protest a letter was sent to the board explaining that the sheriff's office needed the property and requesting approval of the action; testimony by one supervisor that he had voted for the abandonment of the road under the impression that a new road was to be constructed.

[4] While from such proof the supervisors might properly have determined not to close Sheriff Road, yet there is nothing in any of the offered testimony which at its full import would require a finding that the board acted arbitrarily or corruptly or abused its discretion.

The authorities cited by appellants, *Erro v. City of Santa Barbara*, 123 Cal.App. 508, 11 P.2d 890; *Brydon v. City of Hermosa Beach*, 93 Cal.App. 615, 270 P. 255; *People v. City of Los Angeles*, 62 Cal.App. 781, 218 P. 63, are distinguishable by their facts. In each of them there was some proof of actual fraud or corruption in adopting the resolution under attack. Since there was no private gain or fraud or collusion or other act tantamount to actual fraud the resolution of the board in abandoning Sheriff Road was a valid legislative act. Discretion is soundly exercised when based upon facts and adopted with a proper consideration of public needs. Judging from the proffered transcript of the testimony before the board its action was taken after due consideration of the proof offered by appellants and of the evidence from the sheriff's office that the vacation of the road was necessary for the public welfare.

[5] Claim for damages cannot form the basis of a judgment for the reason that it was barred by the provision of section 29702 of the Government Code. "A claim shall be filed within a year after the last item accrued." The resolution of the board vacating the highway was adopted November 12, 1946. The claim was filed January 6, 1948, more than one year having lapsed after the adopting of the resolution. *Kline v. San Francisco Unified School District*, 40 Cal.App.2d 174, 104 P.2d 661, 105 P.2d 362; *Walton v. Kern County*, 39 Cal.App.2d 32, 102 P.2d 531; *Spencer v.*

City of Calipatria, 9 Cal.App.2d 267, 49 P. 2d 320; Carroll v. Siebenthaler, 37 Cal. 193. In Veterans' Welfare Board v. City of Oakland, 74 Cal.App.2d 818, 826, 169 P.2d 1000, 1006; the court said, "It is a well settled and admitted principle of law that a cause of action for either a taking or damaging of private property under the Constitution is subject to the operation of a claim statute or charter provision, provided the terms thereof are broad enough to embrace it. * * *

[6-8] However, appellants contend that respondents are estopped to raise the defense of failure to file the claim within the one year period. They base this contention on the fact that they relied on the motion adopted by the board that certain county agencies take necessary steps to provide a new access road. It is true that an estoppel may be invoked against a governmental body in some instances, *Farrrell v. County of Placer*, 23 Cal.2d 624, 630, 145 P.2d 570, 153 A.L.R. 323, but in the instant case plaintiffs have not pleaded an estoppel and therefore may not now rely upon such an excuse for noncompliance with the statute. *Goorberg v. Western Assurance Co.*, 150 Cal. 510, 519, 89 P. 130, 10 L.R.A., N.S., 876, 119 Am.St.Rep. 246, 11 Am.Cas. 801; *Cohen v. Metro. Life Ins. Co.*, 32 Cal.App.2d 337, 347, 89 P.2d 732; *Silva v. Linneman*, 73 Cal.App.2d 971, 976, 167 P.2d 794. Assuming that appellants had been permitted to amend their pleadings, still facts sufficient to constitute an estoppel have not been shown. Although the board indicated that a new road would be provided, nevertheless appellants should have taken steps before the expiration of the year to investigate as to what plans the county authorities had made. On discovery that no action had been taken, plaintiffs should have filed their claim rather than to have slept on their rights.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

96 Cal.App.2d 417

PEOPLE v. BURATTI.

Cr. 2164.

District Court of Appeal, Third District,
California.

March 10, 1950.

Hearing Denied April 6, 1950.

Woodrow Louis Buratti was convicted in the Superior Court, Yolo County, C. C. McDonald, J., of burglary, and he appealed from the judgment and from order denying a new trial. The District Court of Appeal, Adams, P. J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Burglary ⇨42(1)

Generally, proof of possession of stolen goods, standing alone, will not support a conviction of burglary.

2. Burglary ⇨42(3)

Evidence that articles taken in burglaries were found in possession of defendant, coupled with evidence of false and conflicting statements as to how the articles came into defendant's possession, of the use by defendant of fictitious names in disposing of the articles, and of sale of articles for obviously inadequate prices, sustained burglary convictions.

3. Witnesses ⇨282¾

In burglary prosecution, where defendant admitted lying when he made statements conflicting with defendant's testimony at trial, and in making statements as to how stolen articles came into defendant's possession, trial court properly interrogated defendant as to defendant's reasons for lying, and why defendant was for first time at trial claiming that stolen articles came from a friend of defendant's, and as to how defendant reconciled conflicting statements made at trial. Pen.Code, § 1439.

4. Criminal law ⇨1036(2)

Where no objection was made during trial of burglary prosecution to questions asked defendant by trial judge, and nothing indicated questions were made in an unfair or indiscreet manner, defendant could

not on appeal assert that action of trial judge in questioning defendant was prejudicial misconduct. Pen.Code, § 1439.

5. Criminal law §1171(1)

In burglary prosecution, action of district attorney during examination of defendant, in grasping his hand to his head, tearing his hair and making noises, was not prejudicial to defendant.

Walter C. Frame, Sacramento, and McAllister & Johnson, by Neil R. McAllister, Jr., Sacramento, for appellant.

Fred N. Howser, Attorney General, by Doris H. Maier and Gail A. Stradar, Deputies, for respondent.

ADAMS, Presiding Justice.

Defendant was charged with four burglaries of rooms at El Rancho Motel, in Yolo County, on four different dates, and the taking therefrom of various articles belonging to occupants of the rooms. Nearly all of the loot was found in defendant's possession or was shown to have been disposed of by him. A jury found him guilty on all four counts, his motion for a new trial was denied, and this appeal is taken from the judgment of conviction and the order denying a new trial.

Grounds for reversal urged are that the evidence was not sufficient to sustain the verdict, and that the trial judge and the prosecuting attorney were guilty of misconduct during the trial.

The evidence shows that between 7:30 p. m. November 29, and 1:00 a. m. November 30, 1948, the room occupied by one Joseph F. Reed was burglarized and a watch, a Masonic ring, and a jewel box containing cuff links and studs and a Chinese jade ring taken. The jewel box and some of its contents were found in defendant's possession at the time of his arrest. At that time defendant told the deputy sheriff that same were his father's and came from behind the bar at his father's place in Petaluma. The jade ring was sold by defendant to a Sacramento jeweler, Buratti signing his name in the jeweler's record book as James Fargen. At

the trial defendant testified that he received the jade ring and the jewel box with its contents from Fargen, at a bar in Roseville, and that Fargen was a friend. But Fargen was not produced as a witness, and defendant testified he was unable to produce him.

Between the hours of 7:00 p. m. December 31, 1948, and 1:30 a. m. January 1, 1949, the room occupied by Adolph Memmer at El Rancho Motel was entered and a shotgun in a leather case, a clock, and a manicure set were taken therefrom. These articles were also found in defendant's possession, and he stated to one officer at the time of his arrest that the gun had been left with him by a man whose identity he did not know. Defendant offered to sell the gun to another officer, stating that it had been left in his care by a stranger who had asked him for a ride. Regarding the clock and the manicure set he first stated that they were his father's property, and had been taken from his father's bar in Petaluma; but at the trial he testified that they had been received from Fargen.

Between the hours of 7:30 and 10:00 p. m. on January 5, 1949, the room of Ralph Brown at El Rancho Motel was burglarized and a small radio taken. This radio was found in defendant's room. He first stated that it had been purchased at a pawn shop in San Rafael, but later stated that he had purchased it at a Sacramento music store before Christmas, 1948. At the trial he testified that he received it from Fargen.

Between the hours of 6:00 and 7:15 p. m. on February 2, 1949, the room of a Mrs. Campbell at El Rancho Motel was looted of a purse and a suitcase. A topaz ring contained therein was found in defendant's possession, and a wrist watch worth \$75 was sold by him under his own name for \$20 to the same jeweler to whom he sold the jade ring. Regarding those articles defendant stated to arresting officers that they had been found by him in the middle of the road where he was parked; but to another officer he said they were taken from his father's bar.

[1,2] Appellant's contention is that the foregoing evidence establishes only that he was guilty of receiving stolen goods, but

is insufficient to prove that he is guilty of burglary. Generally speaking, it may well be said that proof of possession of stolen goods, standing alone, will not support a conviction of burglary; but where proof of possession is accompanied by proof of false and conflicting statements as to how such goods came into defendant's possession, the use by him of fictitious names in disposing of them, and their sale for obviously inadequate prices, such evidence is sufficient to sustain a conviction for burglary. In *People v. Wade*, 76 Cal. App.2d 430, 431, 173 P.2d 54, the court said: "The law is established in California that possession of stolen property coupled with false statements as to the manner in which the property came into defendant's possession is sufficient evidence to sustain a conviction of burglary. *People v. McCann*, 34 Cal.App.2d 376, 377, 93 P.2d 643." Also see *People v. Taylor*, 4 Cal.App.2d 214, 217, 40 P.2d 870; *People v. Russell*, 120 Cal. App. 622, 8 P.2d 209; *People v. McCann*, 34 Cal.App.2d 376, 378, 93 P.2d 643; *People v. Carroll*, 79 Cal.App.2d 146, 148, 179 P.2d 75; *People v. Lang*, 142 Cal. 482, 484, 76 P. 232; *People v. King*, 8 Cal.App. 329, 332, 96 P. 916; *People v. Wing*, 23 Cal.App. 50, 51, 137 P. 47; *People v. Majors*, 47 Cal.App. 374, 375, 190 P. 636; *People v. Hunter*, 59 Cal.App. 444, 446, 210 P. 968; *People v. Russell*, 34 Cal.App.2d 665, 669, 94 P.2d 400.

Appellant's assigned error regarding alleged misconduct of the trial judge is based upon certain questions which the judge directed to him which appellant asserts indicated that the judge did not believe defendant's testimony. A reading of the transcript, however, convinces us that the trial court's queries were not prejudicial to the witness, but were calculated and intended to give him an opportunity to explain, if he could, why he had made admittedly contradictory statements regarding how the stolen goods had come into his possession. Prior to any inquiry by the judge, defendant, under questioning by his own counsel, admitted that he had made the statements to the officers to which they had testified, and was then asked: "Q. And the statements that were testified to by the

officer were made by you? A. That's right. Q. Were those true or untrue? A. They were untrue."

On cross-examination by the district attorney defendant then admitted that he was "lying" when he made the statements to the officers which were in conflict with his own testimony at the trial, and had "lied" in making six or seven statements as to how certain stolen articles came into his possession. He also admitted that he had never told them anything about Fargen before the trial.

No objection to the foregoing cross-examination by the district attorney was made by defendant, nor is it assigned as error or prejudicial.

[3] The trial court then interrogated defendant as to his reasons for lying to the officers, and why he was now, for the first time, making claims that certain stolen articles came from Fargen; also as to conflicting statements made at the trial regarding how he came into possession of the jade ring. The court, in its interrogation, used the word "lied", and had the witness not previously admitted that he had lied, the use of this word by the court might be claimed to have been prejudicial to the witness as indicating that the court was calling him a liar. The court also asked him to explain his reasons for lying to the officers, and how he reconciled certain conflicting statements made at the trial. The court was, therefore, doing no more than it was justified in doing—giving defendant an opportunity to explain his reasons for making his untrue statements to the officers and to reconcile, if he could, the apparent conflicts in his statements made at the trial.

In *People v. Butterfield*, 40 Cal.App.2d 725, 731, 105 P.2d 628, 631, where it was contended that a trial judge was guilty of prejudicial misconduct in cross-examining the defendant, this court referred to section 1439 of the Penal Code which authorizes a trial judge to make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case, and then said:

"* * * A trial judge certainly is authorized on cross-examination of a defendant to call his attention to apparently conflicting statements which he has made so as to give him an opportunity to explain or reconcile them if possible. We are of the opinion it is not only the privilege but the duty of a trial judge to ask questions of any witness in a fair and discreet way to elicit facts which are material to a just determination of the case. It has been held the judge is not a mere umpire for the determination of legal questions which are involved in the trial of a case. Of course a judge should not examine a defendant on trial for a crime in such a manner as to give the jury an impression that he thinks the accused is guilty of the charge and should be convicted. It is apparent such conduct would nullify the right of trial by jury. Upon examination of the record in the present case we find no evidence of such conduct on the part of the trial judge. It appears that in good faith the judge upon two or three occasions, in a fair and discreet manner, inquired of the defendant if he had not previously made statements in conflict with the testimony which he gave at the trial. In each instance the court quoted former statements of the defendant which do appear to be in conflict with his testimony at the trial. At least these apparent conflicts of evidence did require explanation or reconciliation. We find no prejudicial misconduct of the trial judge in his cross-examination of the defendant."

The Butterfield case was cited with approval in *Estate of Dupont*, 60 Cal.App.2d 276, 290, 140 P.2d 866, where numerous supporting decisions are cited. In *People v. Coleman*, 53 Cal.App.2d 18, 29, 127 P.2d 309, 316, where appellant contended that the trial court had questioned him to his prejudice, the court said: "All questions propounded were judicial in purpose (*People v. Patubo*, 9 Cal.2d 537, 71 P.2d 270, 113 A.L.R. 1303) and related to matters upon which defendant had been interrogated by his counsel; they were questions that would have been proper if asked by either defendant's counsel or the district attorney. *People v. Ramos*, 3 Cal.2d 269,

44 P.2d 301. 'A trial judge certainly is authorized on cross-examination of a defendant to call his attention to apparently conflicting statements which he has made so as to give him an opportunity to explain or reconcile them if possible.' *People v. Butterfield*, 40 Cal.App.2d 725, 731, 105 P.2d 628, 631."

In *Burns v. California Milk Transport*, 89 Cal.App.2d 70, 77, 200 P.2d 43, *Estate of Dupont* was quoted regarding the duty of a trial court to bring out the facts clearly. And in that case the court also said that the record did not show any objection to the lines of questioning by the court, and, as no objection to its conduct was made in the trial court, it was too late to urge it as error for the first time on appeal, citing *People v. Ottey*, 5 Cal.2d 714, 721, 56 P.2d 193; *Karwoski v. Grant*, 30 Cal.App.2d 171, 178, 85 P.2d 944; *People v. Jenkins*, 118 Cal.App. 115, 119, 4 P.2d 799. Also see *People v. Mendez*, 193 Cal. 39, 47-48, 223 P. 65; *People v. Ferrara*, 18 Cal.App. 271, 122 P. 1089; *People v. Johnson*, 57 Cal. App. 391, 394, 207 P. 281; *People v. Galuppo*, 81 Cal.App.2d 843, 848, 185 P.2d 335; *People v. Skeen*, 93 Cal.App.2d 489, 209 P.2d 132, hearing in Supreme Court denied.

[4] Here no objection to the questions asked by the court was made during the trial, no motion was made to strike them out, and there is nothing to indicate that manner; and, in accordance with the decisions they were made in an unfair or indiscreet in the foregoing cases, it is too late for defendant to urge the conduct of the trial judge as prejudicial misconduct on this appeal.

[5] The final contention of defendant, regarding alleged prejudicial misconduct of the district attorney, is that during the examination of defendant the district attorney grasped his hands to his head, tore his hair and made noises. Defendant's counsel assigned this as misconduct and asked the court to instruct the jury to disregard it. The court said it had observed nothing to admonish the jury about. There is nothing in the record to show such alleged conduct; no affidavit was filed, and as the trial judge observed nothing calling for

an admonition, we find no prejudicial misconduct and no reversible error. See *People v. Averett*, 54 Cal.App.2d 625, 629, 129 P.2d 739.

The judgment and order denying a new trial are and each of them is affirmed.

PEEK, J., concurs.



96 Cal.App.2d 263

In re **DAVISON'S ESTATE.**

DAVISON et al. v. SCHOCK et al.
Civ. 17490.

District Court of Appeal, Second District,
Division 2, California.
Feb. 28, 1950.

Proceeding in the matter of the estate of Albert Milton Davison, deceased. A. Milton Davison, son of deceased, filed his petition for decree determining heirship. Thereafter Oscar H. Schock and others as contestants, filed their "statement of distributees * * * on claim of heirship" in which they asserted that they "are the substitutional distributees" under deceased's will, opposed by the Los Angeles Orthopaedic Foundation, legatee. The Superior Court, Los Angeles County, A. E. Paonessa, J., entered a judgment adverse to the contestants, and the contestants appealed. The District Court of Appeal, Moore, P. J., held that the devise to charity in so far as it exceeded one-third of the distributable estate was not voidable as to the contestants, who were not blood relatives of the deceased.

Judgment affirmed.

1. Wills Ⓒ13(1)

The section of Probate Code relating to testamentary gifts to charities confers no additional rights on any person except as therein specifically implicated, and its provisions must not be ignored. Probate Code, § 41.

2. Wills Ⓒ13(1)

Under statute limiting charitable gifts in will executed at least thirty days before death to one-third of estate as against designated surviving blood relatives, the only person who can successfully object to a bequest to a charity is a spouse or consanguineal relative designated by statute, and otherwise estate passes as provided by the will and devise of entire estate to a charity shall not be affected. Probate Code, § 41.

3. Wills Ⓒ15

Under statute limiting charitable gifts in will executed at least thirty days before death to one-third of estate as against designated surviving blood relatives, portion of devise to charity in excess of designated limitation passes to class of relatives mentioned in the statute only to extent that such relatives take property under a substitutional bequest in will or under laws of succession because of absence of other effective disposition in the will. Probate Code, § 41.

4. Wills Ⓒ15

Where will devising residue of estate to certain charity contained provision that all of residue remaining over and above share to which charity would be entitled under the law should be divided equally among testator's son and five friends, devise to charity in so far as it exceeded one-third of the distributable estate was voidable as to son but not as to other substitutional legatees under law in force at testator's death, and charity was entitled to receive residue of the distributable estate except one-sixth of the remainder "over and above one-third of the distributable estate", which amount would go to son as substitutional legatee. Probate Code, § 41.

5. Wills Ⓒ3, 77

A will speaks from death of testator and is construed as operating according to the law then in force.

6. Wills Ⓒ77

The testamentary act anticipates that testator's devise would pass only at moment of his decease, and it presupposes

that testator will have used language of his will with reference to time of his death.

7. Wills ⚡3

The enactment of a statute after publication of a will changing law in force at date of will, determines construction of document in matter of conveyances of properties.

8. Wills ⚡1

The legislature's power over a will is absolute until death of its author.

9. Wills ⚡3

In determining limitation on gift to charity by will, the law in force at time of testator's death, and not at date of execution of will, should be applied, especially where testator executed a codicil reaffirming his will after change in statute relating to testamentary gifts. Probate Code, § 41; Civ.Code, § 1313.

10. Charities ⚡31

Gifts for charitable purposes are highly favored and bequests of such kind will be liberally construed in order to accomplish intent of donor.

Vaughan, Brandlin & Wehrle, Los Angeles, J. J. Brandlin, Los Angeles, for appellants.

Joseph J. Burris, Los Angeles, for respondent Orthopaedic Foundation.

W. I. Titus, Los Angeles, for respondent A. Milton Davison.

MOORE, Presiding Justice.

By his will dated March 29, 1929, decedent bequeathed to his son Milton and to five friends \$2000 each. By the Tenth paragraph of the instrument he devised the rest, residue and remainder of his property to respondent Foundation concluding with the following clause.

"In the event that for any reason the portion of my estate that would go to said Los Angeles Orthopaedic Foundation shall not be entitled, under the law, to receive all of the rest, residue and remainder

of my estate, then, and in that event, all of said residue remaining over and above the legal share to which said Los Angeles Orthopaedic Foundation is entitled, I give, devise and bequeath, in equal shares, share and share alike, to the persons named in this Will as legatees, to-wit: Margaret Lucile Cecil, Mrs. C. W. Heath, Mrs. Betty Zuanich, Mrs. George Davidson, Oscar H. Schock, and Albert Milton Davison, or to such of them as shall be living at the time of my death."

October 4, 1945, the testator published a codicil as follows:

"First: It is my wish and I hereby direct that my funeral services shall be conducted in accordance with the ritual of the Jewish faith and that interment shall be in a Jewish cemetery.

"Second: I hereby substitute Security-First National Bank of Los Angeles, a national banking association, as executor of my estate in lieu of Los Angeles First National Trust and Savings Bank.

"Third: I hereby reaffirm and republish my said Will unchanged except as herein expressly set forth."

Testator deceased June 28, 1948, and on February 21, 1949, his son Milton filed his petition for decree determining heirship under section 1080 of the Probate Code. In April appellants filed their "statement of Distributees * * * on claim of Heirship," in which they asserted that they "are the substitutional distributees" under decedent's will and each is "entitled to one sixth of so much of the residue of said estate as is in excess of one third of the distributable estate." By such statement they claimed \$2000 for each of such appellants under the specific bequest and also one-sixth for each appellant of all the residue of the estate in excess of one-third of the distributable estate. After a hearing upon the petition and the claims of appellants the court made findings that (1) Milton is the only surviving child of deceased and there is no other progeny; (2) appellants and Mrs. Cecil¹ are strangers in blood to the testator;

1. Mrs. Cecil did not join in the contest.

(3) Milton and his five legatees were named as legatees of \$2000 each; (4) the total valuation of the estate is \$73,906.77; (5) after paying the specific bequests of \$12,000, the residue of the estate, bequeathed to respondent foundation, a charitable corporation, is in excess of one-third of the distributable estate. From such facts the court concluded that (1) the foundation is entitled to receive the residue of the distributable estate except one-sixth of the remainder "over and above one-third of the distributable estate and son Milton is entitled to have distributed to him one-sixth of said rest, residue, and remainder of said estate over and above one-third of the distributable estate"; (2) contestants as strangers in blood to deceased are substitutional legatees and are not entitled to receive or take any portion of said estate in excess of the specific bequest to each of them as set forth in the will.

2. (Section 1313) "No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator; and if so made at least thirty days prior to such death such devise or legacy and each of them shall be valid; provided, that no such devise, or bequests shall collectively exceed one-third of the estate of the testator, leaving legal heirs, and in such case a *pro rata* deduction from such devises or bequests shall be made so as to reduce the aggregate thereof to one-third of such estate; and all dispositions of property made contrary hereto shall be void, and go to the residuary legatee or devisee, next of kin, or heirs, according to law."

3. (Section 41) "No estate, real or personal, may be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, by a testator who leaves a spouse, brother, sister, nephew, niece, descendant or ancestor surviving him, who, under the will, or the laws of succession, would otherwise have taken the property so bequeathed or devised, unless the will was duly executed at least 30 days before the death of the testator. If so executed at least

On this appeal appellants contend that (1) the law in effect at the date of the will gave the foundation one-third of the distributable estate; (2) the execution of the codicil does not alter the dispositions of the will; (3) the interpretation of the will by the trial court is not binding on this court.

[1, 2] Appellants assert that the will involved herein is to be interpreted and governed by section 1313² of the Civil Code which in 1929 controlled charitable dispositions. However, in 1931 and 1937 the restrictions upon charitable bequests were embodied in a new statute, to wit, section 41 of the Probate Code.³ The second paragraph of the latter section was added by amendment in 1943. The language of the section reveals a relaxing of the restraints upon bequests to charitable uses. The legislature did not intend completely to outlaw a charitable gift

30 days before death, such devises and legacies shall be valid, but they may not collectively exceed one-third of the testator's estate as against his spouse, brother, sister, nephew, niece, descendant or ancestor, who would otherwise, as aforesaid, have taken the excess over one-third, and if they do, a *pro rata* deduction from such devises and legacies shall be made so as to reduce the aggregate thereof to one-third of the estate. All property bequeathed or devised contrary to the provisions of this section shall go to the spouse, brother, sister, nephew, niece, descendant or ancestor of the testator, if and to the extent that they would have taken said property as aforesaid but for such devises or legacies; otherwise the testator's estate shall go in accordance with his will and such devises and legacies shall be unaffected.

"Nothing herein contained is intended to, or shall be deemed or construed to vest any property devised or bequeathed to charity or in trust for a charitable use, in any person who is not a relative of the testator belonging to one of the classes mentioned herein, or in any such relative, unless and then only to the extent that such relative takes the same under a substitutional or residuary bequest or devise in the will or under the laws of succession because of the absence of other effective disposition in the will."

even if it should exceed one-third of the estate, provided the will was published 30 days before the death of the testator. Even though a will is made within the thirty-day period such gifts are not for that reason rendered invalid. They are in such event merely voidable "at the instance of an aggrieved heir of a designated class." Section 41 confers no rights upon any person in addition to those specifically mentioned therein. Its provisions must not be ignored. *Estate of Randall*, 86 Cal. App.2d 422, 426, 194 P.2d 709. By virtue of its provisions the only person who can successfully object to the bequest to a charity is a spouse or consanguineal relative designated by the section. By its language a son takes the property only to the extent he would have taken it but for the gift to the charity. Otherwise the estate passes as provided by the will and the devise of the entire estate to the charity shall not be affected. (*Ibid.*)

[3] As if to leave nothing to speculation or interpretation the second paragraph of section 41 provides that nothing in the entire section shall be construed to vest any property bequeathed to charity in any person who is *not a relative of the testator* and of the class mentioned in the section unless and only to the extent that such relative takes the property under a substitutional bequest in the will or under the laws of succession because of the absence of other effective disposition in the will.

[4] Applying the law of the *Randall* decision to the facts at bar we have a voidable gift of two-thirds of the residue of decedent's distributable estate. The share of such voidable devise that passes to Milton is that bequeathed to him by the residuary or substitutional clause. If there had been no such clause, there would be no effective disposition of the two-thirds residue by the will. After the valid, specific gifts to the son and his legatees and the valid one-third gift to the foundation, appellants as strangers to the blood take nothing. Since Milton is a "decendant" of the testator (sec. 41) he takes to the extent provided for him in

the residuary clause while the balance goes "in accordance with his will," that is, to the Orthopedic Foundation. See *In re Estate of Davis*, 74 Cal.App.2d 357, 361, 168 P.2d 789; *In re Estate of Haines*, 76 Cal.App.2d 673, 676, 173 P.2d 693. As a "descendant" son Milton was entitled to \$6000 out of the two-thirds of the residue; but since appellants are not of the classes designated in the last sentence of the first paragraph of section 41, they take no part of the same two-thirds. The disposition to charity of the total estate is valid and enforceable as against strangers to the blood of the testator. *In re Estate of Haines*, *supra*.

A Will is Construed by the Law in Force at Testator's Death.

Appellants' contention that the will should not be interpreted according to the law in effect at the death of the testator is contrary to reason and authority. The conveyance of property by will is a privilege conferred upon man by society and it is neither enlarged by the wish of the testator nor restricted by desires of legatees or of legal heirs. The legislature has no inhibitions other than the constitution. If it determines that a law operates unjustly upon a testator or upon any class of devisees it is free to remove the restraints or relax the restrictions. That is what the legislature did in supplanting section 1313 of the Civil Code with section 41 of the Probate Code.

Decedent wrote his will in 1929. At that time his power to give to charity was limited to one-third of his distributable estate. In 1943 section 41 of the Probate Code was so amended as to permit a testator to give his all to charity so long as he complies with the provisions of that section. *In re Estate of Randall*, *supra*. In 1945 the codicil was executed.

[5-8] There are two reasons why the will is interpreted according to section 41. (1) It is a ubiquitous rule that a will speaks from the death of the testator and is construed as operating according to the law then in force. *In re Estate of Babb*, 200 Cal. 252, 255, 252 P. 1039; *In re Es-*

tate of Rounds, 180 Cal. 386, 387, 181 P. 638; 1 Redfield on Wills, 3d Ed., sec. 30. The testamentary act anticipates that the testator's devise will pass only at the moment of his decease, and it presupposes that "he will have used the language of his will" with reference to the time of his death. In *re Estate of Brickell*, 4 Cal.App.2d 54, 57, 40 P.2d 579, 580. The enactment of a statute after the publication of a will, changing the law in force at the date of the will, determines the construction of the document in the matter of the conveyances of properties. "To give the statute such a construction is not to make it retrospective in its operation, since it affects no rights vested before its passage." *Wakefield v. Phelps*, 37 N.H. 295, 306. The legislature's power over a will is absolute until the death of its author. *Strand v. Stewart*, 51 Wash. 685, 99 P. 1027.

Coming to the language which is asserted to indicate decedent's intention that his will should be construed according to section 1313, in paragraph Tenth he said, "In the event * * * the portion * * * that would go to * * * Foundation *shall* not be entitled, under the law, to receive all the rest * * * *then, and in that event*, all of said residue * * * I give * * *." He thereby disposed of his estate in the event his earlier declaration of a gift of all to the foundation might fail of realization on account of some possible occurrence that might prevent the consummation of his purpose expressed in the previous declaration. He was aware that the determination of the effect of the possible event would necessarily be made as of the date of his death and for that reason used words of futurity.

(2) The second reason why the will must be interpreted according to section 41 is the fact that in 1945 testator wrote and published his codicil. At that writing, section 41 had not only been enacted (1931) and twice amended of which he had notice, but without modifying a word relating to his bequests he "reaffirmed and republished" his will "unchanged except as herein expressly set forth."

In support of their contention that the will must be construed according to the law as it existed at the date of its execution, appellants cite *In re Estate of Wilson*, 65 Cal.App. 680, 225 P. 283, 287. That decision is distinguished by the language Mrs. Wilson used which referred to the existing laws. For example: If my son leaves no issue, then upon his death all my property shall be distributed "*as provided by the laws*" of California. When she used those words instead of "*as the law may provide*" there was very "apt and convenient language by which she could so have expressed herself by inserting after the word 'as' the words 'may be,' 'will be,' etc. 65 Cal.App. at page 687, 225 P. at page 286. The court there approved of the use of the phrase "*as the law may direct*" to refer to some future law. So, in the instant will, when the testator said "In the event * * the portion * * * *shall be reduced, or in the event that* * * * Foundation shall not be entitled, under the law, to receive all the rest, * * * then, and in that event * * * I give," the testator clearly anticipated possible changes in the law prior to his demise.

[9, 10] The language used by the testator indicates his intention to give all the residue to the foundation unless for some reason the law existing at the date of his death would prevent such disposition. His bequests to persons are specific. None of them shall share absolutely in the residue which he declared, "I give, devise and bequeath to Los Angeles Orthopaedic Foundation * * *." His only thought of his charity's not getting the residue is expressed in the clause: "In the event that for any reason the portion of my estate that would go to said * * * Foundation shall be reduced, or in the event that said * * * Foundation shall not be entitled, under the law, to receive all of the rest * * * of my estate, then and in that event, all of said residue remaining over and above the legal share to which said * * * Foundation is entitled, I give, devise and bequeath, in equal shares, share and share alike, to the persons named in this Will as legatees." Hav-

ing so expressed his testamentary wish in 1929, testator lived each day for 20 years with knowledge of his gift to the foundation, thus reiterating daily to the very last his expressed purpose. In the light of the constant knowledge of his charitable gift which must be imputed to him and of his express affirmance thereof, to annul it by construing it in the light of old section 1313 would deprive the testator *post mortem* of the right to devise his property to a worthy beneficiary and work a forfeiture on a legatee chosen by the testator himself. Gifts for charitable purposes are highly favored and bequests of such kind "will be liberally construed in order to accomplish the intent of the donor." In re Estate of Yule, 57 Cal.App.2d 652, 654, 135 P.2d 386, 388.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.



96 Cal.App.2d 398

STRAUSBURG et al. v. CONNOR et al.

Civ. 7753.

Sac. 6055.

District Court of Appeal, Third District,
California.

March 8, 1950.

Action by Mike Strausburg and others against Helen C. Connor and Alice Kratka for cancellation of a deed. The Superior Court for Sierra County, Raymond McIntosh, J., rendered an adverse judgment, and the defendant Connor appealed. The District Court of Appeal, Per Curiam, held that defendant acquired and retained the interest of one of the plaintiffs by fraud and became a trustee for her benefit.

Judgment affirmed.

1. Trusts ⇐91

Trusts arising from transactions within scope of statute providing that one who

gains a thing by fraud or other wrongful act is an involuntary trustee of thing gained, fall within class of trust created by operation of law, and are constructive. Civ.Code, § 2224.

2. Trusts ⇐91

Constructive trusts are not based primarily on intention of parties, but are forced on conscience of trustee by equitable construction and operation of law; and in such trusts based on fraud or wrongdoing, an oral promise is sufficient, and the existence or absence of confidential relationship between parties in a strict sense is not controlling. Civ.Code, § 2224.

3. Trusts ⇐95

Where owner of one-fourth interest in land desired to purchase another one-half interest, and received a deed from person owning the remaining one-quarter interest on representation that first person needed whole title to borrow sufficient funds to complete the purchase, and thereafter first person refused to reconvey, first person acquired and retained interest of party owning the remaining one-quarter interest by fraud, and became a trustee thereof for her benefit. Civ.Code, § 2224.

4. Limitation of actions ⇐103(2)

Where owner of one-quarter interest in land received deed from owner of another one-quarter interest only for purpose of procuring a loan, obligation to make restitution was a continuing one, and statute of limitations on action to cancel deed and require a reconveyance did not begin to run until first party repudiated her trust. Civ.Code, § 2224.

5. Limitation of actions ⇐103(2)

Where owner of one-quarter interest in realty delivered deed to another part owner only to permit that owner to obtain a loan, and second owner recognized obligation to reconvey continuously until she demanded exclusive possession of the property, which event occurred within one year before first owner brought suit to cancel the deed, action was commenced well within any applicable statute of limitations, and was not barred.

6. Quieting title **51**

Where owner of part interest in land sought a decree quieting title against others and based claim entirely on deed to her, court was justified, while granting equitable relief, in ordering owner to do equity by paying remaining portion owed to others on purchase price of the realty.

J. M. Inman, Sacramento, for appellant.

Frank G. Finnegan, Nevada City, for respondent.

PER CURIAM.

By this action the respondents herein, Mike Strausburg, his wife, Dorothy, and Jean DeBreau, sought cancellation of a deed dated March 23, 1939, whereby they had conveyed to appellant, Helen C. Connor, all their interests in the real property described in the complaint. By its judgment the trial court decreed that Miss DeBreau was the owner of an undivided one-fourth interest in the property, that Miss Connor owned the remaining interest, that the deed should not be canceled, that Mike Strausburg recover of appellant the sum of \$20, and that he and his wife had no interest in the land.

By the amended complaint Alice Kratka was made a defendant. It was alleged Connor had assigned an interest to her. The trial court decreed she had no present interest and she has not appealed. No further reference need be made to her.

Connor has appealed from all parts of the judgment except the parts thereof which ordered that the deed be not canceled and that the Strausburgs had no share in the title.

The trial court found that on December 13, 1937, plaintiffs had owned the property in fee and that on that date DeBreau by deed conveyed to appellant a one-fourth interest which appellant still owns; that on March 23, 1939, the plaintiffs herein conveyed the remaining interest to appellant, but that as to DeBreau's remaining one-fourth interest so conveyed appellant had obtained the same by fraud through false representations that this interest

would be reconveyed to DeBreau. The court found that no fraud had been practiced by appellant toward the Strausburgs, but that appellant did agree to pay them \$150 for their one-half interest, and owed them a balance of \$20, having paid only \$130 of the agreed price.

[1,2] The Civil Code, by Section 2224, declares that "One who gains a thing by fraud, * * *, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." Trusts arising from transactions within the scope of the code provisions fall within the class of trusts created by operation of law and are commonly called constructive trusts. Concerning such trusts it was said in *Dankin v. Satir*, 75 Cal.App.2d 691, 695, 171 P.2d 78, 80; "* * * Constructive trusts of this form are not based primarily on the intention of the parties but are forced on the conscience of the trustee by equitable construction and the operation of law. *Millard v. Hathaway*, 27 Cal. 119. In such trusts, based upon fraud or wrongdoing, an oral promise is sufficient and the existence or absence of a confidential relationship between the parties, in the strict sense, is not controlling. *Brison v. Brison*, 75 Cal. 525, 17 P. 689, 7 Am.St.Rep. 189. 'Such trusts are creatures of equity, and take form whenever title is obtained by means of chicanery, deceit, or other variety of fraud, actual or constructive.' *Sanguinetti v. Rossen*, 12 Cal.App. 623, 107 P. 560, 562. In order to create a constructive or involuntary trust, as defined in section 2224 of the Civil Code, no conditions other than those stated in that section are necessary. *Lauricella v. Lauricella*, 161 Cal. 61, 118 P. 430. By section 2223 of that code the rule of constructive trust is extended to the case where one person wrongfully detains a thing from another. The rule extends to almost any case where there is a wrongful acquisition or detention of property to which another is entitled, since it is based upon the equitable principle that no one may take advantage of his own wrong. Civ.Code, sec. 3517. As was said in *Bra-*

zil v. Silva, 181 Cal. 490, 185 P. 174, 176. 'The instances of its application are as various nearly as the ways in which property can be wrongfully acquired.' See, also, Steinberger v. Steinberger, 60 Cal.App.2d 116, 140 P.2d 31.

The following testimony appearing in the record, although contradicted by that of appellant, supports the court's decision. Respondent DeBreau testified as follows: Before March 23, 1939, the Strausburgs desired to sell their half interest and DeBreau wrote to appellant, so informing her, and asking if appellant would purchase. Appellant replied she wanted to acquire the Strausburgs' interest but lacked the money at that time. She requested that both the Strausburgs and DeBreau send her a deed conveying all the title appellant did not then own to the end that she might thus, clothed with the whole title, borrow sufficient funds from a friend to complete the purchase. Responsive to this request, the deed was sent. DeBreau received nothing for the conveyance of her one-fourth interest, but appellant on receiving the deed sent \$130 to Mike Strausburg by check which he received and cashed. DeBreau continued to reside on the property up to the time this action was begun and she and appellant joined in making improvements thereon. Beginning in 1939, DeBreau made demands both orally and in writing that appellant reconvey and appellant always replied she would do so, but, as DeBreau put it, appellant "was always going to do so but never did." Finally appellant demanded exclusive possession, whereupon and within one year thereafter this action was begun.

There was other testimony that appellant often declared in the presence of others that DeBreau had an interest in the property and on other occasions was silent when others made similar statements in her presence. The two women had known each other a long time after the first deed from DeBreau to appellant, and made common use of the land and the improvements thereon. DeBreau testified she joined in

the last deed and forwarded it to appellant, in whom she had confidence, "on trust". There is no testimony in the record that appellant did mortgage the property and the check was sent promptly on receipt of the deed.

[3] In view of the authorities cited above, the foregoing testimony fully supports the court's holding that appellant acquired and retains the interest of DeBreau by fraud and became a trustee thereof for her benefit.

[4, 5] Appellant pleads the statute of limitations as embodied in various sections of the Code of Civil Procedure, but the record signally fails to substantiate her contentions. Where property is obtained under the circumstances and by the means shown here the obligation to make restitution is a continuing one and the statute does not begin to run until the trustee repudiates the trust. *Svistunoff v. Svistunoff*, 94 Cal.App.2d 651, 211 P.2d 352; *Steinberger v. Steinberger*, *supra*. There was evidence, as above set forth, that appellant recognized her obligation continuously until she demanded exclusive possession of the property, which event occurred within one year before plaintiffs brought their suit. The action was thus commenced well within any applicable limitation.

[6] Little need be said about the appeal from that part of the judgment wherein it is decreed that respondent Mike Strausburg recover of appellant the sum of \$20. This was, upon sufficient evidence, held by the court to have been the unpaid part of the purchase price which appellant had agreed to pay for the Strausburg interest. Appellant by appropriate affirmative allegations had sought a decree quieting her title against the Strausburgs, basing her claim entirely on their deed to her. Therefore the trial court was justified, while granting her the equitable relief she asked, in ordering her to do equity by paying her debt.

The judgment is affirmed.

96 Cal.App.2d 423

BRYANT, Director of Employment v. STATE PERSONNEL BOARD et al.

Civ. 7673.

District Court of Appeal, Third District,
California.

March 11, 1950.

Proceedings in mandate by James G. Bryant, as Director of Employment, Department of Employment of the State of California, against the State Personnel Board of the State of California, and others, to review the action of the Board restoring Vernon H. Cress to his position in the Department of Employment. From a judgment of the Superior Court, Sacramento County, Malcolm C. Glenn, J., in favor of the defendants, the petitioner appealed. The Court of Appeal, Peek, J., held that the notice of rejection served upon Vernon H. Cress prior to the expiration of his probation was insufficient in not stating specific reasons for his rejection.

Judgment affirmed.

1. Officers ⇨11.5

A notice of rejection served upon probationary state employee stating that he was being rejected for the good of the service and failure to demonstrate merit and fitness, and that he had been guilty of action unbecoming an employee, stated good cause for removal, but was insufficient in failing to set forth an adequate statement of specific reasons. Government Code, § 19173.

2. Officers ⇨11.5

Where notice of rejection served upon probationary state employee was inadequate for failure to state specific reasons for his rejection, inadequacy of notice was not cured by bill of particulars served on employee more than a month after the notice, since that statement did not "accompany" notice as required by statute. Government Code, § 19173.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Accompany".

Fred N. Howser, Attorney General, and Wilmer W. Morse, Deputy, for respondents.

PECK, Justice.

The sole question presented on this appeal is one of law and relates to the sufficiency and validity of the contents of the notice of rejection of the real party in interest, Vernon H. Cress, as a probationary state employee. It is our conclusion that the judgment of the trial court holding said notice to be insufficient, and which was in accord with the findings and decision of the Personnel Board, is well founded and should be sustained.

From the record before us it appears that on November 2, 1946, Cress was appointed from an eligible list to the position of Referee for the Unemployment Insurance Appeals Board in the Department of Employment and by virtue of such appointment received probationary status in said position. On May 6, 1947, prior to the expiration of his six months' probationary period, a notice of his rejection as such employee, pursuant to Section 19173 of the Government Code, was served upon him. On May 21, 1947, he filed with the State Personnel Board an appeal from said notice of rejection. Thereafter, by a letter dated June 16, 1947, Cress was served with a statement which has been denominated by petitioner as a bill of particulars of what said petitioner expected to prove at said hearing, and on June 26th his attorney was furnished with an amended statement of particulars. A hearing was held before the Personnel Board which resulted in a decision restoring Cress to the position from which he had been rejected. The findings of the Board were concluded as follows: "That the said notice of rejection during probationary period was not accompanied by a statement of the specific reasons therefor, truthful within the knowledge of the appointing power or other officer or person in charge of the said appellant; that said notice of rejection during probationary period did not comply with said Section 19173 of the Government Code."

In its decision the Board stated that while the facts found constituted good cause for

Maurice P. McCaffrey and Mary S. Meritt, Sacramento, for appellant.

rejection of the employee during his probationary period, or for disciplinary action, the notice of rejection failed to "comply with Section 19173 of the Government Code in that it fails to contain a statement of said facts or any specific reasons for the rejection, truthful within the knowledge of the appointing power or other officer or person in charge of the employee", and for the reasons stated ordered Cress restored to the position from which he had been rejected.

Thereafter petitioner brought these proceedings in mandate in the Superior Court to review the action of the Board restoring said probationer to his position, and has taken this appeal from the judgment of said court denying the relief sought.

The particular section of the Government Code here in question, section 19173, reads as follows:

"Any probationer may be rejected by the appointing power during the probationary period for reasons relating to the probationer's qualifications, the good of the service, or failure to demonstrate merit, efficiency, fitness, and moral responsibility.

"Notice of rejection accompanied by a statement of the specific reasons therefor, truthful within the knowledge of the appointing power or other officer or person in charge of the employee, shall be filed by the appointing power with the board and a copy served upon the probationer to give effect to the rejection." (Italics ours.)

[1] The notice of rejection which was served upon Cress and filed with the Board reads as follows:

"You are hereby notified of the rejection during the probationary period of Vernon H. Cress from the position of Referee, Unemployment Insurance Appeals Board, effective at the close of business May 9, 1947, in accordance with Section 19173 of the Government Code.

"The reasons for the rejection are the good of the service and failure to demonstrate merit and fitness.

"Specific examples of such reasons are as follows: Conduct and actions unbecoming an employee of the Department of Employ-

ment serving in the capacity of a Referee, Unemployment Insurance Appeals Board."

The gist of said code section appears to be the specific reasons existing which would "give effect to the rejection". "Reason" is variously defined as:

"That which is supposed or affirmed to support or justify any conclusion, belief or plan of action; a fact, truth, or end to be attained, which drives the mind as a rational ground or motive; proof for an opinion, judgment or resolution, principle of thought or action." (Funk and Wagnalls New Standard Dictionary.)

"Any expression or statement offered as an explanation of a belief or assertion or as a justification of an act or procedure; any sufficient ground of explanation or of logical defense." (Webster's New International Dictionary.)

Thus it is apparent from a reading of the code section that justification for the rejection of a probationary employee, lies not in the appointing power's conclusion, as in the present case, that the action is for "the good of the service and failure to demonstrate merit and fitness" or that "the conduct and actions" were unbecoming to such an employee. Rather the justification therefor lies in the factual reasons which support or justify such conclusion by said appointing power that the rejection of the employee would be for the good of the service. In other words, while the notice of rejection undoubtedly stated a good *cause* for removal such a statement is not an adequate "statement of the *specific reasons* therefor" as contained in said section.

We find nothing to the contrary in any of the cases cited and relied upon by appellant. In fact, *Brown v. State Personnel Board*, 43 Cal.App.2d 70, 110 P.2d 497, 500, one of the cases so cited by appellant substantiates the conclusion of the trial court and that reached herein rather than the position taken by appellant. In that case the purported reason given in the notice was "service unsatisfactory". The court in determining the sufficiency of such statement under Section 9 of the Civil Service Act providing that the notice state "the reasons therefor", the court stated 43 Cal

App.2d at page 76, 110 P.2d at page 500 as follows:

"Where a report assigns as the reason for 'separation' only the phrase 'services unsatisfactory', or 'unsatisfactory service', and no statement of fact is included with respect to the employee's lack of any one of the qualities prescribed by the statute, it is clear that there is no statement of 'the reasons for the dismissal'. In view of the requirement of Rule 9, a probationer's failure as to conduct, capacity, integrity or moral responsibility should be described in language intelligible to a man of ordinary understanding."

[2] Contrary to petitioner's contention, the so-called bill of particulars contained in his letter of June 16th to Cress did not cure the inadequacy of said notice. It is contradicted that the notice was dated May 6th and the letter was dated June 16th. Under the applicable code section such procedure as was followed by petitioner would be proper; however, it is obvious from the facts above mentioned, which are not denied, that the said bill of particulars was not served upon Cress until more than a month after the notice of rejection, and hence it cannot be said that the notice was "accompanied by a statement of the specific reasons therefor."

Furthermore it should be noted that although acts of misconduct as found by the Board occurred prior to the date of the notice of rejection, such acts or conduct were, in the findings of the Board, not brought to the attention of the person in charge until subsequent to the actual date of the notice of rejection. While the brief of respondent Board only mentions this fact in passing, it was held by the trial court to be a further basis for the conclusion that the notice of rejection was improper, since the party giving said notice to Cress did not know of said acts until after the issuance of said notice, and hence the purported reasons could not have been "truthful within the knowledge of the appointing power or other officer or person in charge of the employee."

For the foregoing reasons the judgment is affirmed.

ADAMS, P. J., concurs.

ORTIZ v. PACIFIC STATES PROPERTIES, Inc., et al.
Civ. 17312.

District Court of Appeal, Second District,
Division 2, California.

Feb. 9, 1950.

Rehearing Denied Feb. 24, 1950.

Hearing Denied March 30, 1950.

Manuel M. Ortiz and another brought action to quiet title to real property against Pacific States Properties, Inc., A. F. Ewald, surviving partner of the partnership composed of A. F. Ewald and Fred R. Salter, also known as Fred Richard Salter, deceased, and others.

A judgment in favor of plaintiffs was entered by the Superior Court, Los Angeles County, Philip H. Richards, J., and the defendant Ewald alone appealed.

The District Court of Appeal, Wilson, J., held that plaintiffs established their ownership of the property through adverse possession.

Judgment affirmed.

1. Appeal and error ⇨1050(1)

Error, if any, in admitting deed in evidence in quiet title action over defendant's objection was harmless, where plaintiffs did not rest their claim of ownership of property upon the deed or upon any color of title but asserted ownership solely through adverse possession. Code Civ. Proc. §§ 324, 325.

2. Adverse possession ⇨13

To establish title by "adverse possession", claimant's possession must be by actual occupation under circumstances constituting reasonable notice to owner and hostile to owner's title, claimant must claim property as his own either under color of title or under claim of right, his possession must be continuous and uninterrupted for five years, and he must pay all taxes levied and assessed on property during such period. Code Civ.Proc. §§ 324, 325.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Adverse Possession".

3. Adverse possession ⇨25

The going into possession of the property by plaintiffs' predecessor, renting it

and collecting rents thereon until he sold it to plaintiffs who occupied property after last tenant departed constituted actual, open, notorious, continuous, uninterrupted and exclusive possession with claim of right hostile to true title, and was such constructive notice as would place owner on inquiry, satisfying the requirements of establishing title by "adverse possession." Code Civ.Proc. §§ 324, 325.

4. Adverse possession ⇨60(1)

To constitute a "hostile claim", as regards title by adverse possession, there need not be open aggression or combat, neither need a notice to owner be given other than claimant's occupancy. Code Civ.Proc. §§ 324, 325.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Hostile Claim".

5. Adverse possession ⇨7(2), 8(1), 9

Where land is held by state or any of its subdivisions and has been actually reserved for or dedicated to any specific public use, no adverse holding thereof will give title to adverse claimant, but if land held by state or any of its subdivisions is neither reserved nor dedicated to some public use and may be alienated by its owner, title may be wrested from it by adverse possession. Code Civ.Proc. §§ 324, 325.

6. Adverse possession ⇨49

Fact that property claimed by plaintiffs by adverse possession had been previously sold to state for non-payment of taxes did not preclude plaintiffs from acquiring title by adverse possession, where it did not appear that property had either been reserved

or dedicated to any public use. Code Civ. Proc. §§ 324, 325.

7. Adverse possession ⇨89

Fact that taxes had not been levied during last year of five year period on which plaintiffs were relying to establish title by adverse possession, and, hence, could not have been paid by plaintiffs, did not prevent perfection of their title by adverse possession. Code Civ.Proc. §§ 324, 325; Revenue and Taxation Code, §§ 405, 616, 617; Government Code, § 29120.

8. Adverse possession ⇨89

An adverse claimant to real property will not be denied acquisition of title by adverse possession for non-payment of taxes when taxes have not been both levied and assessed for one or more years during his occupancy. Code Civ.Proc., §§ 324, 325; Revenue and Taxation Code, §§ 405, 616, 617; Government Code, § 29120.

Robt. E. Rosskopf, Los Angeles, for Appellant.

Miller, Beck & Stillwell, San Fernando, for Respondents.

WILSON, Justice.

Defendant Ewald has appealed from a judgment in favor of plaintiffs quieting title to real property, plaintiffs' title being based on adverse possession for more than five years. Code Civ.Proc., secs. 324, 325.¹ Mr. Gil, predecessor of plaintiffs in the title, testified that in 1939 he had an oral agreement with Mr. Bustamente and was buying the property from him. Later he

a substantial inclosure.

"2. Where it has been usually cultivated or improved.

"Provided, however, that in no case shall adverse possession be considered established under the provisions of any section or sections of this code, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, state, county, or municipal, which have been levied and assessed upon such land."

4. Sec. 324: "Where it appears that there has been an actual continued occupation of land, under a claim of title, exclusive of any other right, but not founded upon a written instrument, judgment, or decree, the land so actually occupied and no other, is deemed to have been held adversely."

Sec. 325: "For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only:

"1. Where it has been protected by

testified he was buying it from Mrs. Bustamente and paid her part of the purchase price. He completed his payments in 1944 and received a deed from Juan Bustamente.

Gil went into possession of the property in March, 1939, and immediately rented it to Mrs. Acedo who occupied the premises until May, 1941. Upon her removing from the property Gil rented it to Mrs. Macon, who remained there until April, 1946, when plaintiffs moved into and resided in the house on the property until the date of trial. Both Mrs. Acedo and Mrs. Macon paid rent to Gil.

[1] Defendant did not object to the evidence of Gil's conversation with Mr. Bustamente but did object to the conversation with Mrs. Bustamente and also to introduction of the deed. The objections were overruled and the evidence was received subject to a motion to strike. Such motion was not made and the objection is therefore waived. While the deed might be considered as furnishing a basis of title, plaintiffs do not rest their claim of ownership of the property upon the deed or upon any color of title but assert ownership solely through adverse possession. Hence the evidence was harmless even though the objection had been well taken, a question not necessary to be decided.

[2] Five elements are necessary to be proved by a claimant in order to establish title by adverse possession: (1) Possession must be by actual occupation under such circumstances as to constitute reasonable notice to the owner; (2) possession must be hostile to the owner's title; (3) the holder must claim the property as his own, either under color of title or claim of right; (4) possession must be continuous and uninterrupted for five years; (5) the possessor must pay all taxes levied and assessed upon the property during the five year period. *West v. Evans*, 29 Cal.2d 414, 417, 175 P.2d 219, and cases cited.

[3, 4] Plaintiffs and Gil, their predecessor in interest, were in possession of the property by actual occupation continuously for five years prior to the commencement of the action. The property consists of two 25-foot lots, at about the center of which

there was a house 25 feet wide with a driveway along the side of the house. The land was fenced on two sides and the rear. Gil went into possession of the property, rented it and collected the rents until he sold it to plaintiffs who occupied it after the last tenant departed. Mrs. Acedo and Mrs. Macon corroborated Gil's testimony as to their payment of rent and each one testified that during her occupancy no one made any claim to the property. This constituted actual, open, notorious, continuous, uninterrupted and exclusive possession, with a claim of right, hostile to the true title, and was such constructive notice as would place the owner on inquiry, satisfying the requirements stated in *Yuba River Sand Co. v. City of Marysville*, 78 Cal.App. 2d 421, 429, 177 P.2d 642. To constitute a hostile claim there need not be open aggression or combat, neither need a notice to the owner be given other than the claimant's occupancy.

[5, 6] The property was sold to the State in 1932 for nonpayment of the taxes of 1931. Defendant contends that since the State was the owner of the property plaintiffs could not have acquired title by adverse possession. Where land is held by the State or any of its subdivisions and has been actually reserved for or dedicated to any specific public use no adverse holding thereof will give title to the adverse claimant, but "if land held by the state or any of its subdivisions is neither reserved for nor dedicated to some public use and may be alienated by its owner, title may be wrested from it by adverse possession." *Henry Cowell Lime & Cement Co. v. State*, 18 Cal.2d 169, 172, 114 P.2d 331, 332; *Fresno Irr. Dist. v. Smith*, 58 Cal.App.2d 48, 60, 136 P.2d 382; *Richert v. City of San Diego*, 109 Cal.App. 548, 553-554, 293 P. 673, and cases cited.

To defendant's fatuous argument that because Gil was a real estate broker he might have been renting the property for the real owner and not for himself it need only be said that there is no evidence to this effect and nothing from which such an inference may be drawn. On the contrary, Gil's evidence was that he bought the property, paid the purchase price, took pos-

session of it and collected the rents for himself.

[7] Defendant maintains that there has not been a showing of the payment of taxes for a period of five years preceding the commencement of the action on March 29, 1948. On December 4, 1944, plaintiff's grantor paid the taxes for the fiscal year 1944-45 and in October, 1945, redeemed the property from delinquent taxes for the fiscal years 1931 to 1943, inclusive. Thereafter plaintiffs paid before delinquency the taxes levied and assessed for the fiscal years 1945, 1946 and 1947. Since plaintiffs' payment of taxes for current years was sufficient to comply with section 325 of the Code of Civil Procedure defendant's contention that the redemption of taxes does not constitute payment within the meaning of that section need not be discussed. Taxes levied as of the first Monday in March, 1944, and all taxes levied and assessed thereafter had been paid as above noted. We need consider only the taxes for the tax year 1948-49. The law in force during that year required (1) that property be assessed to the persons owning or claiming it on the first Monday in March, Revenue & Taxation Code, sec. 405; (2) that the assessment roll be completed on or before the first Monday of July, Revenue & Taxation Code, sec. 616; (3) that the taxes be levied by the board of supervisors not later than the first day of September. Government Code, sec. 29120. The action having been commenced on March 29, 1948, the five year period of continuous adverse possession began on March 29, 1943. The tax for the year 1948-49 had been "assessed" as of the first Monday of March, 1948, or on some date prior to the first Monday in July, secs. 405 and 616, *supra*, but had not been "levied" at the time the action was commenced since the date on which that act could have taken place had not then arrived. The levy could not have been made until after the assessor had completed his assessment and delivered the assessment roll to the clerk of the board of supervisors. Revenue & Taxation Code, sec. 617. Since the taxes for the year 1948-49 had not been levied they could not have been paid by plaintiffs, and that fact did not pre-

vent the perfection of their title by adverse possession. In *Allen v. McKay & Co.*, 120 Cal. 332, 334, 52 P. 828, 829, this point is determined adversely to defendant's contention. The court held that a fair construction of section 325 of the Code of Civil Procedure is that "the word 'levied' refers to the act of the board of supervisors in making the levy, and the word 'assessed' refers to the act of the assessor in making the assessment. * * * [B]oth the assessment and levy must be made while the occupant is in possession, or he is not called upon to pay the tax." The court further stated that although such construction might result in the creation of an adverse title by the payment of taxes for only four years, a compliance with the demands of the statute is all that can be asked and the important question is what those demands are and not the results to follow from a compliance with them.

In *Brown v. Clark*, 89 Cal. 196, 26 P. 801, the action was brought by the record owner to quiet title against the claimant by adverse possession. It was commenced on March 25, 1889, hence in order to establish the defendant's title his adverse possession must have dated from not later than March 25, 1884. The plaintiff had paid the taxes assessed as of the first Monday in March, 1883, and the defendant had paid all taxes assessed in each year as of the first Monday of March, 1884 to 1888, inclusive. The plaintiff contended that his payment of the taxes assessed in 1883 was a payment of all taxes due to June 30, 1884, the end of the fiscal year, that the defendant could not claim the benefit of the statute until July 1, 1884, and that his payment of the 1884 assessment was not sufficient to cover the five year period. The court rejected the plaintiff's contention, holding that the plaintiff's payment of the taxes levied in 1883 did not bar the defendant's title and that the latter's payment dated from the first Monday in March, 1884, more than five years prior to the commencement of the action.

[8] If the person claiming title by adverse possession pays all taxes "levied and assessed" against the land during his term of continuous occupation he can maintain his possession against the person who

would otherwise be the owner of the land. The commencement of adverse possession is not required to coincide with the beginning or end of a fiscal year and payment by the record owner of the property of taxes which were levied, assessed and paid during the calendar year preceding the adverse occupation will not postpone the running of the time of adverse possession until the end of the fiscal year. There is nothing in the statute stating directly for how many years taxes shall be paid, the only requirement being that taxes be paid which have been "levied and assessed" during the statutory period. *Brown v. Clark*, supra. An adverse claimant to real property will not be denied acquisition of title by adverse possession for nonpayment of taxes when taxes have not been both levied and assessed for one or more years during his occupancy. *Allen v. Allen*, 159 Cal. 197, 200, 113 P. 160; *City of Santa Clara v. Ivanovich*, 47 Cal.App.2d 502, 511, 118 P.2d 303; *Brown v. Bachelder*, 214 Cal. 753, 757, 7 P.2d 1027.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.



96 Cal.App.2d 402

**IMPERIAL IRRIGATION DIST. v.
RIVERSIDE COUNTY.**

Civ. 4107.

District Court of Appeal,
Fourth District, California.

March 8, 1950.

Rehearing Denied March 29, 1950.

Hearing Denied May 4, 1950.

The Imperial Irrigation District brought action against County of Riverside to secure a refund of taxes paid under protest. A judgment for defendant was entered by the superior court of Riverside County, Roberta Butzbach, J., and the plaintiff appealed. The District Court of Appeal, Barnard, P. J.,

held that plaintiff was a municipal corporation within meaning of constitutional provision excepting from tax exemption such lands of a municipal corporation and improvements thereon located outside of such corporation as were subject to taxation when acquired by the corporation, but that plaintiff was entitled to maintain action for refund of the taxes levied on its property for period prior to January 1, 1947 under specific provisions of the statute.

Judgment reversed with directions.

Opinion followed in 215 P.2d 522.

1. Taxation ☞217

An irrigation district was a "municipal corporation" whose property situated outside the district was not exempt from taxation, within constitutional provision excepting from tax exemption such lands of a municipal corporation and improvements thereon located outside of such corporation as were subject to taxation when acquired by the corporation. Const. art. 13, § 1.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Municipal Corporation".

2. Taxation ☞362

The legislature, having given right under certain condition to assess back taxes on theory property had been overlooked and had escaped assessment in prior years, had power to change those conditions in part, and to limit time within which such a correction could be made. Revenue and Taxation Code, §§ 531, 532, 532.5.

3. Taxation ☞40(12), 195

Statute requiring a county to refund taxes assessed upon property owned by district which is a municipal corporation as escaped property for period prior to January 1, 1947, is not invalid either as violative of uniformity rule or as violative of constitutional provision excepting from tax exemption such lands of a municipal corporation and improvements held thereon located outside of such corporation as were subject to taxation when acquired by the corporation. Revenue and Taxation Code, §§ 531, 532, 532.5; Const. art. 13, § 1.

4. Taxation 543(4)

An irrigation district, which was a municipal corporation within constitutional provision that lands and improvements located outside municipal corporation and taxable when acquired by municipal corporation shall not be exempt from taxation, and which was assessed taxes upon property owned by it and located outside of district as escaped property for period prior to January 1, 1947, was entitled to maintain action for refund of the taxes thus paid under specific provision of statute. Revenue and Taxation Code, §§ 531, 532, 532.5; Const. art. 13, § 1.

Horton & Knox, El Centro, for appellant.

William O. Mackey, Riverside, Horace L. Miller, Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an action to secure a refund of taxes paid under protest. The complaint, which was filed on February 7, 1949, alleged, among other things, that certain real property located in Riverside County, which is owned and operated by the plaintiff district, had been assessed in Riverside County as property which had escaped taxation for the tax years running from 1939-1940 to 1945-1946, both inclusive; that the plaintiff paid these taxes under protest on December 18, 1947, and on July 12, 1948, filed a petition and application for a refund thereof with the board of supervisors of Riverside County; and that this petition was denied on September 20, 1948. A demurrer was sustained without leave to amend, and the plaintiff has appealed from the judgment which followed.

The appellant first contends that the property of an irrigation district is the property of the state and hence exempted from taxation by the provisions of section 1, Article XIII of the State Constitution. The pertinent part of that section, with the two clauses numbered for convenience, provides that property (1) "such as may belong to this state, or to any county, city and county, or municipal corporation with-

in this state shall be exempt from taxation, (2) except such lands and the improvements thereon located outside of the county, city and county, or municipal corporation owning the same as were subject to taxation at the time of the acquisition of the same by said county, city and county, or municipal corporation; * * *." Appellant's contention is that its property belongs to the state and is exempt under clause (1). The respondent contends that an irrigation district is a municipal corporation within the meaning of this constitutional provision, and that clause (2) is applicable to the property here sought to be taxed. The point thus raised depends for its solution upon whether or not an irrigation district is to be considered a municipal corporation within the meaning of this provision of the constitution.

The appellant relies mainly on the case of *Anderson-Cottonwood I. Dist. v. Klukkert*, 13 Cal.2d 191, 88 P.2d 685. In that case, land within an irrigation district was sold to the district for nonpayment of an assessment. It was thereafter sought, in the county where the land was located, to assess it for general taxes on the theory that it was nonoperative property of the district and hence taxable. It was there held that the use to which the property was put is immaterial, since what we have called clause (1) of section 1 of article XIII provides an exemption on the basis of ownership, without any limitation respecting the use of the property. The question of use was the only one then involved, the land was not situated in another county, and the provisions of clause (2) of the constitutional provision were neither applicable nor considered. While some of the language of that decision appears to treat the land as belonging to the state, it made no difference in that case whether the land belonged directly to the state or belonged to a municipal corporation created as a state agency. It was pointed out that the fundamental basis for the decision in certain prior cases, including *Turlock Irr. Dist. v. White*, 186 Cal. 183, 198 P. 1060, 17 A.L.R. 72, was that the property in question was either "owned by the state or held by a subordinate

agency thereof," [13 Cal.2d 191, 88 P.2d 687] and was thus exempt from taxation.

In the case of *Turlock Irr. Dist. v. White*, supra, decided in 1921, the irrigation district was the "owner of land" situated in another county, which the other county sought to tax on the theory that the irrigation district was a municipal corporation and thus subject to a tax under the provisions of clause (2), which was added to section 1, article XIII of the constitution by amendment in 1914. The court reviewed the argument in behalf of this amendment, which had been submitted to the voters. In so doing, the court emphasized the portion which, by way of illustration, referred to the invasion of other counties by the cities of San Francisco and Los Angeles in the development of their water projects, but passed lightly over the main purpose of the amendment, as stated in the argument, which was to remedy similar conditions and to remove all uncertainty "by a legal assurance that, while natural resources within one county may be directly used for the upbuilding of another, lands or other property already upon the invaded county's tax roll shall continue to bear its share of maintaining the local government." The court adopted the view that the words "municipal corporation", as used in the 1914 amendment clause (2), should be given a strict technical interpretation and construed as referring only to cities. It was accordingly held that an irrigation district is not a "municipal corporation", although it was admitted that such a district is a public corporation for municipal purposes. A dissenting opinion was filed by Judge Sloane pointing out what he conceived to be the real purpose of the 1914 amendment, and contending that a strict technical construction should not be applied to the words "municipal corporation" as there used.

In *Laguna Beach County Water District v. County of Orange*, 30 Cal.App.2d 740, 87 P.2d 46, the controlling question was whether the plaintiff, a county water district, was a municipal corporation within the meaning of the 1914 amendment to

section 1, article XIII. Following the holding in *Turlock Irr. Dist. v. White*, 186 Cal. 183, 198 P. 1060, 17 A.L.R. 72, and certain other decisions deemed more or less analogous, it was held that such a county water district does not fall within the technical definition of a municipal corporation. In *Metropolitan Water Dist. of Southern California v. Co. of Riverside*, 21 Cal.2d 640, 134 P.2d 249, it was pointed out that the purpose of the 1914 amendment was to protect and conserve the revenue of the invaded territory. With that purpose in mind it was held that the words "municipal corporation" should be construed to include a district made up of several municipalities and a municipal water district. The court there criticised and inferentially disapproved the statements appearing in the opinions in *Turlock Irr. Dist. v. White* and *Laguna Beach County Water District v. County of Orange*, to the effect that the words "municipal corporation" in the constitutional provision were used "in the strict technical sense."

In *Rock Creek etc. Dist. v. County of Calaveras*, 29 Cal.2d 7, 172 P.2d 863, the facts are identical, in effect, with those involved in the instant case, except that the plaintiff in that case was organized as a public agency under the Water District Act. The court reversed the judgment which had awarded the district a return of such taxes paid under protest. It expressly overruled *Turlock Irr. Dist. v. White* and *Laguna Beach County Water District v. County of Orange*, and held that in line with the aim and policy of the 1914 amendment to section 1, article XIII the term "municipal corporation," as used therein [29 Cal. 7, 172 P.2d 865] "must be given a broad meaning unrestrained by the strict technical sense of the term." It was pointed out that the evil sought to be remedied by that amendment is the same whether the agency involved be an irrigation district, a water district or a city. Also, that it is immaterial, within the meaning of the constitutional provision, whether the agency in question be described as a municipal corporation in the

technical sense, a quasi municipal corporation, or a public corporation for municipal purposes.

[1] We consider the case of Rock Creek etc. Dist. v. County of Calaveras as controlling upon the point under consideration, and as requiring a holding that the appellant is a municipal corporation within the meaning of this constitutional provision. While that case involved a district organized under the Water District Act and the appellant here was organized under the Irrigation District Act there is, as pointed out in that case, no rational basis for distinction in this regard between two such public agencies. As was there said, for the purposes in question, "an irrigation district and a water district are substantially the same."

[2-4] The appellant further contends that, in any event, it was entitled to maintain an action for a refund of the taxes thus paid because of the provisions of sections 532.5 and 5096 of the Revenue and Taxation Code. Section 532.5 reads: "The assessor shall not assess for years of escaped assessment occurring in whole or part prior to January 1, 1947, real or personal property owned by a district which is a municipal corporation within the meaning of Section 1 of Article XIII of the Constitution. If any such assessments have been or are made they shall be canceled pursuant to Chapter 4 of Part 9 of this division as if levied or charged illegally and refunds in connection therewith, if any, shall be made pursuant to Chapter 5 of said Part 9 as if illegally collected."

That section became effective on April 29, 1948, before a demand for the refund here in question was made. The act adopting that section declared it to be an urgency measure. As reasons therefor, the act stated that a recent supreme court decision, *Rock Creek etc. Dist. v. County of Calaveras*, supra, had overruled a previous decision which had stood for twenty-five years, holding that the property of districts was not subject to property taxes; that because there was presently no statute of limitations on such taxation, districts were faced, retroactively, with a

debt for back taxes for all of the escaped years; and that this liability for back taxes would impose a burden which would impair the ability of all such districts to function effectively, and of some to function at all.

The respondent contends that section 532.5, insofar as it requires a county to refund such taxes, is violative of section 1, article XIII of the constitution because it attempts to revise the effective date of the 1914 amendment thereto; because it attempts to modify and annul a judicial determination of that section; because it violates the provisions of that section which require that all property not specifically exempted should be taxed; because it compels a remission of taxes in violation of that section; and because it violates the provisions of that section requiring the uniform and equal taxation of all property.

Section 532.5 is a part of article 4, Pt. 2, Div. 1 of the code, which provides for the assessing of escaped property under certain conditions and provides the procedure therefor. Section 532 of that article has long provided a limitation of two years upon the assessment of escaped personal property. That section was amended in 1947, extending that limitation to certain real property. Section 532.5 provides a similar limitation with a shorter period at the beginning, in connection with real property owned by certain districts. It also, by its terms, makes the cancellation and refund provisions of the code applicable thereto.

Section 532.5 does not change in any respect the basis and rules for taxation provided in section 1, article XIII of the constitution. It does not conflict with the provisions of that section, but adds another limitation on the time within which corrections may be made with respect to certain taxes which might have been, but were not, assessed during prior years. It merely places a limit upon how far back the assessing authorities may go in correcting old errors in this regard. It cannot be held that the limit thus provided for was an unreasonable one, especially since these

had become "escaped assessments" only because of a later interpretation of the law. Having given the right, under certain conditions, to assess back taxes on the theory that the property had been overlooked and had escaped assessment in prior years, now sec. 531, Revenue and Taxation Code, it was within the power of the legislature to change those conditions in part, and to limit the time within which such a correction could be made. *Southern Service Ltd. Co. v. Los Angeles*, 15 Cal.2d 1, 97 P.2d 963. This statute does not violate the uniformity rule since there is a natural and logical distinction between the lands of such a district, with its peculiar and special public functions, and the lands of cities, exercising different functions, or of individuals. Section 532.5 is a limitation statute in connection with procedural matters and does not in any way violate section 1 of article XIII of the constitution.

The judgment is reversed with directions to the trial court to overrule the demurrer and permit further proceedings not inconsistent with the views herein expressed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; CARTER, J., dissenting.



96 Cal.App.2d 990

**IMPERIAL IRRIGATION DIST. v.
RIVERSIDE COUNTY.**

Civ. 4103.

District Court of Appeal,
Fourth District, California.

March 8, 1950.

Hearing Denied March 29, 1950.

Hearing Denied May 4, 1950.

Appeal from Superior Court, Riverside County, Roberta Butzbach, Judge.

Horton & Knox, El Centro, for appellant.

William O. Mackey, Riverside, Horace L. Miller, Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is a companion case to the one of the same name, Cal.App., 215 P.2d 518, this day decided. This case involves taxes paid under protest, a part of which were regularly assessed for the tax year 1947-48 and a part of which were assessed on the theory that the property had escaped taxation during the year 1946-47. In all other material respects, aside from amounts and dates, the facts herein are exactly similar to those in the other case.

While separate briefs have been filed in this case the points raised and the rules that should be applied are the same in both cases since this case also involves, in part, an application of the provisions of section 532.5 of the Revenue and Taxation Code.

For the reasons given in the companion case, the judgment is reversed with directions to overrule the demurrer and to permit further proceedings not inconsistent with these decisions.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; CARTER, J., dissenting.



96 Cal.App.2d 513

SZEKERES v. REED et al.

Civ. 14199.

District Court of Appeal, First District,
Division 1, California.

March 7, 1950.

Louis L. Szekeres sued Mae Reed and others, as administrators of the estate of Oswald Ladd, deceased, to quiet title to land conveyed by decedent, and defendants answered and cross-complained to have title quieted. The Superior Court, San Benito County, A. M. Runnells, J., found that the deed had not been legally delivered and was executed as result of undue influence, and rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that the evidence authorized the findings as to undue influence

and therefore evidence of grantor's acts and declarations subsequent to the delivery of the deed was admissible on the issue of intent in delivery.

Judgment affirmed.

1. Deeds ⇨208(3)

Proof that owner of realty signed and acknowledged deed and handed it to grantee named therein established prima facie case of delivery with intent to make the grant operative immediately as transfer of title.

2. Deeds ⇨194(2)

Presumption of delivery of deed created by proof of signing, acknowledgment and delivery is not conclusive.

3. Deeds ⇨56(2)

"Delivery" involves more than physically handing possession of deed to grantee named therein or someone on grantee's behalf, and the physical act must be accompanied with intent to presently pass title, even though right to possession and enjoyment may not accrue until some future time.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Delivery".

4. Deeds ⇨56(2)

Rule that physical act of delivery of deed must be accompanied with intent presently to pass title applies not only where possession of deed is given to third person but also where such possession is given to grantee directly.

5. Deeds ⇨56(2)

Intention to part with title to realty described in deed is indispensable to legal delivery and is the factor that gives vitality to such delivery.

6. Evidence ⇨230(3), 314(1)

Where valid delivery of deed is established, grantor's subsequent acts and declarations in disparagement of deed, outside grantee's presence, are inadmissible as hearsay and "self-serving".

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Self-serving Declaration".

7. Deeds ⇨200

Where question presented is whether alleged grantor intended to divest himself of title to realty, his declarations and acts out of grantee's presence, after physically delivering possession of deed to grantee or third person, are admissible on question of intent.

8. Deeds ⇨200

Evidence authorized finding that grantor was of limited education and understanding, and executed deed of property constituting his sole means of support to his financial adviser without consideration, and hence evidence of grantor's acts and declarations after delivery of deed was admissible to show intent to retain title.

9. Deeds ⇨196(2, 3)

If a confidential relationship exists between grantor and grantee and there is no consideration for deed, presumption of fraud and undue influence arises, which grantee has burden of rebutting.

10. Deeds ⇨196(3)

Evidence supported finding that grantor was of limited education and understanding, and signed deed of ranch constituting his sole means of support to his financial advisor as result of undue influence.

11. Contracts ⇨94(1)

A "confidential relation" is any relation between parties to a transaction wherein one party is in duty bound to act with the utmost good faith for benefit of other party, and ordinarily arises where confidence is reposed by one person in integrity of another.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Confidential Relation".

12. Contracts ⇨94(1)

A "fiduciary relation" is ordinarily synonymous with a "confidential relation", and is also founded upon trust or confidence reposed by one person in integrity and fidelity of another, and likewise precludes the idea of profit or advantage resulting

from dealings of parties and person in whom confidence is reposed.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Fiduciary Relation".

13. Deeds ⇨196(3)

Proof that grantor voluntarily handed deed to grantee is insufficient to rebut presumption of undue influence arising from confidential relation and absence of consideration, and grantee must also show that gift was made with a full knowledge of all facts and with a complete understanding of effect of transfer.

14. Appeal and error ⇨1009(3)

Reviewing court could not interfere with finding that presumption of undue influence inducing deed had not been rebutted, where evidence and reasonable inferences therefrom on such issue were conflicting.

15. Deeds ⇨72(3)

Failure to receive independent legal advice is not conclusive of undue influence in deed without consideration to person in confidential relationship, but is a circumstance which may be considered.

16. Appeal and error ⇨1009(2)

Trial court's finding that presumption of undue influence had not been rebutted could not be successfully challenged when supported by substantial evidence.

Walker & Walker, San Jose, Campbell, Hayes & Custer, by Frank V. Campbell, San Jose, Edward J. Niland, Santa Clara, of counsel, for appellant.

Sidney L. Church, Jacob Abramson, Salinas, Thomas P. O'Donnell, Hollister, for respondents.

PETERS, Presiding Judge.

Plaintiff, claiming to be the grantee of certain real property from the decedent, Oswald Ladd, brought this action against the administrators of Ladd's estate to quiet his title to the property, asserting title under a deed from Ladd dated in 1923 and not recorded until after Ladd's death in 1946. The brother and sisters of Ladd

answered and cross-complained, denying the claim of plaintiff and seeking to quiet their title to the property on the theory that there had not been a valid delivery of the deed forming the basis of plaintiff's claim. They also alleged the existence of a confidential relationship between Ladd and plaintiff, and undue influence on the part of plaintiff. The trial court found that Ladd had no intent to divest himself of title to his property, that the deed under which plaintiff claims had not been legally delivered, and that the deed was executed as the result of plaintiff's undue influence. From the judgment based on these findings plaintiff appeals, making two major contentions.

(a) That the trial court erred in admitting, over appellant's objections, evidence of the acts and declarations of the grantor subsequent to and in derogation of the deed; and (b) that, as a matter of law, the evidence is insufficient to support the finding that the deed was executed as the result of undue influence. Neither contention is sound.

Appellant has practiced in San Jose as a drugless practitioner since 1916, and as a chiropractor since 1925. He first met Oswald Ladd in 1916. From that date on, appellant treated Oswald and his mother, and both were frequent visitors at his office. In 1916, Oswald lived with his mother, and farmed the ranch in San Benito County which is the subject of this dispute. It was their sole means of support. There is no doubt that Oswald and appellant, in addition to the professional relationship, became personal friends, and that they frequently went on hunting trips together.

Oswald's mother died in 1920. About three months before her death she called upon appellant at his home and told him that she did not have long to live and that she wanted Oswald to have the ranch upon her death, he being the only one of her children who had remained on the ranch with her. She commented upon the fact that Oswald had worked on the ranch for years with very little compensation. Appellant agreed to assist her and referred her to his friend, an attorney, Eli Wright, whose office was on the same floor as ap-

pellant's. The mother consulted Wright, and he drew a deed naming Oswald as grantee. This deed was entrusted to appellant, with instructions to record it upon the mother's death. Appellant kept the deed, and when informed of Mrs. Ladd's death, recorded it. Appellant testified that shortly after the deed had been delivered to him, he had a conversation with Mrs. Ladd in which she said: "My boy won't have anybody in the world after I die. Everybody is against him. He might need financial aid and I ask you to help him. You are more like a brother to him." Appellant gave his solemn oath to Mrs. Ladd that he would look after and help Oswald.

Shortly after Mrs. Ladd's death appellant made several loans to Oswald. Early in 1921, Oswald borrowed \$600 from appellant, and gave him a deed of trust on the ranch as security. Later in that year Oswald got into a dispute with his brother and sisters over certain personal property including the farm equipment, and he borrowed \$1,500 from appellant to purchase this property. Oswald gave appellant a chattel mortgage to secure this loan. Both transactions were supervised by attorney Wright. Apparently, appellant loaned other sums to Oswald, but his records and memory in reference thereto were confused. These loans have since been repaid in full.

Appellant testified that, between 1920, and September, 1923, Oswald, on several occasions, told him that he wanted him to have the ranch in return for the many favors and kindnesses he had shown Oswald and his mother. Appellant's nurse testified that Oswald had told her the same thing.

The execution and purported delivery of the deed under which appellant claims took place on September 21, 1923. On that day Oswald called upon attorney Wright. What then took place does not appear. Wright, although alive at the time of trial, was physically and mentally unable to testify. Appellant testified that Wright telephoned to him and asked him to step over to his office; that Whitney, a real estate man and notary, and friend of appellant and Wright, whose office was on the same floor, was called in as a witness; that Oswald was already there; that the deed was al-

ready drawn up; that Wright "read it to Oswald. He handed it over to Oswald to read it himself. He read it and then he signed it. Then he gave it back to Mr. Wright. Then Mr. Wright sealed it and gave it back to Oswald and Oswald gave it to me and he said, 'I want you and your family to have this.' I told him, 'Thank you and I will keep it.' Mr. Wright spoke up and said, 'Now, Doctor, you can go ahead and record the deed.' And I said, 'No.' Oswald said, 'Yes, go and record it,' and I said, 'No, I will not record this during your lifetime' and I told him, 'You own the ranch as you always did. Treat it as your own. Borrow money on it or do whatever you want but pay back whatever you borrow on it and I will assist you as I did in the past.'"

Whitney corroborated appellant as to this occurrence. Admittedly, when this incident occurred, appellant was the financial adviser of Oswald, and, admittedly, no consideration was given for the deed. The deed remained in possession of appellant from 1923 until after Oswald's death in 1946, when appellant caused it to be recorded.

There is substantial evidence that Oswald could read and write at best with great difficulty, and was of limited intelligence. Joe Mota, a neighbor and lifelong friend of the deceased, testified that Oswald often brought letters, bills, and other documents to him to have them read and explained; that he occasionally wrote checks for Oswald which Oswald signed; that Oswald could not write a letter because his spelling was so poor; that he wrote Oswald's Christmas cards and letters; that Oswald, on many occasions, told him that his father had secured a private tutor for him, but that he could not get the lessons "through my head"; that most of Oswald's business was handled for him by a Mr. Gardner of the local hay and grain store.

One of Oswald's sisters testified that the private tutor hired by her father for Oswald was unable to "give any results," and the lessons were discontinued.

Peter Daley, the son-in-law of one of the respondents, testified that he had known Oswald since 1888; that shortly after the

death of Oswald's mother, he had a conversation in appellant's office at which appellant and his nurse were present, during which appellant stated, upon being told by Daley that Oswald would receive his mother's ranch, "I am glad to hear that because, really, Daley, that man hasn't the mind of a 12-year old boy." This incident was denied by both appellant and his nurse.

A Dr. Hull testified that he had known Oswald all of his, the doctor's life; that before he was a doctor he had frequently visited the Ladd farm with his father who was the Ladd physician, and talked with Oswald; that these conversations took place between 1918 and 1920; that he frequently saw and talked with Oswald in and around Hollister; that he had formed an opinion of Oswald's mental condition; that Oswald "was an individual of not too great intelligence * * * he certainly wasn't a man of even an ordinary degree of intelligence", that "he was a dull type of individual, not an alert man, not a man with an alert or active type of mind. He was a pretty dull person to talk to * * *."

A niece of Oswald testified that he never wrote any letters and that, after 1937, she handled almost all of his correspondence.

Appellant produced several witnesses who testified that Oswald was "as bright as most men," or that he was "of average intelligence."

Over the objections of appellant the trial court admitted evidence relating to several transactions which occurred after September 21, 1923, all tending to show that after the deed was delivered, Oswald treated the ranch as his own property. Appellant claims that the admission of this evidence was error.

The challenged evidence showed the following:

All taxes on the ranch, before and after 1923, and until his death, were paid by Oswald. After 1923, he tore down old buildings on the ranch, and built new ones, all at his own expense. In 1924, Oswald was sued by San Benito County, and in that action filed a verified answer in which he alleged that he was the owner of the property. Also in 1924, Oswald became indebted in

the sum of \$3,150 to appellant and gave him a deed of trust on the ranch as security. This deed of trust was notarized by attorney Wright. The deed is dated in October, 1924, over a year after appellant claims he became the owner in fee of the premises. In an attempt to explain why, in 1924, he accepted a security interest in land he claims to own in fee since 1923, appellant testified that he did it to protect his family if he should predecease Oswald.

As already pointed out, in 1921, Oswald had given appellant a deed of trust to secure a loan, and when the 1924 deed of trust was executed it included the 1921 debt, and the first deed of trust was reconveyed. The 1924 loan was fully paid off in 1932. In that year Oswald borrowed money from another lender and appellant was repaid, and the new creditor took a deed of trust as security. Sometime later Oswald fell behind in his interest payments to his new creditor, and appellant wrote to Oswald stating: "So in order to avoid any trouble of loosing [sic] your ranch, come in to San Jose as soon as you can, and come to some agreement with him."

In 1934, Oswald, on the advice of appellant, again refinanced his obligations, this time securing a loan for \$5,700 from the Federal Land Bank, and paying off his existing creditor, from whom he secured a reconveyance. He gave the Land Bank a deed of trust on the ranch, and this deed was still a lien on the property at the time of Oswald's death. Appellant admitted that he, personally, had borrowed money from the Land Bank, and was therefore familiar with the application forms furnished by that institution, although there is no evidence that he saw Oswald's application. The form filed by Oswald contained his positive assertion that he owned a clear title to the ranch.

There is some evidence that in 1942 or 1943 Oswald complained of the activities of appellant, and told Mota that he was "through" with the doctor, and stated that: "He sure done me dirt."

Appellant contends that the evidence, without contradiction, shows a clear and unequivocal delivery of the deed to him, and that, therefore, it was error to admit

evidence of the subsequent acts and declarations of the grantor.

The law on this subject is clear. It was reviewed by this court in *Dinneen v. Younger*, 57 Cal.App.2d 200, 204, 134 P. 2d 323, 325, as follows:

[1-5] "There can be no doubt that upon proof that Rose Dinneen signed and acknowledged the deed and handed the same to the grantee, the plaintiff established a prima facie case of complete execution—that is, of delivery with intent to make the grant operative immediately as a transfer of title. [Citing cases.] The presumption of legal delivery, thus created, is not conclusive. The concept of delivery involves more than merely physically handing possession of the deed to the grantee or someone on his behalf. [Citing cases.] The act of delivery must be accompanied with the intent that the deed shall become presently operative as such, that is, must be accompanied with the intent to presently pass title, even though the right to possession and enjoyment may not accrue until some future time. (See cases collected 9 Cal.Jur., p. 153, § 52.) The rule applies not only where possession of the deed is given to a third person, but also where such possession is given to the grantee directly. [Citing cases.] Intention to part with title is indispensable—that is the factor that gives vitality to the delivery. [Citing cases.]

[6,7] "It is also clear that where a valid delivery is established, subsequent acts and declarations of the grantor in disparagement of his deed, outside the presence of the grantee, are not admissible. Such declarations or acts are hearsay and self-serving. See cases cited *infra*. But when the very question presented is whether or not the alleged grantor intended a valid delivery—that is, intended to divest himself of title—his declarations and acts made and done outside the presence of the grantee after physically delivering possession of the deed to the grantee or to a third person, are admissible as bearing upon the vital question of intent. This problem has frequently been before the courts of this state. The leading case is *Williams v. Kidd*, 170

Cal. 631, 151 P. 1, Ann.Cas.1916E, 703, where an exhaustive review of the authorities is to be found."

The court then quoted with approval from *Williams v. Kidd*, 170 Cal. 631, 648, 151 P. 1, Ann.Cas.1916E, 703, as follows:

"It is, of course, well settled that acts and declarations of a grantor made after he has parted with the title to property and in disparagement of it are inadmissible when made in the absence of the grantee, and it is the claim of appellants that the conduct and declarations of Williams after the deed was handed to Kidd were inadmissible as contravening this rule.

"But here the very question was whether Williams had ever parted with title to the property. This was the main issue in the case; the claim of respondents being that there had been no delivery of the deed with intent on the part of Williams to do so. The conduct and declarations of Williams covered a period subsequent to the making of the deed and while Kidd held it as a depository, and we are satisfied that such acts, conduct, and declarations of Williams with reference to the property during that period were properly admissible as bearing on the issue as to whether there had been a delivery of the deed. All these matters had some tendency to show that there was no intention on the part of Williams to deliver it except as a part of a testamentary scheme which he had abandoned."

Many cases are cited in support of these fundamental propositions. Mr. Justice Traynor, speaking for the court in *Whitlow v. Durst*, 20 Cal.2d 523, 524, 127 P.2d 530, 531, summarized the law on this subject as follows: "When intent is a material element of a disputed fact, declarations of a decedent made after as well as before an alleged act that indicate the intent with which he performed the act are admissible in evidence as an exception to the hearsay rule, and it is immaterial that such declarations are self-serving. Thus, in cases involving the delivery of deeds, declarations of the alleged grantor made before and after the making of the deed are admissible upon the issue of delivery, and it is

immaterial that such declarations are in the interest of the party producing them. [Citing cases.]” See annotations 105 A.L.R. 398; Ann.Cas.1916E, 713; 19 Cal.L.Rev. 231; 26 Cal.L.Rev. 631.

[8,9] The facts of the present case clearly bring it within the rule of the above cases. There is no doubt, of course, that the deed was handed to appellant in attorney Wright’s office by Oswald, but the very question at issue is the intent with which that manual delivery was made. The trial court had the right to consider the fact that in 1923, when Oswald, without limitation, is supposed to have divested himself of the title to the ranch, he was 49 years of age, not in ill health, and solely dependent upon the ranch for his support. It is not reasonable to suppose that any reasonable man, under such circumstances, would give away his sole means of support. The court also undoubtedly considered the evidence that Oswald was of limited intelligence and could hardly read and write. It is of significance that neither appellant nor the notary testified that anyone at the meeting in Wright’s office explained to Oswald the effect of a legal delivery. Of even greater importance is the fact that appellant admittedly promised Oswald’s mother to act as Oswald’s financial adviser, and admittedly acted in that capacity. There was ample evidence that Oswald looked to appellant for financial aid and advice. There can be no doubt but that such evidence supports the finding that a confidential relationship in fact existed between the parties. This is not seriously disputed by appellant. While this factor is also relevant to the issue of undue influence, it is also relevant on the issue under discussion. In such a case the burden is on the grantee to rebut the presumption of fraud and undue influence. This elementary rule was stated in *Sparks v. Mendoza*, 83 Cal.App.2d 511, 514, 189 P.2d 43, 45, as follows: “If a confidential relationship exists between a grantor and grantee and there is no consideration, a presumption of fraud and undue influence arises, shifting the burden of proof to the grantee to show fairness and good faith in the transaction, and upon his failure to do so the presumption of fraud and undue in-

fluence prevails and will support a finding that there was not a delivery of a deed.” In that case the court found that a confidential relationship existed between the grantor and grantee because “the evidence discloses that (a) decedent was not familiar with the English language, (b) plaintiff acted as her mother’s agent and adviser in various business transactions, (c) the mother had received no independent advice before executing the deed in question, and (d) there was no consideration for the deed.”

In the present case we have one who was in a confidential relationship to Oswald claiming to have received from Oswald, without consideration, a deed to the property constituting the grantor’s sole means of support. The evidence clearly indicates that there was sufficient doubt as to Oswald’s intent to warrant the trial court in admitting into evidence the acts and declarations of the grantor made after the date of the claimed delivery. These acts and declarations show that after 1923 Oswald acted as if he owned, and declared that he was the owner of, the property.

[10] The finding that Oswald signed the deed as the result of the undue influence of appellant is also supported. Appellant claims to the contrary, and also urges, quite properly, that there was no evidence to warrant a finding that Oswald was incompetent. The trouble with this last argument is that no finding of incompetency was made. The court simply found, by adopting the allegation in the pleadings, that Oswald “all during his lifetime was a person of limited education and understanding.” That finding is amply supported.

[11,12] As already pointed out, the finding that a confidential relationship existed between the grantor and grantee is supported, and as also pointed out above, in such cases a presumption of undue influence arises. In addition to *Sparks v. Mendoza*, supra, see *Johnson v. Clark*, 7 Cal.2d 529, 61 P.2d 767, and *McNulty v. Copp*, 91 Cal.App.2d 484, 205 P.2d 438. The proper rule in such cases was stated as follows in the frequently cited case of *Bacon v. Soule*, 19 Cal.App. 428, 434, 126 P. 384, 385:

"A 'confidential relation' in law may be defined to be any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent. A 'fiduciary relation' in law is ordinarily synonymous with a 'confidential relation.' It is also founded upon the trust or confidence reposed by one person in the integrity and fidelity of another, and likewise precludes the idea of profit or advantage resulting from the dealings of the parties and the person in whom the confidence is reposed. [Citing cases.]

"* * * the party in whom the confidence is reposed must stand in his dealings with the other party unimpeached of the slightest abuse of the confidence reposed, and, if he derives or claims any advantage from the relation, the law places upon him the burden of showing that the transaction out of which the advantage arose was fair and just and fully understood and consented to by the party confiding in him."

[13, 14] Appellant contends that, because the evidence shows that Oswald voluntarily handed him the deed, the presumption of undue influence was rebutted. But that is not all that is required. The grantee in a confidential relationship to the grantor must also show that the gift was made "with a full knowledge of all the facts, and with a complete understanding of the effect of the transfer." *Brown v. Canadian Industrial Alcohol Co.*, 209 Cal. 596, 598, 289 P. 613, 614, citing many cases. The evidence and the reasonable inferences therefrom on this issue were conflicting and this court, therefore, cannot interfere with the finding.

[15] Appellant also claims that Oswald received independent advice from attorney Wright, and from his friends Mota and

Gardner. Although the evidence shows that these men may have advised Oswald on other matters, there is not one word of evidence that he received any advice from anyone concerning this particular transaction. Although the failure to receive independent legal advice is not conclusive of undue influence, in a transaction such as this one, it is a circumstance which may be considered by the trial court. *Brown v. Canadian Industrial Alcohol Co.*, supra; *Helbing v. Helbing*, 89 Cal.App.2d 224, 200 P.2d 560.

[16] Under the facts it was for the trial court to determine whether the presumption of undue influence was rebutted. Its finding that it was not is supported by substantial evidence and therefore cannot be successfully challenged.

The judgment appealed from is affirmed

BRAY, J., and SCHOTTKY, J., pro tem,
concur.



96 Cal.App.2d 394

PEARSON v. HANSEN.

Civ. 7670.

Sac. 6022.

District Court of Appeal, Third District,
California.

March 8, 1950.

Action by R. G. Pearson against Helen Hansen, to quiet title to a tract of land in Yuba county, which land had been part of a larger tract owned formerly by a common predecessor in interest of both parties. The Superior Court, Yuba County, Warren Steel, J., quieted plaintiff's title and defendant appealed. The District Court of Appeal, Per Curiam, held that the description in the will devising land to plaintiff and defendant was too clear and definite to permit defendant to offer evidence concerning intent of testator to aid in construction of will.

Affirmed.

1. Wills ⇨487(1)

To say that a testator intended to fix a boundary line so as to leave a room partly on one property and partly on other, thus largely destroying its value to either owner, requires clear proof of that intent.

2. Wills ⇨440, 441

In construing wills, the intent must be sought first in writing itself, and must be that which is expressed in instrument and not that which may have existed in mind of testator, and if it be clearly expressed no further search or inquiry is permitted and court must follow intent, however, if intent cannot be so found, and there is real uncertainty in writing, court may inquire into circumstances existing when instrument was executed. Probate Code, § 101.

3. Wills ⇨490

A devise of realty describing a boundary as "the westerly side of the small pump and tank house which provides the domestic water supply for the home" was not ambiguous so as to permit devisee to offer evidence that by description testator intended to include a small guest house attached to westerly side of pump house after execution of will. Probate Code, § 101.

4. Wills ⇨561(2)

A devise of realty describing a boundary as "the westerly side of the small pump and tank house which provides the domestic water supply for the home" did not include a small guest house attached to westerly side of pump house after execution of will. Probate Code, § 101.

Manwell & Manwell, Marysville, for appellant.

Rich, Weis, Carlin & Fuidge, Marysville, for respondent.

PER CURIAM.

This action was brought to quiet title to a tract of land described in the complaint and located in Yuba County. The land had been part of a larger tract owned

formerly by the common predecessor in interest of plaintiff and defendant, and came to the parties hereto by devise and purchase. Before making his will the deviser had lived for a long time on the whole property, devoting the land, excluding that used as his home, to fruit raising and general farming.

By his will he devised to defendant his "home and place of residence * * *, including the surrounding lands described as follows:

"Beginning at the intersection of the south line of Ella Lane with the west line of the Earl Fruit Company Road; running thence south and along the said westerly line of the Earl Fruit Company Road three hundred (300) feet; thence at a right angle westerly to a point on a line running in a north and south direction and at right angles to the aforementioned Ella Lane, and being distant three (3) feet west from the westerly side of the small pump and tank house which provides the domestic water supply for the home premises herewith devised; thence at a right angle northerly and along said last mentioned line to the southerly line of said Ella Lane; thence east and along said southerly line of Ella Lane to the point of beginning."

The balance of his holdings the testator devised to a number of residuary legatees, one of whom was plaintiff; and before this action was begun plaintiff had acquired the interest of the other residuary devisees by purchase. The will was executed December 10, 1941. Two codicils were later executed, the last under date of November 25, 1946, but no change was made in the real property devises nor in the descriptions first used.

After the testator's death his will was probated and distribution was made of the real property, the parcel devised to defendant being distributed by the description used in the will. A dispute arose between plaintiff and defendant concerning the location on the ground of the calls of defendant's devise. Plaintiff employed a licensed surveyor who located the lines according to the description appearing in

the complaint, and plaintiff brought this action claiming to own all of the land except that portion which this description allocates to the defendant. The decree of the trial court quieted plaintiff's title according to this same description, and defendant appeals.

At the trial the principal controversy had to do with the location of the west line of defendant's parcel. This line was, by the description used in the will, fixed only by reference to "the westerly side of the small pump and tank house which provides the domestic water supply for the home premises herewith devised." A small building clearly fitting this description had existed for a long time before the will was made. It was square in shape and its westerly side approximated a north and south position. From the date of its construction it had housed the pump which furnished domestic water. About one year before the will was executed the testator had built along and against the southerly side a room usable for a guest room or sleeping quarters, which projected westerly and beyond the pump house about twelve feet. A landing, and steps down to the ground level, projected yet another five or six feet. The existing southerly wall of the older pump house was not disturbed, but the roof over it and the new structure was fashioned into a common roof. Within the angle formed by the two structures and about seven or eight feet westerly of the pump house there had long been situated a well and pump for irrigation purposes, and just north of the pump house was a valve box and stand pipe used as a part of the irrigation system. The line fixed by the court as the westerly line of defendant's property runs through this westerly projection of the guest room and encloses within her boundaries the valve and stand pipe. The trial court construed the testator's reference to the pump house as referring exclusively to the older and smaller structure housing the domestic supply pump, and held that it did not refer to or include the guest room. It is the main contention of appellant that in so doing the court erred, and that a proper construction would fix the line three feet

west of the steps leading into the guest room. Such a construction would enclose the irrigation well and irrigation pump within the appellant's lines, and deprive respondent of the use of the existing water supply for irrigation of the farming lands.

Appellant points out that the testator first declares he gives to her his home and place of residence including the surrounding lands; and she argues that he intended his following description to accomplish this generally declared purpose, and that it should and must be so construed. She says the guest room is part of the home and place of residence, and that the intention to give all parts of the home and residence to her demands such a construction of the particular calls as will achieve that result.

[1] It is true that to say the testator intended to so fix the westerly line as to leave the guest room partly on one property and partly on the other, thus largely destroying its value to either owner, requires clear proof of that intent.

[2] The rules for construing wills, deeds and written instruments generally, are well settled. The intent must be sought first in the writing itself, and must be that which is expressed in the instrument and not that which may have existed in the mind of the testator. In re Estate of Maloney, 27 Cal.App.2d 332, 335, 80 P.2d 998; Probate Code, sec. 101. If the intent be clearly expressed then no further search or inquiry is permitted; the court must follow the intent, however unusual or unreasonable the result may appear to be. In re Estate of Spreckels, 162 Cal. 559, 567, 123 P. 371. If the intent cannot be so found, if there is real uncertainty in the writing, then, and then only, may the next step be taken, that of inquiring into the facts and circumstances existing when the instrument was executed, as an aid in construing the instrument. In re Estate of Spreckels, supra.

[3,4] This latter situation is not presented by the record here. Notwithstanding the testator's general declaration that he gives to appellant his "home and place of residence * * *, including the sur-

rounding lands" he proceeds to describe the properties so given by a particular description that is too clear and definite to permit any change under the guise of construction. Appellant's contention that by the words "small pump and tank house which provides the domestic water supply for the home premises herewith devised" he meant to include the guest room cannot be sustained. The smaller and older building was the only object to which could be applied the descriptive words used. That being so, the westerly line of appellant's devise was unalterably fixed, and the trial court by its judgment has properly construed the will.

The judgment is affirmed.



96 Cal.App.2d 465

CAPTAIN v. L. A. WRECKING CO. et al.
Civ. 17487.

District Court of Appeal, Second District,
Division 2, California.
March 13, 1950.

Action by John Captain against L. A. Wrecking Company and the Atlantic Savings & Loan Association and Dominic Dinoto. The Superior Court, Los Angeles County, William B. McKesson, J., rendered judgment for defendants Atlantic Savings & Loan Association and Dominic Dinoto after sustaining their demurrer to the amended complaint, and denied plaintiff's motion for leave to file a second amended complaint, and plaintiff appealed. The District Court of Appeal, Wilson, J., held that a notice of motion for leave to file a second amended complaint without a motion to vacate judgment in case was properly denied.

Affirmed.

1. Pleading Ⓒ245(7)

A trial court is without power to permit filing of an amended complaint without

first vacating a judgment which has been entered prior to filing of notice of motion for leave to amend.

2. Pleading Ⓒ245(7)

Where trial court entered judgment for defendants after sustaining their demurrer to amended complaint, without leave to amend, a notice of motion for leave to file a second amended complaint without a motion to vacate judgment was properly denied.

Barry Sullivan, Los Angeles, for appellant.

Hindman & Davis, Los Angeles, for respondents.

WILSON, Justice.

Plaintiff has appealed from a judgment in favor of defendants Atlantic Savings and Loan Association and Dominic Dinoto entered after the sustaining of their demurrer to the amended complaint without leave to amend. He has also purportedly appealed "from the plaintiff's Motion to Vacate Order made on the 17th day of June, 1949 and from the plaintiff's Motion for Leave to File a Second Amended Complaint." It is assumed that it was plaintiff's intention to appeal from the order denying his motions.

The judgment in favor of the defendants mentioned was entered on June 29, 1949. On July 1 plaintiff filed a notice of motion to vacate the order sustaining the demurrer without leave to amend and for an order permitting the second amended complaint to be filed, and a separate notice of motion for an order to permit the filing of the second amended complaint. Both motions were denied on July 7 as to defendants Atlantic Savings and Loan Association and Dinoto.

Plaintiff does not contend in his brief that the amended complaint to which the demurrer was sustained stated a cause of action, nor does he contend that the second amended complaint, which the court did not permit to be filed, stated a cause of action. In fact, the only point made by plaintiff in his brief is that he had a right to amend

"when it appears that a cause of action could be stated." Plaintiff does not point out in his brief that a cause of action could have been stated. It has not been made to appear that the court was in error in sustaining the demurrer to the amended complaint nor that the court abused its discretion in refusing leave to file the second amended complaint.

[1, 2] Furthermore, the court was without power to permit the filing of the second amended complaint without first vacating the judgment which had been entered on

June 29. The notices of July 1 did not contain a notice of motion to vacate the judgment but merely to permit the filing of a second amended complaint. There was no error in the ruling of the court.

Judgment affirmed. Treating the purported appeal from "plaintiff's motion[s]" as being an appeal from the order made after judgment denying the motions, the order is affirmed.

MOORE, P. J., and McCOMB, J., concur.

35 Cal.2d 1

FEDERAL FARM MORTGAGE CORPORATION v. SANDBERG et al.**L. A. 20944.**

Supreme Court of California, in Bank.

March 15, 1950.

The Federal Farm Mortgage Corporation sued Marion G. Sandberg, Marie Von Piontkowski, E. S. Von Piontkowski and others, for a determination either that plaintiff had a lien against realty formerly comprising estate of decedent, or that defendants Von Piontkowski were constructive trustees of the amount of plaintiff's claim against estate. The Superior Court, Los Angeles County, F. Ray Bennett, J., entered a judgment adverse to plaintiff and plaintiff appealed. The Supreme Court, Traynor, J., held, inter alia, that equitable relief could not be granted to avoid decree of distribution whereunder distributees received realty free of plaintiff's claim.

Judgment affirmed.

Prior opinion, 209 P.2d 58.

1. Executors and administrators ⇨241

The allowance and approval of a claim against an estate when the executrix was sole beneficiary, did not give claim the force and effect of a judgment against estate, and even if it did, it would create no lien on assets of estate. Probate Code, §§ 713, 730.

2. Executors and administrators ⇨315(1)

Probate Court may incorporate into its decree of distribution some other document either expressly or by apt reference.

3. Judgment ⇨679

A decree of distribution of assets of estate of decedent, which did not create a lien on realty in accordance with recital of final report of executrix, and distributed estate to assignees of sole beneficiary of estate, was res judicata as to rights of lien claimant and all persons interested in estate, in absence of extrinsic fraud or mistake. Probate Code, §§ 955, 1021.

4. Judgment ⇨435, 443(1)

The final judgment of a court having jurisdiction over person and subject matter can be attacked in equity after the time for appeal or other direct attack has expired

only if the alleged fraud or mistake is extrinsic rather than intrinsic.

5. Judgment ⇨435, 443(1)

Fraud or mistake as "extrinsic fraud" or "extrinsic mistake" within rule that a final judgment can be attacked in equity after time for appeal or direct attack has expired, if alleged fraud or mistake is extrinsic rather than intrinsic, when it deprives unsuccessful party of an opportunity to present his case to court.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Extrinsic Fraud" and "Extrinsic Mistake".

6. Judgment ⇨456(1)

If an unsuccessful party to an action has been kept in ignorance thereof, or has been prevented from fully participating therein, there has been no truly "adversary proceeding" and the judgment is open to attack at any time.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Adversary Proceeding".

7. Judgment ⇨443(1)

A party who has been given proper notice of an action, and who has not been prevented from full participation therein, has had an opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary, and hence judgment cannot be attacked after time for appeal or other direct attack has expired, as fraud perpetrated under such circumstances is "intrinsic fraud", even though the unsuccessful party does not avail himself of the opportunity to appear before court.

8. Executors and administrators ⇨315(4)

Where plaintiff had actual notice of probate proceedings and filed claim against estate, but plaintiff did not file request for special notice of further proceedings, and after claim was approved, plaintiff assumed probate court would proceed correctly and made no effort to keep informed of proceedings, so that plaintiff's failure to protect plaintiff's interests was caused, not by fraud or mistake on part of others, but, by plaintiff's inaction, equitable relief could

not be granted after time for appeal or other direct attack had expired, to avoid decree of distribution whereunder distributees received realty free of plaintiff's claim. Civ.Code, §§ 1202, 2224.

Richard W. Young, Morton G. Hoffmann, Berkeley, Daniel Schnabel, Beverly Hills, for appellant.

Arch. H. Vernon, Earl E. Johnson, Gilbert E. Harris, W. T. Stockman, Los Angeles, for respondents.

TRAYNOR, Justice.

Harold Sandberg died testate in 1939, and his widow Marion G. Sandberg was appointed executrix of his estate. Thereafter plaintiff presented two claims against the estate, which were allowed and approved. One was secured by a deed of trust on the real property owned by decedent; the other was unsecured. The sole beneficiary of decedent's will was Marion Sandberg. In 1940, before the distribution of the estate, she assigned all her interest therein to defendants Mr. and Mrs. Von Piontkowski. In July 1944, she filed a document entitled "Waiver of First and Final Account; Report of Executrix; Petition for Distribution; Petition for Attorney Fees." She erroneously stated therein that both of plaintiff's claims were secured by the only assets of the estate, the real property involved in this action, and that "there are no claims presented or allowed in the within entitled Estate that remain unpaid or unsecured at the present time." Neither of the claims had in fact been paid. The probate court entered its order approving the final report and distributing to the Von Piontkowskis "All of the right, title, and interest of said decedent and his estate in and to" the real property. The Von Piontkowskis sold the property to defendant Vedder. Vedder conveyed the property to defendant D. G. Vedder Company, and the latter sold the property to defendant El Tejon Ranch Company. In the course of this last sale, approximately two years after the decree of distribution became final, the escrow holder paid the secured claim against the property, but on the instructions of the

D. G. Vedder Company refused to pay the amount of plaintiff's unsecured claim against the Sandberg estate. Plaintiff then brought this action for declaratory relief to have the court determine either that a lien existed against the real property or that the Von Piontkowskis were constructive trustees of the amount of its claim under the provisions of Civil Code, section 2224. The trial court entered judgment for all defendants in reliance on the decree of distribution, and plaintiff has appealed.

[1] Plaintiff does not attack the jurisdiction of the probate court to enter the decree but contends that the decree must be construed either as creating a lien on the property for its unsecured claim or as leaving undisturbed a lien created earlier in the probate proceedings by the allowance and approval of its claim. Plaintiff contends that the allowance and approval of a claim when the executrix is the sole beneficiary should give the claim the force and effect of a judgment against the estate. It is settled, however, that the allowance and approval of a claim does not give it the force of a judgment. Probate Code, § 713; *Haub v. Leggett*, 160 Cal. 491, 494, 117 P. 556; *In re Estate of Naegely*, 31 Cal. App.2d 470, 474, 88 P.2d 715. Even if it did, it would create no lien on the assets of the estate. Probate Code, § 730.

Plaintiff contends that the recital in the decree of distribution that "said report is in all respects approved" incorporated the executrix's final report into the decree by reference, and that therefore the statement in the report that plaintiff's claim was "still due and secured by the real property" was sufficient when incorporated in the decree to create a lien on the property.

[2,3] Although the probate court may incorporate into its decree of distribution some other document either expressly or by apt reference, *Horton v. Winbigler*, 175 Cal. 149, 158, 165 P. 423; *Goad v. Montgomery*, 119 Cal. 552, 558, 51 P. 681, 63 Am.St.Rep. 145, in this case it did not do so. There is nothing in the decree to suggest that the distributive provisions were to be modified by the executrix's report. Moreover, if the approval of the report were sufficient to incorporate its terms by

reference, it would create a direct conflict between the recitals in the report and the distributive provisions of the decree. Since plaintiff's claim against the estate was unsecured, it did not reduce Harold Sandberg's or his estate's right, title, and interest in the real property. It was precisely this interest, however, that the probate court distributed to the Von Piontkowskis. It did not, in making its decree, create a lien in accordance with the recital in the report. The situation is thus the same as one where the decree of distribution departs from the terms of a will it purports to be carrying out. In either case in the absence of extrinsic fraud or mistake, when the decree becomes final, it is *res judicata* as to the rights of all persons interested in the estate. In *re Estate of Loring*, 29 Cal. 2d 423, 428, 175 P.2d 524; In *re Estate of Easter*, 24 Cal.2d 191, 194, 148 P.2d 601; *Dabney v. Dabney*, 54 Cal.App.2d 695, 701, 129 P.2d 470; *O'Malley v. Carrick*, 108 Cal. App. 520, 523, 291 P. 871; *Benning v. Superior Court*, 34 Cal.App. 296, 299, 167 P. 291; Probate Code, §§ 955, 1021.

[4-7] Plaintiff contends, however, that even if the decree did not create a lien in its favor, the Von Piontkowskis received the property free of its claim by fraud or mistake within the meaning of Civil Code section 2224* and that they should therefore be declared constructive trustees of the proceeds of the sale of the property to the extent of plaintiff's claim. Whether or not the executrix reported that plaintiff's claim was secured through fraud or mistake or the probate court by mistake failed to distribute the property subject to a lien, plaintiff is not entitled to equitable relief to avoid the decree. "The final judgment of a court having jurisdiction over persons and subject matter can be attacked in equity after the time for appeal or other direct attack has expired only if the alleged fraud or mistake is extrinsic rather than intrinsic. [Citations.] Fraud or mistake

is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court. [Citations.] If an unsuccessful party to an action has been kept in ignorance thereof [citations], or has been prevented from fully participating therein [citations], there has been no true adversary proceeding, and the judgment is open to attack at any time. A party who has been given proper notice of an action, however, and who has not been prevented from full participation therein, has had an opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary. [Citations.] Fraud perpetrated under such circumstances is intrinsic, even though the unsuccessful party does not avail himself of his opportunity to appear before the court. Having had an opportunity to protect his interest, he cannot attack the judgment once the time has elapsed for appeal or other direct attack. [Citations.]" *Westphal v. Westphal*, 20 Cal.2d 393, 397, 126 P.2d 105, 106; *Gale v. Witt*, 31 Cal.2d 362, 367, 188 P.2d 755; *Jorgensen v. Jorgensen*, 32 Cal.2d 13, 18, 193 P.2d 728.

[8] In the present case statutory notice of all proceedings was given. Although plaintiff had actual knowledge of the probate proceedings and filed its claim, it did not file a request for special notice of further proceedings. See, Probate Code, § 1202. After its claim was approved, it assumed the probate court would proceed correctly and made no effort to keep informed of the proceedings. Its failure to protect its interests was caused not by fraud or mistake on the part of others, but by its own inaction. Accordingly, equitable relief may not be granted to avoid the decree of distribution.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.

* "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right

thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

In re ALDRICH'S ESTATE.

S. F. 17657.

Supreme Court of California, in Bank.

March 17, 1950.

Rehearing Denied April 13, 1950.

The Bank of America, National Trust & Savings Association, as successor trustee of testamentary trusts, filed final account in the matter of the trust estate of William W. Aldrich, deceased, and William Arnold Aldrich filed objections thereto, opposed by Claude Rees, trustee in bankruptcy of William Arnold Aldrich, and by Bernice King and another, remaindermen. The Superior Court of Alameda County, Exra W. Decoto, J., rejected contestant's objections and he appealed from the decree settling the account. The Supreme Court, Gibson, C. J., held that the contestant had no right to object to the account because his interest in the trust had passed to his trustee in bankruptcy.

Decree affirmed.

Prior opinion, see 206 P.2d 447.

1. Bankruptcy ⚡143(10)

When beneficiary of trusts was declared bankrupt all his rights in trusts passed to his trustee in bankruptcy. Bankr. Act, § 70, sub. a. 11 U.S.C.A. § 110, sub. a.

2. Bankruptcy ⚡390

A bankrupt beneficiary of trusts had no right to object to settlement of trustee's account, where his rights as beneficiary had passed to his trustee in bankruptcy and had been treated by trustee as hypothecated. Bankr. Act, § 70, sub. a, 11 U.S.C.A. § 110, sub. a.

3. Bankruptcy ⚡390

A bankrupt cannot maintain action regarding property which has passed to trustee in bankruptcy, unless it has been abandoned by trustee. Bankr. Act, § 70, sub. a, 11 U.S.C.A. § 110, sub. a.

4. Bankruptcy ⚡150

A trustee may abandon worthless or burdensome assets, and title revests in bankrupt on such abandonment.

5. Bankruptcy ⚡150

Burden of proof rests heavily upon one asserting that bankruptcy trustee, with-

out court's permission, has abandoned or disclaimed property the retention of which does not involve considerable burden upon the estate, and abandonment must be predicated upon positive indication of intent to do so.

6. Bankruptcy ⚡150

Evidence did not establish that bankruptcy trustee violated his duty in failing to reduce bankrupt's remainder interest in trust to money, as basis for claim of abandonment of such interest by trustee. Bankr. Act, § 47, sub. a(1), 11 U.S.C.A. § 75, sub. a(1).

7. Bankruptcy ⚡150

Where bankrupt's remainder interest in trusts was not collectible unless bankrupt survived life beneficiaries and amount thereof was dependent upon number of other remaindermen who might also survive, bankruptcy trustee was not required to attempt to make a sale of such interest and did not abandon the interest by waiting until termination of the trusts before attempting to realize thereon.

8. Bankruptcy ⚡150

Mere inaction, even if violation of bankruptcy trustee's duty in failing to attempt liquidation of assets, could not alone amount of "abandonment". Bankr. Act, § 47, subd. a(1), 11 U.S.C.A. § 75, sub. a(1).

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Abandonment".

9. Bankruptcy ⚡11

Though bankruptcy trustee may object to any claim of doubtful validity and pursue property of bankrupt which is held as security for such claim, allowance of claims and proper order of payment of creditors are questions within bankruptcy court's exclusive jurisdiction, which is interested equally in payment of secured and unsecured claims. Bankr. Act, § 57, sub. h, 11 U.S.C.A. § 93, sub. h.

10. Bankruptcy ⚡390

Bankruptcy trustee's acknowledgment of validity of bank's secured claim against bankrupt's remainder interest in

trust, did not constitute "abandonment" of such interest so as to authorize bankrupt to object to trustee's account.

11. Appeal and error §909(1)

In absence of showing by appellant to contrary, reviewing court would assume that bankruptcy trustee was acting properly under supervision and control of bankruptcy court and within scope of his powers as trustee.

12. Bankruptcy §390

If bankruptcy trustee was acting improperly and without approval of bankruptcy court in acknowledging validity of bank's secured claim against bankrupt's interest as remainder beneficiary in trusts, remedy would be application to bankruptcy court for appropriate action, rather than permitting bankrupt to object to trustee's account.

Augustin C. Keane, San Francisco, for appellant.

Donahue, Richards & Hamlin, Donahue, Richards, Rowell & Gallagher, Oakland, Leicester & Leicester, San Francisco (Samuel B. Stewart, Jr., George D. Schilling, San Francisco, Orlando J. Bowman, Oakland, of counsel), for Bank of America etc.

Ernest J. Torregano, San Francisco, for Claude Rees, trustee, etc.

GIBSON, Chief Justice.

Appellant, a beneficiary in two trusts created by the will of his grandfather, filed objections to the final account of respondent Bank of America, successor trustee of the testamentary trusts. His objections were rejected by the probate court, and he has appealed from the decree settling the account.

The testator left one-fourth of his estate in trust for his son, George Albert Aldrich, for life. Appellant, who was George Albert's nephew, became entitled to one-eighth of the corpus of this trust upon the death of the life beneficiary in 1918. Another one-fourth of the estate was left by the testator in trust for appellant's mother and father, Minnie C. and William Holt

Aldrich, for life. Appellant's interest in this trust, which was contingent upon his surviving the life beneficiaries, became distributable upon the death of his mother in 1946. These trusts will hereafter be referred to as the "George Albert" trust and the "William Holt" trust, respectively.

In 1919 appellant borrowed money from the Banca Popolare Fugazi, hereinafter called "Fugazi," and made an assignment of his interest in one or both of the trusts to secure the loan. This assignment is somewhat ambiguous, and the principal question raised by appellant's objections to the final account was whether the assignment covered only appellant's interest in the George Albert trust, or whether it also covered his interest in the William Holt trust.

[1] Appellant was declared a bankrupt in 1921, and all of his rights in the two trusts passed to the trustee in bankruptcy. See 11 U.S.C.A. § 110 sub. a; *In re Paleis*, 2 Cir., 296 F. 403, 407, writ of certiorari denied, 264 U.S. 591, 44 S.Ct. 404, 68 L.Ed. 865. A claim was filed in the bankruptcy proceeding by Fugazi for the amount of the loan then unpaid, and in 1922 appellant's interest in the George Albert trust was distributed to Fugazi in partial satisfaction of the debt. The contingent interest of appellant in the William Holt trust, which passed to the trustee in bankruptcy subject to any rights which Fugazi had under the assignment, will be referred to as the "remainder interest."

In 1931 respondent bank acquired the assets of Fugazi, including the unsatisfied portion of appellant's obligation, and in 1933 it also became the successor trustee of the William Holt trust upon acquiring the business and assets of the original trustee. After the death of appellant's mother in 1946, the bank as successor trustee set aside appellant's remainder interest to itself as holder of the assignment which appellant had given Fugazi, and this transaction was reflected in its final account.

Both appellant and his trustee in bankruptcy, who is also a respondent here, appeared in this proceeding. Appellant ex-

cepted to the account on the grounds that the assignment covered only his interest in the George Albert trust which had been distributed to Fugazi in 1922, that the unpaid portion of the obligation was not secured by the remainder interest in the William Holt trust, and that the bank was not entitled to the proceeds therefrom. The trustee in bankruptcy acquiesced in the application of the proceeds of the remainder interest to the payment of the debt due the bank and asked that any residue be distributed to him as trustee for the benefit of the general creditors.

The probate court found that appellant's remainder interest in the William Holt trust passed to his trustee in bankruptcy subject to the rights of the bank under the Fugazi assignment, and that appellant's share in the William Holt trust was covered by the assignment to Fugazi. The court approved the account and ordered distribution of the remainder interest to respondent bank, there being no excess for other bankruptcy creditors.

[2] Appellant contends that the finding of the probate court that the assignment to Fugazi covered his remainder interest in the William Holt trust is not supported by the evidence. We think it is clear, however, that appellant has no right to object to the settlement of the account, and therefore it is not necessary for us to pass upon this contention.

[3-5] A bankrupt has no right to maintain an action regarding property which has passed to his trustee in bankruptcy, unless it has been abandoned by the trustee. See *First Nat. Bank of Jacksboro v. Lator*, 196 U.S. 115, 118-119, 25 S.Ct. 206, 49 L.Ed. 408; *Stockwell v. McAlvay*, 10 Cal.2d 368, 374, 74 P.2d 504; *Dean v. Shingle*, 198 Cal. 652, 659, 246 P. 1049, 46 A.L.R. 1156; *Heffron v. Rosenberg*, 51 Cal.App.2d 156, 159, 124 P.2d 74. A trustee may abandon worthless or burdensome assets, and title reverts in the bankrupt on abandonment of the property. 4 *Remington on Bankruptcy*, 4th Ed., 1943, § 1407, p. 95. It has been held, however, that "the burden of proof * * * rests heavily upon the one who asserts that the trustee, with-

out the permission of the court, has abandoned or disclaimed property, the retention of which does not involve any considerable burden upon the estate * * *," *Carter v. Rives*, 4 Cir., 9 F.2d 62, 63; *Stanolind Oil & Gas Co. et al. v. Logan*, 5 Cir., 92 F.2d 28, 31, and abandonment in such circumstances must be predicated on some positive indication of intent to do so, *Tuffy v. Nichols*, 2 Cir., 120 F.2d 906, 909.

The record shows that appellant was adjudicated a bankrupt in 1921, that the Fugazi claim was filed in the same year and was partially satisfied in 1922 by the application of the proceeds from the George Albert trust, that in 1923 points and authorities were submitted "on assignment of future interest under will" and a hearing was had before the referee in 1925 in relation to the "bankrupt's interest in the will," that in 1937 an order was made granting the bank's petition for restoration of lost records and for leave to file an amended claim, that the bank's amended claim was filed immediately thereafter, that in 1938 the trustee's "report and account and order classifying creditors" was approved, and that appellant was discharged as a bankrupt in 1944. The bankruptcy proceeding, however, was not closed upon the discharge of the bankrupt, and it was still open in 1946 when the remainder interest became distributable. As before stated, the trustee in bankruptcy appeared before the probate court, consented to the application of the proceeds to payment of the bank's claim, and asked that any residue be distributed to him for the benefit of the general creditors. The bank's claim, including interest, was \$165,002.73, the value of the remainder interest was \$61,716.25, and the claims of general creditors totaled \$14,000.

It can be reasonably inferred from the facts proved that consideration was given in the bankruptcy proceeding as to whether the bankrupt's remainder interest in the William Holt trust had been hypothecated, that the interest was treated by the trustee as being so hypothecated, and that the proceedings were kept open for the purpose of permitting a distribution of this asset following termination of the trust.

[6-8] Appellant contends that the failure of the trustee to reduce the remainder interest to money constituted an abandonment of the asset, and in support of his position he relies on the provision of the Bankruptcy Act which requires the trustee to collect and reduce to money the property of the estate as expeditiously as is compatible with the best interests of the parties in interest. 11 U.S.C.A. § 75 sub. a (1). There are two answers to this argument: first, the evidence does not establish that the trustee violated his duty in this regard, and, second, even if it could be said that he did not exercise good judgment in waiting until the termination of the trust before attempting to realize on the asset, this would not amount to an abandonment. The remainder interest was not collectible unless appellant survived the life beneficiaries, and the amount of appellant's interest was dependent upon the number of other designated remaindermen who might also survive the termination of the trust. In view of the uncertainties involved it would seem clear that the trustee was not required to attempt to make a sale of the interest, and that his conduct was not incompatible with the best interests of the bankrupt and his creditors. In any event, even if the trustee violated a duty by failing to attempt liquidation of this asset, mere inaction, as has been stated, could not alone amount to an abandonment. *Tuffy v. Nichols*, 2 Cir., 120 F.2d 906, 909.

[9-12] Appellant also contends that the acquiescence of the trustee in bankruptcy in the application of the proceeds of the remainder interest to the payment of the bank's claim constituted an abandonment. While the trustee in bankruptcy may object to any claim of doubtful validity and may pursue property of the bankrupt which is held as security for such a claim, the allowance of claims and the proper order of payment of creditors are questions within the exclusive jurisdiction of the bankruptcy courts, see *Isaacs v. Hobbs, etc.*, 282 U.S. 734, 738-739, 51 S.Ct. 270, 75 L.Ed. 645; *United States v. Wood*, 2 Cir., 290 F. 109,

111, affirmed 263 U.S. 680, 44 S.Ct. 134, 68 L.Ed. 503, which is interested equally in the payment of secured and unsecured claims, *In re Stamps*, D.C., 300 F. 162, 165, and it is the duty of the trustee to determine, under the supervision of the bankruptcy court, the value of securities held by secured creditors and to credit the amount of such value upon their claims. 11 U.S.C.A. § 93, sub. h. In the present proceeding the trustee in bankruptcy has acknowledged the validity of the secured claim of respondent bank and has appeared in this proceeding to ask that any residue be distributed to him for the benefit of the general creditors. His conduct, rather than indicating an abandonment of the asset, demonstrates an effort to close the estate as expeditiously as possible in accordance with the provisions of the Bankruptcy Act. In the absence of any showing by appellant to the contrary, it will be assumed that the trustee is acting properly under the supervision and control of the bankruptcy court and within the scope of his powers as trustee. If the trustee is in fact acting improperly and without the approval of the bankruptcy court, the remedy lies in applying to that court for appropriate action. *Gochenour v. George & Francis Ball Foundation*, D.C., 35 F.Supp. 508, 517; *Heffron v. Vaughn*, 66 Cal.App.2d 161, 152 P.2d 23; *Pourroy v. Gardner*, 122 Cal. App. 521, 527, 10 P.2d 815; *Greene v. Moore*, 43 Cal.App. 91, 184 P. 506.

All of appellant's interest in the two trusts passed to the trustee in bankruptcy, and since appellant has failed to show that the asset has been abandoned, he has no right to object to the final account. In view of our disposition of this case it is unnecessary to consider additional evidence offered by respondent bank, and, accordingly, its application for leave to produce such evidence is denied.

The decree appealed from is affirmed.

SHENK, EDMONDS, CARTER,
TRAYNOR, SCHAUER and SPENCE,
JJ., concur.

35 Cal.2d 16

BONEBRAKE et ux. v. McCORMICK.

Sac. 6023.

Supreme Court of California, in Bank.

March 17, 1950.

Action by Oscar L. Bonebrake and another, against Julia Fortunate McCormick for wrongful death of plaintiffs' son in a bicycle-automobile collision. The Superior Court for San Joaquin County, George F. Buck, J., rendered a judgment for defendant, and plaintiffs appealed. The Supreme Court, Gibson, C. J., held that refusal to give an instruction on the doctrine of last clear chance was prejudicial error.

Judgment reversed.

Prior opinion, 201 P.2d 558.

1. Appeal and error ⇨837(6)

In determining whether trial court erred in refusing to give requested instruction under doctrine of last clear chance, Supreme Court would determine whether there was evidence which would reasonably support recovery on that theory.

2. Evidence ⇨222(1), 265(1)

A declaration by a litigant contrary to his position in a law suit is admissible under exception to the hearsay rule as an admission, and is positive evidence which tends to prove truth of matter admitted. Code Civ.Proc. § 1870, subd. 2.

3. Witnesses ⇨379(1), 397

Statement made by a motorist to a police officer immediately after an accident was admissible in later lawsuit, not only to impeach motorist's testimony, but also to prove that what she first said was true. Code Civ.Proc. § 1870, subd. 2.

4. Appeal and error ⇨928(1)

In determining whether court erred in refusing to instruct on doctrine of last clear chance, evidence must be construed in light most favorable to plaintiff's case.

5. Automobiles ⇨246(58)

In parents' action against motorist for wrongful death of son in collision between automobile and bicycle, plaintiffs were entitled to an instruction on the doctrine of last clear chance in view of evidence that driver saw minor traveling in same direc-

tion on shoulder 450 feet away and that minor looked back and turned left when motorist honked horn at distance of 150 feet.

Willens & Boscoe, Stockton, for appellants.

Honey & Mayall, Stockton, for respondent.

GIBSON, Chief Justice.

[1] Plaintiffs appeal from an adverse judgment in a suit for the wrongful death of their fourteen year old son who was struck by defendant's car while riding his bicycle. The principal question presented is whether the trial court erred in refusing to give a requested instruction on the doctrine of last clear chance. This depends on whether there was evidence which would reasonably support a recovery on that theory. See *Raymond v. Hill*, 168 Cal. 473, 479, 143 P. 743.

Mrs. McCormick, the defendant, was driving east on the south side of a straight, dry, two-lane highway at forty-five or fifty miles per hour, and the boy was traveling in the same direction on the same side of the road. The paved portion of the highway was twenty-four feet wide, and there were dirt shoulders about eight feet in width on each side. Defendant testified that the boy was about 450 feet ahead of her when she first saw him. At that time there were no cars in front of her on the right side of the road, and the closest car coming from the opposite direction was a mile or a mile and a half away. The boy was then riding his bicycle on the shoulder near the edge of the pavement. Defendant testified that she sounded her horn when she was approximately 150 feet from the boy, and that he continued to ride ahead without turning until she drew even with him when he suddenly veered to the left into the path of her car.

There were three disconnected sections of skid marks variously estimated as commencing from 200 to about 300 feet before the point of impact. The first set of skid marks was straight and was followed by a gap of fifteen or twenty feet; the second set angled slightly to the left and was fol-

lowed by a gap of thirty to thirty-five feet; the third set angled farther to the left and continued past the point of impact to where defendant's car came to a stop on the north side of the highway. The third set of skid marks began approximately 100 feet before the point of impact and was described by a highway patrol officer as being the "heaviest and blackest that I have ever seen." The accident occurred approximately two feet south of the center line of the highway.

The patrol officer testified that, immediately after the accident, defendant told him the boy looked back and turned to the left when she sounded her horn. According to her testimony, as we have seen, she sounded her horn when she was 150 feet away from the boy.

[2, 3] It is argued that the statement to the patrol officer was admissible solely for the purpose of impeachment, and that it could not be used in determining whether there was evidence upon which the refused instruction could be based. This argument, however, fails to take into consideration the fact that the statement was made by a party to the action. A declaration by a litigant contrary to his position in the lawsuit is admissible under an exception to the hearsay rule as an admission. It is positive evidence, that is to say, it is evidence which tends to prove the truth of the matter admitted. See Code Civ.Proc., § 1870, subd. 2; *Lane v. Pacific Greyhound Lines*, 26 Cal.2d 575, 581, 160 P.2d 21; *Card v. Boms*, 210 Cal. 200, 204, 291 P. 190; 4 *Wigmore on Evidence*, 3d Ed. 1940, § 1048, p. 2; *McBaine*, California Evidence Manual, 1st Ed. 1945, § 257, p. 363. The statement made by defendant outside the courtroom was admissible not only to impeach her testimony but also to prove that what she then said was true. Language to the contrary in *Lopez v. Wisler*, 58 Cal.App.2d 455, 462, 136 P.2d 816, is disapproved.

[4, 5] In determining whether the court erred in refusing to instruct on the doctrine of last clear chance, the evidence must be viewed in the light most favorable to plaintiff's case. *Brown v. McCuan*, 56 Cal.App. 2d 35, 36, 132 P.2d 838. When so consid-

ered, it appears that all necessary elements for the application of the doctrine are present. See *Girdner v. Union Oil Co.*, 216 Cal. 197, 202, 13 P.2d 915. It could be inferred from the facts proved that the boy by his own negligence put himself in a position of danger from which he could not escape by the exercise of ordinary care, that defendant knew of the boy's peril, that she had the last clear chance to avoid the accident by the exercise of ordinary care but failed to do so, and that the boy was killed as a proximate result of such failure.

Accordingly, plaintiffs were entitled to an instruction on the doctrine of last clear chance, and in view of the state of the record, the refusal to give it was prejudicial error.

The judgment is reversed.

SHENK, EDMONDS, CARTER,
TRAYNOR, SCHAUER and SPENCE,
JJ., concur.



35 Cal.2d 5

FRISTOE v. DRAPEAU et al.

L. A. 20657.

Supreme Court of California, in Bank.

March 17, 1950.

Margaretta B. Fristoe brought action against Jack Drapeau and another to enjoin interference with use of a roadway constructed by the common grantor of the parties. A judgment for plaintiff and an order denying defendants' motion for a new trial was entered by the Superior Court, Los Angeles County, Carl A. Stutsman, J., and the defendants appealed. The Supreme Court, Gibson, C. J., held that trial court did not err in refusing to limit plaintiff's right on roadway over defendants' land to use thereof for agricultural purposes.

Appeal from order dismissed; judgment affirmed.

Prior opinion, see 204 P.2d 336.

1. Appeal and error ◊110

An order denying motion for new trial was nonappealable.

2. Easements ◊18(3)

Where roadway had been permanently constructed by common grantor of parties for benefit and convenience of all parcels lying contiguous thereto, and it had been used for more than twenty-five years by grantor and its grantees, and it appeared that use of a portion of the roadway lying on defendants' land was reasonably necessary for beneficial enjoyment of plaintiff's parcel in that there was no other available means of reaching lemon and avocado groves thereon, plaintiff had an "easement by implied grant" to use roadway for purpose of gaining access to her property. Civ.Code, § 1104.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Easement By Implied Grant".

3. Easements ◊15

A necessary element for creation of an easement by implication is that easement should be reasonably necessary for enjoyment of the property conveyed. Civ. Code, § 1104.

4. Easements ◊15

The purpose of doctrine of implied easements is to give effect to actual intent of parties as shown by all circumstances. Civ.Code, § 1104.

5. Easements ◊17(1)

Although prior use made of property is one of circumstances to be considered, easements of access may be implied in situations in which there was no prior use. Civ.Code, § 1104.

6. Easements ◊15

The factors enumerated in statute relating to creation of easements by implied grant are not exclusive of other possible factors which may have a bearing in ascertaining extent of an easement created by implication. Civ.Code, § 1104.

7. Easements ◊15

Statutes ◊222, 223.2(25)

The statute relating to creation of easements by implied grant must be read

with statute defining extent of all servitudes, also in light of common-law rules governing easements by implication. Civ. Code, §§ 806, 1104.

8. Easements ◊15

Under statute defining extent of all servitudes, except in cases of descriptive rights, the controlling factor is terms of the grant, and when the grant is implied, its terms must be inferred from all circumstances of the case. Civ.Code, §§ 806, 1104.

9. Easements ◊16

In determining intent of parties as to extent of grantee's possessive rights under an easement by implied grant, consideration must be given not only to actual uses being made at time of severance, but also to such uses as circumstances show were within reasonable contemplation of parties at time of the conveyance. Civ.Code, §§ 806, 1104.

10. Easements ◊51

Where it was determined that plaintiff had easement by implied grant in roadway over defendants' land which had been constructed by common grantor of parties in view of fact that there was no other available means of reaching lemon and avocado groves on plaintiff's land, trial court was authorized to find use of road for purposes connected with a private residence to be constructed on plaintiff's land was within contemplation of parties at time of creation of grant, and in refusing to limit plaintiff's right on roadway to use thereof for agricultural purposes only. Civ. Code, §§ 806, 1104.

11. Easements ◊61(10)

Courts are not required to anticipate improper extension of an easement by implied grant and are not called upon to prohibit acts which do not appear to be threatened or likely to occur. Civ.Code, § 1104.

Charles F. Gerard, Edward Henderson, Ventura, for appellants.

Sprague & Sparks, Los Angeles, for respondent.

GIBSON, Chief Justice.

[1] This action was brought to enjoin interference with the use of a roadway constructed by the common grantor of the parties. Defendants have appealed from a judgment which decrees that the parties have an equal right to use the roadway as a means of ingress and egress to and from their respective parcels. Defendants also noticed an appeal from an order denying their motion for a new trial. The order is nonappealable, and the attempted appeal therefrom is dismissed. See *Casner v. Daily News Company, Ltd.*, 16 Cal.2d 410, 415, 106 P.2d 201; cf. *Fickett v. Rauch*, 31 Cal.2d 110, 111, 187 P.2d 402.

The Whittier Extension Company, the common grantor of the parties, constructed a permanent gravel roadway with concrete retaining walls running through a tract of land which it owned. The roadway connected with a public highway, Oak Canyon Drive, and terminated within the tract. Thereafter the Whittier Company planted lemon and avocado groves on the tract and subdivided it, the division being made so that the boundary lines followed the roadway in such a manner that it could be used to serve each parcel. The roadway after it leaves the highway runs along the boundary between defendants' parcel and land belonging to third persons, not parties to this action, until it reaches the boundary of plaintiff's land, and thereafter it runs partly on plaintiff's and partly on defendants' land, ending at a turnabout. Before any of the parcels were sold the road was used by the Whittier Company for ingress to and egress from all parcels for the pruning of trees, fertilization, irrigation, harvesting of crops, spraying, inspection and other work incidental to growing lemons and avocados.

The parcel owned by plaintiff was purchased by her predecessor from the Whittier Company in 1930. The deed from the company did not contain any express grant of a right to use the roadway, but it did reserve to the company the right to use the portion of the roadway lying within plaintiff's parcel and also the right to dedicate that portion to public use. There was

evidence that because of the hilly nature and steepness of the slope of plaintiff's property it was practically impossible to service the lemon and avocado groves thereon except by using the private roadway. Defendants purchased their parcel from the Whittier Company in 1946 and thereafter threatened to interfere with plaintiff's use of the road.

The trial court found that the roadway had been permanently constructed by the common grantor of both parties for the benefit and convenience of all parcels lying contiguous thereto, and that it had been used for more than twenty-five years by the company and its grantees. It further found that use of the portion of the roadway lying on defendants' land is reasonably necessary for the beneficial enjoyment of plaintiff's parcel, and that due to the nature of the terrain there is no other available means of reaching the groves located thereon. The court concluded that both parties were entitled to the use of the roadway as a means of ingress and egress to and from their respective parcels.

[2, 3] It is clear that plaintiff has an easement by implied grant to use the roadway for the purpose of gaining access to her property. Section 1104 of the Civil Code provides: "A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed." See also *Silveira v. Smith*, 198 Cal. 510, 517, 246 P. 58; *Fischer v. Hendler*, 49 Cal.App.2d 319, 322, 121 P.2d 792. The conditions of section 1104 are met by the facts of this case and there is also present the additional element usually required at common law for the creation of an easement by implication, i. e., that the easement should be reasonably necessary for the enjoyment of the property conveyed. See *Fischer v. Hendler*, supra.

The principal question presented on this appeal is whether the trial court should have limited plaintiff's rights over the roadway to use for agricultural purposes, thereby precluding its use as a means of ingress and egress to and from a residence which plaintiff has indicated she intends to build on her property. Defendants contend that under section 1104 plaintiff's easement is restricted to the use being made of the roadway at the time of the severance of plaintiff's parcel, that it was then being used solely for servicing the lemon and avocado groves, and that the use of the road for purposes connected with a residence would increase the burden of the easement. In our opinion defendants' contention cannot be sustained.

[4,5] The purpose of the doctrine of implied easements is to give effect to the actual intent of the parties as shown by all the facts and circumstances. Although the prior use made of the property is one of the circumstances to be considered, easements of access have been implied in this state in situations in which there was no prior use. For example, where land was conveyed by reference to a map or plat showing proposed streets, it has been held that the grantee had an implied easement therein for use as a private way. See *Danielson v. Sykes*, 157 Cal. 686, 689, 109 P. 87, 28 L.R.A.,N.S., 1024; *Douglas v. Lewin*, 131 Cal.App. 159, 162, 20 P.2d 959; *Syers v. Dodd*, 120 Cal.App. 444, 446, 8 P.2d 157.

[6-8] The factors enumerated in section 1104 of the Civil Code are not exclusive of other possible factors which may have a bearing in ascertaining the extent of an easement created by implication. Section 1104, which relates to the creation of easements by implied grant, must be read with section 806 of the Civil Code, which defines the extent of all servitudes, and also in the light of the common law rules governing easements by implication. Section 806 provides that "the extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired." Under this section, except in cases of prescriptive rights,

the controlling factor is the terms of the grant. When the grant is implied, its terms must be inferred from all of the circumstances of the case. The effect of section 806 is to establish intent as the criterion, and this is in accord with the rationale of the rules governing easements by implication.

The Restatement sets forth the rule as follows: "The extent of an easement created by implication is to be inferred from the circumstances which exist at the time of the conveyance and give rise to the implication. Among these circumstances is the use which is being made of the dominant tenement at that time. Yet it does not follow that the use authorized is to be limited to such use as was required by the dominant tenement at that time. It is to be measured rather by such uses as the parties might reasonably have expected from the future uses of the dominant tenement. What the parties might reasonably have expected is to be ascertained from the circumstances existing at the time of the conveyance. It is to be assumed that they anticipated such uses as might reasonably be required by a normal development of the dominant tenement. It is not to be assumed, however, that they anticipated an abnormal development. Hence, the scope of an easement created by implication does not extend to uses required by such development." Rest., Property, § 484, comment b.

[9-11] Accordingly, in determining the intent of the parties as to the extent of the grantee's rights, we are of the opinion that consideration must be given not only to the actual uses being made at the time of the severance, but also to such uses as the facts and circumstances show were within the reasonable contemplation of the parties at the time of the conveyance. Under all of the circumstances existing at the time of severance in the present case, we cannot say as a matter of law that the use of the road for purposes connected with a private residence was not within the contemplation of the parties or that the trial court erred in failing to limit plaintiff's rights in the roadway to use

thereof for agricultural purposes. If at some future date there is an improper extension of the burden on defendants' parcel, they may at that time seek appropriate relief. The courts, however, are not required to anticipate an improper extension of such an easement and are not called upon to prohibit acts which do not appear to be threatened or likely to occur. See *De Haviland v. Warner Bros. Pictures*, 67 Cal.App.2d 225, 238, 153 P.2d 983; *Fairbanks v. Macready*, 92 Cal.App. 156, 159, 267 P. 716, 268 P. 947.

The judgment is affirmed.

**SHENK, EDMONDS, CARTER,
TRAYNOR, SCHAUER, and SPENCE,
JJ., concur.**



34 Cal.2d 863

JONES v. POLLOCK et al.

L. A. 21225.

Supreme Court of California, in Bank.

March 14, 1950.

Rehearing Denied April 11, 1950.

Action by J. Elbert Jones against James Pollock and Jane Pollock to foreclose a mechanics' lien and recover a balance claimed due under a written contract to construct a residence for the defendants. The Superior Court, Los Angeles County, Percy Hight, J., entered judgment for the plaintiff for less than the amount claimed and he appealed. The Supreme Court, Edmonds, J., held that under contract providing that work should be done in a good, workmanlike and substantial manner and within estimated cost of \$13,100 and that costs of construction of building should be understood as an estimate only by contractor who in no way was to be responsible for fluctuation in prices of labor or materials, named price was merely an estimate of cost of building and not a ceiling price and contractor was entitled to recover cost of construction plus his fee.

Judgment reversed.

Schauer, J., dissented.

Prior opinion, see 208 P.2d 1031.

1. Contracts ⇨152

The language of a contract is to govern its interpretation, if language is clear and explicit and does not involve an absurdity. Civ.Code, § 1638.

2. Contracts ⇨152

When a contract is in writing, instrument itself must be considered as containing all terms of agreement and measures the rights, duties and obligations of the parties. Code Civ.Proc. § 1856.

3. Contracts ⇨231(1)

Under construction contract providing that work should be done in a good, workmanlike and substantial manner and within estimated cost of \$13,100 and that costs of construction of building should be understood as an estimate only by contractor, who in no way was to be responsible for fluctuation of prices of labor or materials, price named was merely an estimate of cost of building and not a ceiling price and contractor was entitled to recover cost of construction plus his fee. Civ.Code, §§ 1638, 1641; Code Civ.Proc. § 1856.

4. Contracts ⇨290

Where contractor was entitled to recover for materials and labor furnished over and beyond that required under contract, if contract required arbitration of that amount by providing that any dispute respecting valuation of extra work done be referred to builders exchange, right to arbitrate was waived by both parties through litigation of their rights.

Bruce Mason, Long Beach, for appellant.

Raymond J. Kirkpatrick, Moses E. Lewis, Jr., Long Beach, for respondent.

EDMONDS, Justice.

J. Elbert Jones, a building contractor, sued to foreclose a mechanic's lien and to recover a balance claimed due under a written contract to construct a residence for James and Jane Pollock. The court determined that recovery must be limited to "the estimated cost" stated in the contract, plus extras, rather than the amount of the cost of construction. The appeal of

Jones from the judgment presents as a question of law the nature and effect of the agreement made by the parties.

By the "Contract For Building", Jones agreed " * * * for the consideration hereinafter named to furnish the necessary labor and materials * * * and to perform and complete according to this agreement * * * the buildings described, in a good workmanlike and substantial manner, and within the estimated cost of \$13,100 and the contractor shall receive for his services % 15% of cost of construction which is included in estimated cost * * *." In the event an authorized architect or engineer is required by law or is demanded by the owner, " * * * an additional charge will be made for such engineer or architect". The "cost of the construction" as defined by the parties, " * * * shall be understood as an estimate only by the contractor, who, in no way shall be responsible for the fluctuation of prices of labor or materials. No alterations or deviations from plans or specifications shall be had or done without written consent of the owner and the increase or extra charge therefor agreed to".

Jones completed the building at a cost to him of \$20,421.87. In his final bill to the Pollocks, he added the 15% contractor's fee to that amount, making a total of \$13,005.15 after crediting \$10,480 which had been paid on account.

The Pollocks insist that \$13,100 is the maximum price chargeable under the agreement. They also claim that Jones did not complete certain work, necessitating the expenditure of \$2,431.73 by them. Deducting this amount and the \$10,480 paid on account from \$13,100, leaves a balance of \$188.27, which they offered to pay in full settlement of all obligations under the contract.

There is no dispute as to the construction cost of the building and its value as constructed. According to the evidence the shortage of materials had required an unusually long time for construction. There was also a substantial increase in the cost of labor and materials. Several changes from the original plans were made upon

the order of Mrs. Jones, which added materially to the building cost.

The trial court found that by the terms of the contract the maximum price payable by the Pollocks is \$13,100 plus the cost of extra labor and materials amounting to \$1,763.52, which sum includes the 15% commission. From the total of those sums was deducted the \$10,480 paid on account with an additional allowance for \$2,431.73 paid by the Pollocks to complete the building. The judgment for Jones of \$1,951.79 is based upon these figures.

The contractor contends that as a matter of law the amount of \$13,100 was only an estimate of cost; that the contract expressly excused him from responsibility for fluctuation of prices; and his agreement was to build upon a cost plus basis and not for a fixed fee amount. As another ground for a reversal of the judgment he argues that if the contract is ambiguous, it should be construed to require payment of the prevailing market rate rather than in a manner which will give one party to it an inequitable or unjust advantage over the other one.

The owners agree that the contract is one to build on a cost plus basis. But as they read the agreement, its terms support, as a matter of law, the finding that the maximum cost was to be \$13,100. They argue that "within \$13,100" means a ceiling price, and the provisions for additional charges for "extras" and for architects' or engineers' fees require the same interpretation. A further point upon which they rely is that any ambiguity in the contract must be construed against the contractor, who prepared the agreement.

[1,2] "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." Civil Code, sec. 1638. As stated in *Miranda v. Miranda*, 81 Cal.App.2d 61, 69, 183 P.2d 61, 66: "When a contract is in writing the instrument itself shall be considered as containing all the terms of the agreement * * *." And where a contract has been reduced to writing, the instrument measures the rights, duties and obligations of the parties. *Harding v. Rob-*

inson, 175 Cal. 534, 166 P. 808; C.C.P. § 1856.

The contract sued upon by Jones provided that the work should be done " * * * in a good workmanlike and substantial manner, and within the estimated cost of \$13,100 * * *." But it explained the obligation of the owners by the statement that " * * * the cost of the construction of said building * * * shall be understood as an estimate only by the contractor, who, in no way shall be responsible for the fluctuation of prices of labor or materials." In construing a contract, the instrument must be examined as a whole. Civil Code, sec. 1641. Considering these provisions together, the conclusion is inescapable that \$13,100 was merely an estimate of the cost of the building and not a ceiling price. It is also of considerable significance that the word "within" used in connection with the amount of \$13,100 is limited by the term "estimated", which immediately follows it. The presence of the restrictive and qualifying word "estimated" and the later provision that the figure " * * * shall be understood as an estimate only by the contractor, who, in no way shall be responsible for the fluctuation of prices of labor or materials", make entirely unreasonable a construction of the controversial provision as fixing a ceiling price of \$13,100.

The express reference to "extras" and to architects' or engineers' fees may well have been incorporated to designate the scope of the contractor's authority, or to authorize their inclusion as part of the chargeable cost. In the light of the express language to the contrary, those provisions do not justify an interpretation of them which would be consistent with a ceiling price. Aside from the "estimated cost" the contract consistently refers in general terms to the eventual cost, using words such as "20% of the total price charged" rather than a specific sum. At least by implication, this factor tends to support the conclusion compelled by express language that \$13,100 was but an estimate of the cost of the building.

[3] Under this construction of the contract, the trial court erroneously limited the recovery under it to an amount based

upon the estimated price. In the absence of evidence of fraudulent inducement or misrepresentation or lack of authorization for some portion of the work, the contractor is entitled to recover the cost of construction plus his fee.

[4] It appears that there is substantial evidence in the record to support the trial court's determination that the plaintiff is entitled to recover for materials and labor furnished over and beyond that required under the contract. If the contract required arbitration of that amount by providing that any dispute respecting the valuation of extra work done be referred to the Builder's Exchange, the right to arbitrate was waived by both parties through the litigation of their rights. *Trubowitch v. Riverbank Canning Co.*, 30 Cal.2d 335, 339, 182 P.2d 182.

The judgment is reversed.

GIBSON, C. J., SHENK, CARTER, TRAYNOR and SPENCE, JJ., concur.

SCHAUER, Justice.

I dissent. Obviously the contract is ambiguous. The parties differ in their respective interpretations of it; justices of this court differ among themselves and the majority differ from the trial judge; the whole burden of the controversy is the construction to be placed on the uncertain contract. Perusal of the 946 pages of Reporter's Transcript, together with the several exhibits, discloses evidence competent and ample in every respect to support the trial court's construction of the ambiguous contract. If we follow the law, the trial court's construction should prevail. (*Edwards v. Billow* (1948), 31 Cal.2d 350, 359, 188 P.2d 748; *Palmtag v. Danielson* (1947), 30 Cal.2d 517, 522, 183 P.2d 265; *Estate of Rule* (1944), 25 Cal.2d 1, 11, 152 P.2d 1003, 155 A.L.R. 1319.) The findings, liberally construed to support the judgment, are not in my view inadequate as a matter of law. I would, therefore, affirm the judgment.

Rehearing denied: SCHAUER, J., dissenting.

35 Cal.2d 33

KOBE et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (three cases).

L. A. 21179-21181.

Supreme Court of California.

March 21, 1950.

Proceedings by T. R. Kobe, employer, and his insurance carrier to review orders of Industrial Accident Commission awarding compensation for injuries and death of employees in automobile accident which occurred while employees were returning home from work. The Supreme Court, Gibson, C. J., held that the fact that the employer paid employees specified amount to cover time required to travel to and from work warranted inference that employer had agreed that employment relationship should commence when employee left home and continue until his return so that perils of journey could properly be regarded as hazards of employment against which employee was entitled to be protected by Workmen's Compensation Act.

Awards affirmed.

Prior opinion, see 207 P.2d 849.

1. Workmen's compensation ☞719, 721

Generally injuries sustained by employee going to or returning from work are not compensable under Workmen's Compensation Act, but if employer expressly or impliedly agrees that employment relationship shall continue during the period of going to and returning from work, employee is entitled to protection of the Act during such period. Labor Code, § 3201 et seq.

2. Workmen's compensation ☞721, 734

An agreement that employment relationship shall continue during period employee is going to and returning home from work so that employee will be entitled to protection of Workmen's Compensation Act during such period may be inferred from fact that employer furnishes transportation to and from work as an incident of employment or from fact that employer compensates employee for the time consumed in traveling to and from work. Labor Code, § 3201 et seq.

3. Workmen's compensation ☞721

Fact that employer paid employee specified amount to cover time required to travel to and from work warranted inference that employer had agreed that employment relationship should commence when employee left his home and continue until his return so that perils of journey to and from work could properly be regarded as hazards of employment against which employee was entitled to be protected by Workmen's Compensation Act. Labor Code, § 3201 et seq.

Kearney, McCartney, Scott & Clopton, Los Angeles, for petitioners.

Robert W. Gilbert, Louis A. Nissen and William B. Irvin, Los Angeles, amici curiæ on behalf of petitioners.

T. Groezinger and Robert Ball, San Francisco, for respondents. Charles P. Scully, San Francisco, amicus curiæ on behalf of respondents.

GIBSON, Chief Justice.

These are proceedings to review orders of the Industrial Accident Commission awarding compensation for injuries sustained by employees in an automobile accident which occurred while they were returning home from work.

Bjerke, Padilla and Ruble lived in Pomona and were employed by petitioner Kobe on a roofing job in San Bernardino. It was agreed that the men would work nine hours per day and would receive an additional hour's pay to compensate them for the time spent in traveling to and from work. Kobe was a party to a union contract which obligated him to pay travel time to employees who traveled back and forth each day to jobs over fifteen miles distance from the employer's place of business, and it was common practice in the business to pay one hour's extra pay in lieu of travel time. The employees involved in these proceedings traveled to and from the job in San Bernardino in an automobile owned and driven by Bjerke, the trip ordinarily taking about thirty-

five minutes. On the day of the accident, they left their place of work at 4:30 p. m. and ten to fifteen minutes later, after they had proceeded about five miles on the shortest route to Pomona, the automobile in which they were riding was struck by a locomotive. Bjerke and Padilla were seriously injured and Ruble subsequently died from the effects of the injuries he received.

The question before us is whether the evidence supports the commission's findings and conclusion that the injuries arose out of and in the course of the employment.

[1,2] It is the general rule that injuries sustained by an employee going to or returning from work are not compensable under the Workmen's Compensation Act. Labor Code, § 3201 et seq. The rule is premised on the theory that ordinarily the employment relationship is suspended from the time the employee leaves his work to go home until he resumes his work. *California Casualty Indemnity Exchange v. Industrial Accident Comm.*, 21 Cal.2d 751, 753, 754, 135 P.2d 158. However, the employer may agree, either expressly or impliedly, that the relationship shall continue during the period of "going and coming," in which case the employee is entitled to the protection of the act during that period. Such an agreement may be inferred from the fact that the employer furnishes transportation to and from work as an incident of the employment. *California Casualty Indemnity Exchange v. Industrial Accident Comm.*, 21 Cal.2d 461, 132 P.2d 815; *Trussless Roof Co. v. Industrial Accident Comm.*, 119 Cal.App. 91, 6 P.2d 254; cf. *Breland v. Traylor Eng. etc., Co.*, 52 Cal.App.2d 415, 126 P.2d 455. It seems equally clear that such an agreement may also be inferred from the fact that the employer compensates the employee for the time consumed in traveling to and from work.

The case of *Western Pipe & Steel Co. v. Industrial Accident Comm.*, 49 Cal.App.2d 108, 121 P.2d 35, is directly in point. There a death benefit award was affirmed in favor of the widow of an employee who was killed while returning to work from

dinner. After pointing out that normally an employee on his way to or from meals is not performing services for the employer, the court stated, 49 Cal.App.2d at page 112-113, 121 P.2d at page 38: "But, of course, the employer may expressly or impliedly agree that service shall continue during the period the employee is going to or coming from his meals taken off the premises. When the employer pays the employee at an hourly rate during his meal hours * * * it seems to be, and is a reasonable inference, that by such an arrangement the employer has impliedly agreed that service will continue during such period." In reaching this conclusion, the court pointed out that an exception to the "going and coming" rule is generally recognized "where the employee's compensation covers the time involved in going to or from his work, or an allowance is made for the cost of transportation" (87 A.L.R. 250). "Running through the cases," the opinion continues, "is the thought that by agreeing to pay the employee from the time he leaves home until the time he returns, the employer has agreed that the employment shall be continuous * * *." Cf. *Voehl v. Indemnity Ins. Co.*, 288 U.S. 162, 53 S.Ct. 380, 77 L.Ed. 676, 87 A.L.R. 245; *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 67 S.Ct. 801, 91 L.Ed. 1028.

[3] We conclude that where, as in the present cases, the employer pays the employee a specified amount to cover the time required to travel to and from work, it is a permissible inference that the employer has agreed that the employment relationship shall commence at the time the employee leaves his home and continue until his return. Under such circumstances, the perils of the journey may properly be regarded as the hazards of the employment against which the employee is entitled to be protected by the Workmen's Compensation Act.

The awards are affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

96 Cal.App.2d 579

PEOPLE v. RICH.

Cr. 2621.

District Court of Appeal, First District,
Division 1, California.

March 22, 1950.

Hearing Denied April 20, 1950.

William A. Rich and another were indicted for robbery and the named defendant appealed from conviction and sentence in Superior Court in and for the City and County of San Francisco, Herman A. Van Der Zee, J. The District Court of Appeal, Schottky, J., pro tem., held that evidence sustained defendant's conviction for robbery.

Affirmed.

1. Robbery ☞24(1)

Evidence sustained conviction for robbery.

2. Witnesses ☞389

In robbery prosecution, admission of testimony by officer relating statements made to officer outside defendant's presence by another, who admitted participation in robbery, implicating defendant in robbery, was proper to impeach testimony of one admitting robbery who previously had denied statement in his testimony.

3. Criminal law ☞1171(1)

In robbery prosecution, although trial court allowed counsel on both sides too much latitude, and counsel failed to maintain decorum appropriate to a judicial proceeding, actions of assistant district attorney were not prejudicial to defendant.

4. Criminal law ☞778(11)

In robbery prosecution, instruction that flight of a person immediately after commission of a crime is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by jury in light of all other proven facts to determine defendant's guilt or innocence, was not erroneous.

Fred N. Howser, Attorney General of the State of California, David K. Lener, Deputy Attorney General, Edmund G. Brown, District Attorney of San Francisco County, Elton C. Lawless, Asst. District Attorney, San Francisco, for respondent.

SCHOTTKY, Justice pro tem.

Appellant William A. Rich and John Doe were charged by indictment with a violation of section 211 of the Penal Code (robbery) alleged to have been committed on January 6, 1949, in the City and County of San Francisco. Rich further was charged with four prior felony convictions. Upon being arraigned he admitted the prior felony convictions but pleaded not guilty to the offense charged. After a trial by jury he was found guilty and sentenced to the state prison. This appeal is from the judgment of conviction and from the order denying a new trial.

On the morning of January 6, 1949, shortly after 8:00 o'clock, two men entered the Department of Employment Office of the State of California, then located at 1690 Mission Street, San Francisco. Mrs. Kathleen Regan, a cashier, was just about to start down the stairs from the mezzanine to her job on the first floor, previously having gone to the cashier's cage on the mezzanine "to say hello to one of the girls," when she was stopped by the two men. She was ordered by the taller of the two—identified on the trial as Daniel J. Mammini—to go back. The smaller one, whom the People claimed was the defendant Rich, "pulled a gun," and she turned around and went back toward the cashier's cage. Mammini told her to open the door and she replied that she could not because it was locked. Mammini then put a red bandana over his face, threw a brown paper shopping bag over the top and into the approximately seven-foot-high cage, and ordered those inside to put all their money into it; he then pulled a revolver from his waistband and "told them to hurry up, that he would give them three minutes to get the money in the bag." Mrs. Lucille Spear, head cashier for the Department of Employment Office and one of the four people

Alfred J. Hennessy, San Francisco, for appellant.

in the cage at the time of the holdup, brought the paper bag filled with the money to the door and handed it to Mammini. Mrs. Regan had been standing outside the cage all this time and had had an opportunity to observe the smaller man in a well-lighted position. She then was told to enter the cage by Mammini, which she did. After telling them not to scream, the two men disappeared.

On the day before, January 5, Mrs. Spear, as head cashier for the Department of Employment Office, had drawn on the Bank of America three checks payable to Brink's Armored Car Service, specifying the time of delivery and the denominations of the currency desired. Two sealed canvas sacks, one containing \$10,000 and the other \$20,000, were delivered by a messenger for Brink's, who arrived at the mezzanine of the employment office at 8:00 a. m. on January 6 and left about 8:05 a. m. The money from the \$20,000 sack was being distributed by Mrs. Spear to the various cashiers in the cage when Mammini appeared at one of the wire-screened windows or openings and ordered that it be collected and put into the paper bag, including the unopened \$10,000 sack which was lying on a chair. This Mrs. Spear did. Mrs. Spear testified that approximately \$26,827 was taken, as verified by state auditors immediately after the theft. \$9,622 had been left from the preceding day, and \$13,000 was not put into the bag.

The two sacks of money which were delivered that morning by Brink's had been obtained by them the day before from the Bank of America. Each package of currency contained 100 bills and had a band of the Federal Reserve Bank around it. The money had been counted and checked at the Federal Reserve Bank in San Francisco and a stamp put on the band around each package showing the initials of the person who had checked it.

On February 5, 1949, just after he alighted from a plane at Boeing Airport in Seattle, appellant William Rich, traveling under the name of William Morgan, was taken into custody, he was taken to his hotel room where he was searched by

the officers and on his person were found about \$1600 in currency and an ounce of narcotics; and in a suitcase in the room there were found \$2,000 in currency together with a Federal Reserve Bank money wrapper bearing the initials "A.C.L."

Appellant first contends that the verdict is against law and then proceeds to argue that the evidence is insufficient. He states that Mammini pleaded guilty to the crime and testified that Rich was not the man who was with him on the robbery. He argues that the testimony of the witness Police Lieutenant Martin M. Lee to the effect that Mammini had told him Rich was in on the robbery with him was hearsay and inadmissible, and that its admission was prejudicial error. He particularly attacks the testimony of Kathleen Regan as "too indefinite and uncertain to constitute a positive identification of Rich." He also asserts that the money found in his possession at the time of his arrest was not identified as the money that was taken in the robbery. He attacks various other parts of the testimony and concludes by asserting that the evidence is insufficient to support the verdict.

We shall briefly summarize the evidence as shown by the record.

There is no dispute as to the details of the robbery as hereinbefore set forth. After the arrest of appellant, Kathleen Regan went to Seattle and identified him in an eight-man lineup and at the trial she testified that she was positive Rich was the smaller man who held the gun on her during the robbery. She admitted that she previously had been shown a picture of appellant and also that before she looked at the lineup in Seattle she had been told that his leg was in a cast, but she insisted she had looked at his face and not at his feet. Appellant's counsel cross-examined her at length but she insisted that at the time of the holdup she was looking straight at the man, who stood only five or six feet away from her for four or five minutes in a well-lighted room, and that he was the defendant Rich.

Lucille Spear testified that the approximately \$26,827 taken that morning con-

sisted of currency of the following denominations: the bag containing the \$10,000 had in it \$5,000 in \$20 bills; \$2,000 in \$10 bills; \$2,000 in \$5 bills, and \$1,000 in \$1 bills: in the \$20,000 bag, which had been opened, there had been \$14,000 in \$20 bills; \$3,000 in \$10 bills; \$2,000 in \$5 bills, and \$1,000 in \$1 bills,—some of which was not taken because it was pushed into a drawer by one of the girls. The currency was in packages of 100 bills each, a paper wrapper being around each package with a stamp on it indicating the initials of the person who had checked it.

John K. Boggs, an automobile salesman employed by Dick Dubois, Incorporated, at Seattle, Washington, testified that late in the afternoon of January 10, 1949, he had a conversation with the appellant, who inquired about a new Hudson automobile. Rich left a deposit of \$40 on a new car. He had selected a Hudson four-door sedan, the price of which was approximately \$2,900. On the next day, January 11, Rich called again at the automobile agency, around 11:00 o'clock, when he paid the balance of the amount, \$2,870, which he paid in cash. About 80 per cent was in \$20 bills and the balance in \$10 bills. Rich told Boggs he was not doing anything at present; Boggs received the impression that he had sold a cigar store in California.

Robert W. Waitt, an officer with the Seattle Police Department, testified he arrested appellant at the Boeing Airport about 12:35 on February 5, 1949. He had gone there with a fellow officer, Detective Duarri. They took appellant to his room at the Vance Hotel in Seattle. Appellant was traveling under the name of William Morgan, though he was registered at the hotel under the name of William Rich. The officers searched appellant in his room and found \$1600 on him. \$2,000 more in \$20 bills were found in a large envelope in his suitcase under the bed. Appellant put his hand in the envelope and two officers standing close to him "grabbed his hand" and pulled the money out. There was a money wrapper in the envelope bearing the name "Federal Reserve Bank of San Francisco." The officers also found an ounce of heroin, and a sample of heroin

on his person. The money was introduced in the evidence as "People's Exhibit No. 11 in Evidence."

Raymond Doherty, an inspector of police in San Francisco, testified that appellant Rich told him in Seattle, in explaining his possession of the \$2,000, that after he left Folsom prison on parole he made a tour of the eastern cities "knocking over boxes [safes]" from which he got a collection of jewelry; and that he sold the jewelry in January, 1949, to a "fence" in San Francisco for \$2,500, \$2,000 of which he had in his suitcase when arrested.

The appellant Rich took the stand in his own defense and denied that he had taken any part in the robbery. He testified he was in Folsom prison August 6, 1948, when he was paroled to Los Angeles; that he first came to San Francisco, where he had some money put away and some narcotics; that he had \$4,000; that he gave "Tony" Skinner, a married woman, \$500 and went to Los Angeles that night and reported to the parole officer the following day. He testified that he later returned to San Francisco and on January 26, 1949, went to Stockton with "Tony" Skinner; that he had a narcotics deal there and "got \$2,500 on the deal," \$2,000 of which had a paper band around it, and the name of the Federal Reserve Bank of San Francisco was on the wrapper. He claimed to be engaged in dealing in narcotics in San Francisco and Seattle, and in jewelry in the black market. He testified that when arrested February 5, 1949, at Seattle he had "close to \$2,000" in his pocket and \$2,000 in his suitcase. He was searched at his hotel and an ounce of narcotics was found on him, for which he had paid \$800. He stated he could "cut that with * * * sugar of milk" and "make five ounces out of it," which would retail for approximately \$10,000 or \$11,000. He admitted that he had been convicted of four prior felonies. He admitted buying an automobile in Seattle and paying for it in \$10 and \$20 bills, and claimed that he got the money for the purchase of the car "from the deals in narcotics."

Dan J. Mammini, called by the defense, testified his then address was San Quentin;

that he was arrested for robbery of the Department of Employment Office and pleaded guilty. He recounted the details of the holdup of the employment office with the aid of another person, substantially as stated by Mrs. Regan. On cross-examination, he admitted he had a prior conviction of second-degree burglary. He denied that Rich was the other man who assisted him in the employment office robbery. He denied telling the assistant district attorney when questioned at the county jail that if he would testify against Rich his life "wouldn't be worth a plugged nickel in San Quentin." He denied telling Police Lieutenant Lee that he "made a mistake in getting Rich in on the job." He admitted he had read that Rich was arrested for the holdup. He denied telling Lieutenant Lee that "[his] heart fell" after he learned of Rich's arrest. He claimed he did not tell Lee that Rich was arrested in a narcotics deal, that "all narcotics [users] would turn stool pigeon" and that he was "afraid." He denied admitting to Lieutenant Lee that Rich was the other man in the holdup.

Police Lieutenant Lee, called in rebuttal by the People, testified that he brought Mammini back to San Francisco from Los Angeles, and that he had questioned Mammini at the office of the robbery detail of the Los Angeles Police Department on March 29, 1949. He testified, without objection, that Mammini told him he intended to plead guilty to the robbery charge, and that he said "You have the right man. Rich was with me but I want it understood now * * * I am not going to testify against him." Then Lee was permitted to relate, without objection, the full details of the robbery as told to him by Mammini, whereupon counsel for appellant for the first time objected, stating: "I object to all this testimony and move to strike it out on the ground it is hearsay testimony and incompetent as regards Rich." The motion was denied by the court and the following then appears in the record:

"Mr. Lawless [assistant district attorney and counsel for the People]: Q. Now, on the way back from Los Angeles in the automobile of Mammini, did you have any

conversation with Mammini in regard to Rich?

"Mr. Hennessy [counsel for defendant and appellant]: I object to that on the ground it is an extrajudicial statement outside of the presence of the defendant. It is hearsay and incompetent.

"The Court: Objection overruled. You may answer.

"The Witness: A. Yes, sir. We conversed considerably with Mammini and several times the subject of Rich was brought up.

"Mr. Lawless: Q. What was said? A. Sometime I asked him, I said, 'Dan, did you think you were going to get away with this job? When did you first get the idea that you may be caught? And he said, 'One morning in February I was down at the corner and bought a newspaper,' he said, 'I opened it up and I saw where Rich —'

"Mr. Hennessy: If the Court please, my objection goes to all the testimony.

"The Court: Very well.

"The witness: A. '—had been arrested in Seattle with narcotics.' He said, 'My heart fell down to my shoes, because the narcotics was something new to me.' He said, 'I thought Rich would stand up but when I saw he was arrested with the narcotics and everybody knows that a hophead talks, I knew I was sunk.'

"Mr. Lawless: Q. Was there any—did he make any statement when he met the Defendant Rich? A. Yes, I asked him in Los Angeles and he said they had first met about one month prior to the robbery.

"Q. Where? A. In San Francisco.

"Q. They had met in San Francisco? A. Yes, sir."

Mrs. Antoinette Skinner then was called as a witness by appellant. She testified that she was a housewife; that she had known appellant since about 1945; that the last of August or the first part of September, 1948, she had met him on Taylor Street in San Francisco and they had gone out to dinner, and he had given her \$500; that she met him again in January, 1949, and they had driven to Stockton that after-

noon; that while she sat in his parked car he went into a restaurant and when he came out he handed her "more than \$2,000" in currency with a flat brown wrapper on it and marked "\$2,000" on the seal, and that she kept it in her purse for him until they returned to San Francisco the same night.

[1] So far as the appellant's argument that the evidence is insufficient is concerned, it has little merit, and is in effect an argument as to the weight of the evidence and the credibility of witnesses, which are matters more properly argued to the trial court and jury. There can be no question as to the sufficiency of the evidence to sustain the conviction of appellant. In fact, it may be stated that a careful reading of the record convinces us that it would have been difficult for the jury to have arrived at any other conclusion.

The identification of appellant by Kathleen Regan was clear and positive and the witness had had abundant opportunity to observe him at the time of the holdup. The currency found in appellant's possession when he was arrested was of similar denominations as that stolen and the brown wrapper around the \$2,000 package was from the Federal Reserve Bank in San Francisco and had the initials "A.C.L." stamped on it. Within three or four days after the robbery appellant purchased an automobile in Seattle, paying the purchase price of \$2,900 in currency, 80 per cent of which was in \$20 bills and the rest in \$10 bills. The \$30,000 delivered at the Department of Employment Office on the morning of the robbery contained \$19,000 in \$20 bills and \$5,000 in \$10 bills. The appellant had been paroled from Folsom prison on August 6, 1948, just four months before the robbery. Appellant's explanation that the money found in his possession and the money paid for the automobile were derived from his dealings in narcotics might well have taxed the credulity of the jury, and likewise the explanation that Inspector Doherty testified appellant made, when arrested in Seattle, to the effect that he got the money found in his possession from the sale of jewelry derived from a series of robberies in the East following his parole.

Mammini's testimony that appellant was not implicated in the robbery was impeached by Lieutenant Lee's testimony of contrary statements made to him. Furthermore, both appellant and Mammini were impeached by evidence of a number of prior convictions of felonies.

[2] The strongest point made by appellant is his contention that prejudicial error was committed in permitting the People's witness, Lieutenant Lee, to testify as to statements made by Mammini, outside of the presence of appellant, implicating appellant in the robbery. He argues that such evidence was hearsay and should have been excluded. It does not require the citation of authority to support the proposition that such evidence was hearsay and that, ordinarily, it would be inadmissible. But here, Mammini, when he was on the stand, was asked whether or not he had not made such statements to Lieutenant Lee, and the People were entitled to impeach his testimony by proving he had made such statements. It may be that the questions were not asked of Lieutenant Lee in the usual form of impeaching questions, but no objection was made on that ground. If appellant had made an objection as to the form of the questions, the court no doubt would have ordered that the questions be put in the usual form; but appellant not having made such objections and the answers to the questions being to the effect that Mammini had made the statements to Lieutenant Lee that he denied making in his testimony, we cannot hold that the court erred in overruling appellant's objections that the testimony was hearsay or in denying appellant's motions to strike it out. Furthermore, the trial court instructed the jury on the subject of impeachment of a witness, pointing out that such evidence is not received for the purpose of proving the truth of what then was said, but only for the purpose of testing the credibility of the witness.

[3] Appellant also charges there was prejudicial misconduct on the part of the assistant district attorney during the course of the trial. During the prosecution's final argument, counsel for appellant constantly

interrupted the assistant district attorney, and the assistant district attorney used language toward him that should not be used in a courtroom, whereupon counsel for appellant retaliated by hitting the assistant district attorney on the chin. It is unfortunate that the trial court allowed counsel on both sides too much latitude, as both failed to maintain the decorum appropriate to a judicial proceeding. However, counsel for appellant was more culpable than the assistant district attorney and we are unable to see how the appellant was prejudiced.

Appellant in a supplemental brief contends that the court erred in giving the following instruction on flight: "The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, *if proved*, may be considered by you in the light of all other proved facts deciding the question of his guilt or innocence. Whether or not evidence of flight shows a consciousness of guilt, and the significance to be attached to such a circumstance, are matters for your determination." (Emphasis added.)

[4] There was no error in giving this instruction. The court qualified the jury's consideration of the significance of any flight by adding the words "if proved." The evidence showed that the defendant had registered at a hotel in Seattle on January 8, two days after the robbery, and on January 10 and 11 had negotiated in Seattle for the purchase of a new car. The fact that he subsequently returned to San Francisco and except for short trips remained in San Francisco about a month would not necessarily destroy the impression of original flight. Flight was not presumed by the court. The determination of that fact was left to the jury.

Appellant in his supplemental brief asserts that the court was repeatedly in error in ruling on questions of law and sets forth, by page and line, 35 instances of such rulings. Appellant does not point out what such rulings were or wherein the court erred. Notwithstanding the undue burden placed upon this court by such a shotgun

method of appeal, we have examined the record as to such assignments of error, and are convinced that no prejudicial error was committed in any of such rulings.

The judgment and order are affirmed.

PETERS, P. J., and BRAY, J., concur.



96 Cal.App.2d 562

PEOPLE v. YOUNGERS.

Cr. 811.

District Court of Appeal, Fourth District,
California.

March 21, 1950.

Hearing Denied April 20, 1950.

Henry F. Youngers was convicted in the Superior Court of Tulare County, Frederick E. Stone, J., of issuing and passing a check with intent to defraud, and he appealed. The District Court of Appeal, Griffin, J., held that evidence sustained conviction and that there were no reversible errors in the Superior Court.

Affirmed.

1. False pretenses ☞49(1)

Evidence sustained conviction for issuing and passing a check with intent to defraud. Pen. Code, § 476a.

2. Criminal law ☞1159(3)

Where there are substantial conflicts in the evidence before the jury, and the jury has resolved such conflicts against the defendant, the appellate court is bound by the finding of the jury.

3. Witnesses ☞337(5)

In prosecution for issuing and passing a check with intent to defraud, admission of defendant that he had been convicted of a felony was entitled to be considered by the jury. Pen.Code, §§ 476a, 1025.

4. Witnesses ☞337(5)

A defendant may be impeached by proof of a prior conviction of a felony, if

he takes the stand in his own defense, and it is not error to ask him if he has suffered such a prior conviction and the nature of the crime. Pen.Code, § 1025.

5. Criminal law ☞706

In prosecution for issuing and passing a check with intent to defraud, district attorney was not guilty of misconduct in questioning defendant concerning a felony conviction, for purpose of impeachment, and concerning prior issuance of no fund checks, for purpose of showing intent. Pen. Code, §§ 476a, 1025.

6. Criminal law ☞1036(2)

Where defendant failed to object to cross-examination by district attorney, and did not request the trial judge to strike the testimony elicited by district attorney on cross-examination or to instruct or admonish the jury in reference thereto, the defendant could not complain on appeal of the cross-examination.

7. Criminal law ☞371(1)

Evidence of other offenses is admissible as bearing on question of intent of defendant.

8. Criminal law ☞1128(1)

On appeal from a judgment of conviction District Court of Appeal would not go outside of the record to consider contention of defendant that he was improperly extradited, particularly where contention did not appear to have merit.

9. Criminal law ☞1028

Where contention of defendant that he had been improperly extradited, was not raised before a trial court, it would be considered on appeal to have been waived.

10. Criminal law ☞99

Even though defendant who contended that he was improperly extradited, may have been brought before trial court by illegal proceedings in prosecution for issuing and passing a check with intent to defraud, court was not deprived of jurisdiction. Pen.Code, § 476a.

11. Criminal law ☞1035(3)

If defendant felt that his counsel did not adequately represent him because of

alleged fact that no action was taken against witness for defendant for refusal to obey subpoena, defendant should have complained to the trial court and should have given the trial court an opportunity to correct the situation, and, in absence of such complaint, act of defendant's counsel was imputed to defendant.

12. Criminal law ☞999(1)

Order of commitment committing defendant who was convicted of issuing and passing a check with intent to defraud, to state prison and directing that he should be remanded to custody of sheriff and by him be taken and delivered to Director of Corrections at state prison on charge alleged, including a prior conviction, was not defective because of the failure to include the phrase "for the term prescribed by law." Pen.Code, §§ 476a, 1168.

13. Criminal law ☞991(3)

Under statute providing that every person convicted of a public offense shall be sentenced to be imprisoned in a state prison, but that court in imposing a sentence shall not fix the term or duration of the period of imprisonment, court has only to sentence defendant to state prison in order to comply with the statute. Pen. Code, § 1168.

14. Criminal law ☞1202(1)

Mere fact that allegation in information of a prior conviction followed second count did not mean that it was included in the second count and had no application to the first count, and therefore fact that that defendant was acquitted under the second count, did not preclude determination of a prior conviction. Pen.Code, § 969.

Gordon W. Mallatratt, San Francisco, Henry F. Youders, in pro. per., for appellant.

Fred N. Howser, Attorney General, Dan Kaufmann, Deputy Attorney General, for respondent.

GRIFFIN, Justice.

Defendant was charged in one count of an information with the crime of issuing

and passing a check in the sum of \$10 on May 29, 1949, to one Gilbreath, with intent to defraud. In the second count he was charged with passing a fictitious check. Then followed an allegation of "prior conviction" alleging that defendant was convicted of forgery in Nevada, and served a term in a penal institution. Defendant admitted this prior conviction and pleaded not guilty to each count of the information. Trial before a jury was had resulting in a verdict of guilty as to the first count and not guilty as to the second count. Defendant appealed.

Defendant first complains that the conviction is contrary to the evidence, mainly because he testified that the \$10 check was postdated; that it was given to the complaining witness about May 22nd or 23rd and that he was told by defendant that he was to hold the check until he could repay the sum of \$10 to him; that the transaction was, in effect, the giving of a promissory note as security for the loan.

The evidence on this point is highly conflicting. Gilbreath testified that on May 29, 1949, about 2 o'clock in the afternoon, defendant came to his gasoline service station; that he bought five gallons of gasoline and a package of cigarettes and asked him to cash a personal check for him; that he asked defendant what bank he wanted the check drawn on and defendant told him the "Bank of America"; that defendant made out the check and told Gilbreath: "This check will be good", or it "would be good—You won't have to hold it"; that Gilbreath cashed the check and gave defendant the balance in cash; that he deposited it on the next business day and it was returned to him by the Bank of America marked "No account". It is conceded that the defendant never had an account nor credit with this bank. About ten days before this transaction defendant obtained a used tire and tube from Gilbreath because of a flat tire which defendant had on his car. On that occasion he gave Gilbreath a personal check for \$3, which Gilbreath was to hold for a few days. On the 29th of May defendant did pick up this check for \$3 and paid it. Although Gilbreath was confused as to wheth-

er or not defendant filled out the face of the check and whether the check was dishonored on May 30 or 31, yet he was positive in his statement that the defendant was in his place of business on the 29th day of May and not the 22nd or 23rd, as claimed by the defendant. Defendant fixes the date of the transaction as being on the 22nd or 23rd of May, due to the fact that he had money coming from a packing company and that on the 25th day of May he secured and cashed his pay check and left for Oregon in company with one Bartlett. He testified that he was in Oregon on the 29th day of May and therefore could not have been present in California at the time indicated by Gilbreath. The defendant produced in evidence a letter posted on *June 6th*, in Oregon, written to his brother, in which defendant acknowledged owing Gilbreath money and in which he indicated that his brother should advise Gilbreath that defendant's "intentions were good" and that he would repay him some time in July when he returned home. Defendant produced a witness, Decker, who testified that he drove defendant to Oregon on May 25, that he did not stay in Oregon but came back to California to pick up his wife, and during the four days that it took him to accomplish this, he did not see defendant; that he returned to Oregon and worked with the defendant for many days thereafter. On rebuttal Gilbreath again denied that the check was post-dated and maintained that it was given to him on May 29, and denied that anything was said about holding the check. He reiterated the fact that defendant told him that the check was good.

[1] The evidence surrounding the giving of the check involved in the second count indicates that defendant passed a fictitious check in the same town on May 13. However, the jury returned a verdict of not guilty on this count. As to the first count, it is clear that the prosecution did establish by the evidence all the elements of the offense denounced by sec. 476a of the Penal Code.

[2,3] Defendant argues that the testimony produced by the prosecution as to

whether the check was or was not post-dated is so weak and so highly improbable that the court was not justified in submitting the conflict in the evidence to the jury and that this court should therefore reverse the judgment upon this ground. There was a substantial conflict in the evidence. Where there are substantial conflicts in the evidence before the jury and the jury has resolved such conflicts against the defendant, the appellate court is bound by the finding of the jury. *People v. Thompson*, 114 Cal.App. 258, 260, 299 P. 821. It does not appear that the testimony of the complaining witness was improbable. *People v. Rose*, 9 Cal.App.2d 174, 176, 48 P.2d 1009. The jury chose to believe the story of the alleged victim. The defendant admitted he had received a check for \$35 for his wages and had the money to pay Mr. Gilbreath, and yet he departed for Oregon without seeing him or making any other arrangements. The fact that defendant posted a letter in Oregon on June 6 does not conclusively show that he was not in California on May 29. Defendant's testimony was entitled to be weighed by the jury and the fact that his testimony was impeached by the admission that he had been convicted of a felony was entitled to be considered by the jury. *People v. Becker*, 80 Cal.App.2d 691, 693, 181 P.2d 958.

[4] The next complaint is that the district attorney was guilty of misconduct in relation to the cross-examination of the defendant as to his previous conviction of a felony and the claimed conviction of other similar offenses committed by the defendant prior to May 29, 1949. He claims that his past offense of which he admitted conviction was not a proper subject of cross-examination under section 1025 of the Penal Code. It is well settled that a defendant may be impeached by proof of a prior conviction of a felony if he takes the stand in his own defense and it is not error to ask him if he has suffered such a prior conviction and the nature of the crime. *People v. Romer*, 218 Cal. 449, 23 P.2d 749; *People v. O'Brand*, 92 Cal.App.2d 752, 207 P.2d 1083; *People v. Peete*, 28 Cal.2d 306, 169 P.2d 924.

With regard to the claimed crimes of which the prosecution inquired, the record shows that most of the information concerning these offenses was volunteered by the defendant, and no objection was made at the time to the introduction of this evidence. The cross-examination of the defendant in reference to these charges was generally as follows:

"Question by the prosecution: Have you ever previously been convicted of a felony?
A. Yes, sir, I have.

"Q. What felony? A. I was convicted in Nevada—it was a gambling affair which I did give a note as security, and I was sentenced.

"Q. Was the charge issuing a check without sufficient funds? A. It was issuing a check. * * *

"Q. You served time therefor in a penal institution? A. Yes, I did. This check I wrote in Nevada was a gambling affair. But the gambling was legal in Nevada. They held it in Court just like a check any place else.

"Q. Have you every knowingly issued a check without sufficient funds, without informing the other party that that was the case? * * * A. No, sir, I haven't.

"Q. I will ask you if you gave a check to a hospital in Alameda? A. That wasn't an NSF check. I used my mother-in-law's name in order to pay a hospital bill.

"Q. In other words that was a forgery? A. Well, it was not. There was no complaint signed as far as the name used on the check. The District Attorney made a —filed a complaint against me, but they gave me a light sentence under the conditions that I was paying a hospital bill for the wife with which I had no funds to pay.
* * *

"Q. You cashed a check in the amount of about \$50, with Mr. McKay, at his store? A. I know of that check. I had no connection—I can say I had no connection with the check other than receiving it.
* * *

"Q. Do you remember talking with me over at the Tulare County Jail? * * *
A. I distinctly remember every word.

"Q. Isn't it a fact that at that time you told me you cashed this check for another party and he was going to give you half of the money? A. No, sir. I made the same mention to you as now, that I knew of the check, that it was passed and that I was to pay it back. I was to make it good.

"Q. Why should you send money back to make it good, if you had nothing to do with it? A. Well, there was a connection there. This fellow—I was accused of cashing the check. But I had nothing to do with the cashing or writing, but I was involved and was frightened and was scared to contest it, because I had had a previous conviction. That is why I sent money to pick it up. I knew if they would get me in Court, and knowing of my past, they were liable to send me up regardless if I had anything to do with it or not * * *. A. * * * That was after my Nevada conviction * * * I got word from my family they had a warrant for my arrest on this check * * * I sent payments to pay it off to save the trouble of appearing in Court."

[5-7] Under the circumstances related it does not appear that there was misconduct on the part of the district attorney and, if there had been, defendant cannot complain for the first time on appeal because he failed to object to this line of questioning and there was no request to the trial judge to strike the testimony or to instruct or admonish the jury in reference thereto. *People v. Alexander*, 92 Cal. App.2d 230, 206 P.2d 657; *People v. DuBois*, 16 Cal.App.2d 81, 87, 60 P.2d 190; *People v. O'Brand*, *supra*. Other offenses are admissible as bearing on the question of defendant's intent. *People v. Sindici*, 54 Cal.App. 193, 201 P. 975; *People v. Anderson*, 95 Cal.App. 225, 272 P. 755.

[8-10] Attached to appellant's opening brief, which was prepared by himself, in *propria persona*, there is attached an affidavit of the defendant in which he claims that he was illegally removed from the State of Oregon to stand trial in California and that the trial court here had no jurisdiction to pronounce judgment upon him. He recites certain facts indicating that he demanded

the sheriff of Douglas County, Oregon, to permit him to seek an attorney or permit him, in *propria persona*, to bring a habeas corpus proceeding to test the validity of the warrant; that since he refused to sign a waiver of extradition his constitutional rights were invaded. The affidavit shows that defendant did retain an attorney in that state who petitioned the court for a writ of habeas corpus and that the court granted the writ on the ground that issuing a check without sufficient funds did not constitute a felony in the State of Oregon and therefore was not an extraditable offense; that thereafter the second warrant was forwarded which included the charge of forgery, an extraditable offense, and that therefore the governor signed extradition papers. Defendant's complaint is that he was deprived of his rights by not being apprised of the hearing pertaining to the extradition matter and was not permitted to be present in his own behalf. It does not properly appear before this court that there was any illegal extradition of the defendant from Oregon. The affidavit is not a part of the certified record on appeal and we do not feel disposed to go outside of the record to consider this point, particularly where it does not appear to have merit. *People v. Gonzales*, 69 Cal.App. 609, 231 P. 1014; *People v. Agnew*, 16 Cal.2d 655, 660, 107 P.2d 601. Furthermore, the matter was not raised before the trial court and is considered waived by the defendant on appeal. *People v. Newell*, 192 Cal. 659, 221 P. 622. Even though the defendant may have been brought before the trial court by illegal proceedings, this does not deprive that court of jurisdiction. *People v. Pratt*, 78 Cal. 345, 20 P. 731.

The next contention seems to be that the defendant was denied the right to subpoena witnesses and the court erred in refusing to cite a witness for failure to appear. There is very little in the record to support this charge. It is defendant's contention that his attorney in the trial court was negligent in failing to have a subpoena issue. The only evidence on this subject appears in the transcript in relation to the cross-examination of the defendant. The testimony of Mr. Gilbreath was that he *thought* the defendant was alone at the time he passed the

\$10 check upon him. In response to the question: "Who was present when you and Mr. Gilbreath talked about it?" (the check). Defendant answered: "The fellow with me was Clyde Bartlett. I asked for a subpoena to have him in court as a witness, but he hasn't appeared."

[11] Defendant argues in his brief that he asked his attorney to subpoena this witness and that his attorney informed him that he had been subpoenaed and that no action was taken against this witness for his refusal to obey the subpoena, and that consequently he was denied due process of law. Other than the statement made by the defendant on the witness stand, the record does not show that defendant asked his attorney to subpoena the witness nor does it show that the witness was subpoenaed or that the witness failed or refused to attend or that such witness actually existed. The trial judge cannot be blamed for supposedly failing to cite the witness for failure to observe a subpoena in the absence of a request for such a citation. Defendant made no request for a continuance for the purpose of securing the presence of the desired witness. A subpoena is issued as a matter of course and since other witnesses appeared and testified for the defense, there is no reason to believe that defendant was denied the right to produce the person he contends failed to appear. If defendant felt his counsel did not adequately represent him he should have complained to the trial court and given that court an opportunity to correct the situation. In the absence of such complaint the acts of defendant's counsel are imputed to him. *People v. Gilbert*, 25 Cal.2d 422, 154 P.2d 657; *Sayre v. Commonwealth*, 194 Ky. 338, 238 S.W. 737, 24 A.L.R. 1017, 1025; *People v. Figueroa*, 134 Cal. 159, 163, 66 P. 202.

In this connection, in defendant's closing brief, wherein he is represented by an attorney, he claims that the public defender, who represented the defendant at the trial, was "not diligent in protecting defendant" and that defendant was "not afforded the constitutional right to effective assistance of counsel", citing such cases as *Powell v. State of Alabama*, 287 U.S. 45, 53 S.Ct. 55,

77 L.Ed. 158, 84 A.L.R. 527; and *United States v. Bergamo*, 3 Cir., 154 F.2d 31.

For the reasons stated, we see no merit to this argument. An examination of the entire record indicates that the defendant had a fair and impartial trial and that the public defender fairly represented the defendant. The public defender was successful in procuring a verdict of not guilty as to the second count and was successful in obtaining a recommendation of leniency as to the first count. The issues were properly placed before the jury under proper instructions and no prejudicial error resulted.

[12, 13] The next complaint is technical in form. The order of commitment committed the defendant to the State prison in San Quentin and directed that he be remanded to the custody of the sheriff and by him taken and delivered to the Director of Corrections at that institution upon the charge alleged, including the prior conviction. Defendant complains because the court failed to include therein the phrase "for the term prescribed by law". Section 1168 of the Penal Code provides that every person convicted of a public offense shall be sentenced "to be imprisoned in a State prison, but the court in imposing the sentence shall not fix the term or duration of the period of imprisonment." It has been expressly held and is now settled that under this section the court has only to sentence the defendant to such state prison in order to comply with the provisions of sec. 1168, *supra*. *People v. Page*, 86 Cal.App. 148, 159, 260 P. 591; *People v. Ure*, 68 Cal.App. 545, 548, 229 P. 987; *People v. Mendosa*, 178 Cal. 509, 510, 173 P. 998.

[14] In the last complaint defendant argues that under the information in the first count he was charged with violating sec. 476a of the Penal Code; in the second count with the crime of forgery; and in a third count with a prior conviction of a felony; that since he was acquitted of the second count, the count pertaining to his prior conviction of a felony could have no application to the first count. This argument is more fanciful than real. The mere fact that the allegation of prior conviction follows the second count does not mean that

it is included therein. The allegation pertaining to the prior conviction follows the language of sec. 969 of the Penal Code, which prescribes how the prior conviction should be pleaded. The defendant admitted the prior conviction before his trial on the two counts involved. The information did charge that "before the commission of the offense charged in this information, the defendant sustained a prior conviction". Even though the pleader used the singular "offense", and the information contains more than one count, there is no reason to conclude that this allegation was to be limited to only one count. *People v. Howard*, 31 Cal.App. 358, 160 P. 697.

Judgment affirmed.

BARNARD, P. J., and MUSSELL J.,
concur.



96 Cal.App.2d 346

**STROBLE v. SUPERIOR COURT IN AND
FOR LOS ANGELES COUNTY.**

Civ. 17691.

District Court of Appeal, Second District,
Division 1, California.

March 6, 1950.

Fred Stroble filed a petition for a writ of mandate to be directed to the Superior Court of the State of California in and for the County of Los Angeles for order for examination of court reporter who reported petitioner's trial in criminal prosecution. The District Court of Appeal, Per Curiam, held that the application for a writ of mandate should have been made to the Supreme Court.

Petition denied without prejudice.

Courts ⇨ 207(4)

Where application for writ of mandate to Superior Court to perpetuate testimony

of court reporter who reported petitioner's trial in criminal prosecution for use in proposed habeas corpus proceeding, was closely connected with the criminal prosecution which was on appeal to the Supreme Court, the application should have been made to Supreme Court, and not to District Court of Appeal. Code Civ.Proc. § 2084.

John D. Gray, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel,
Wm. E. Lamoreaux, Deputy County Counsel,
Los Angeles, for respondent.

PER CURIAM.

Petitioner herein was found guilty of murder of the first degree by a jury, without recommendation as to punishment, and subsequently was found sane by the trial judge. An appeal from that verdict is now pending in the Supreme Court.

On February 14, 1950, petitioner made application to the superior court for an order for examination of witness under section 2084 of the Code of Civil Procedure, stating therein that he expected to bring a habeas corpus proceeding in connection with his conviction and that he desired to take the deposition of the court reporter who reported his trial, so as to ascertain the contents of the reporter's notes made during a conference in the judge's chambers during the time when the sanity hearing was being conducted.

The proposed habeas corpus proceeding and the application to perpetuate testimony in connection therewith are so connected with the criminal prosecution which is on appeal to the Supreme Court that the application for a writ of mandate here prayed for should be made to that court. The Rosicrucian Fellowship v. Superior Court, 73 Cal.App.2d 824, 167 P.2d 213; Collins v. Superior Court, 147 Cal. 264, 81 P. 509.

Therefore, the petition is denied without prejudice to applying for the writ in the Supreme Court.

PEOPLE v. JONES.**Cr. 4411.**

District Court of Appeal, Second District,
Division 2, California.

March 13, 1950.

Hearing Granted April 11, 1950.*

Howard Jones was convicted of grand theft by Charles W. Frick, J., and he appealed. The District Court of Appeal, Wilson, J., held that a person was not guilty of grand theft when he induced copartners to part with their money by false representations or by trick and device and the money was not paid to or retained by the defendant for his personal use but was paid to the partnership and was used in part to liquidate debts of partnership existing at time false representations were made.

Order denying defendant's motion for a new trial reversed and defendant's purported appeal from the judgment of sentence and conviction dismissed.

Moore, P. J., dissented.

1. Criminal law ☞1023(9)

Where defendant, convicted on two charges of grand theft, appealed from order denying his motion for a new trial and purportedly appealed from "judgment of sentence and conviction" but proceedings were suspended and no judgment was announced, and defendant was granted probation, purported appeal from judgment would be dismissed.

2. Embezzlement ☞1

False pretenses ☞1, 11

Larceny ☞1

The crimes of larceny, embezzlement, obtaining money by false pretenses and kindred offenses are now all included under the designation of theft, but elements of several offenses have not been changed and in a prosecution for any such offense it is necessary to prove that accused obtained money, property or services by any of the means denounced by statute. Pen. Code, § 484.

3. False pretenses ☞11

Where by false representations, defendant induced copartners to pay money to a partnership, and funds were used in

part to liquidate partnership debts existing at time false representations were made, title and possession of funds passed to partnership and defendant was not guilty of grand theft. Corporations Code, §§ 15006, 15008, 15009(1), 15018(e), 15024, 15025(1), 15025(2) (a); Pen.Code, § 484.

4. False pretenses ☞11

To sustain a conviction of obtaining money either by false pretenses or by trick and device, evidence must show that accused acquired money or appropriated or converted it to his own use. Pen.Code, § 484.

5. False pretenses ☞11

In a prosecution for obtaining money by false representations, it is necessary to prove that the defendant obtained and received the money and proof that it was received by a certain person is insufficient to sustain a conviction. Pen.Code, § 484.

Horace Appel, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Donald D. Stoker, Deputy Attorney General, for respondent.

WILSON, Justice.

The question to be determined upon this appeal is whether a person is guilty of grand theft when he induces another to part with his money by false representations or by trick and device and the money is not paid to or retained by the defendant for his own personal use but is paid to a partnership in which both parties and others are partners and is used in part to liquidate debts of the partnership existing at the time the false representations were made.

[1] Defendant was convicted on two charges of grand theft, (1) of \$6,000 from E. Y. Masi, (2) of \$4,000 from Thomas W. Patterson. He has appealed from the order denying his motion for a new trial and has purportedly appealed from the "judgment of sentence and conviction." Since no judgment was pronounced but proceed-

* Subsequent opinion 224 P.2d 353.

ings were suspended and defendant was granted probation, the purported appeal from the judgment will be dismissed.

The evidence shows that defendant and two others, Stock and Parsons, were co-partners doing business under the name of Sun Supply Co.; by means of defendant's false representations concerning the business conducted by them Masi and Patterson were induced to pay the respective sums above mentioned to the partnership by checks payable to the Sun Supply Co., which were deposited in the partnership bank account; articles of copartnership were signed by defendant, Parsons, Stock, Patterson and Masi; part of the money was used for the purpose of paying pre-existing debts of the partnership, including a chattel mortgage on partnership property and money previously advanced by defendant for partnership business; portions of it were paid during the existence of the partnership to each of the five partners as salary or compensation for services rendered after the money had been paid into the partnership treasury by Masi and Patterson; the partnership terminated about 30 days after the money was advanced by Masi and Patterson, whereupon its business and affairs were turned over to a law firm for the purpose of dissolution; after paying the existing debts and the cost of the liquidation proceedings the remainder was divided equally among defendant, Stock, Patterson and Masi. Parsons not having invested any money did not receive any part of the proceeds.

The applicable portions of the Uniform Partnership Act found in the Corporations Code are as follows: Masi and Patterson as partners were co-owners with the other partners of the business and assets of the partnership. Sec. 15006. All property acquired on account of the partnership, including the money paid into its treasury by Masi and Patterson, became the property of the partnership. Sec. 15008. Every partner was an agent of the partnership for the purpose of its business. Sec. 15009(1). All partners had equal rights in the management and conduct of the partnership business. Sec. 15018(e). The property rights of each partner were (1)

his rights in specific partnership property, (2) his interest in the partnership, and (3) his right to participate in its management. Sec. 15024. Each partner was a co-owner with his partners of the partnership property, in which was included the funds above mentioned, holding as a tenant in partnership. Sec. 15025(1). One of the incidents of such tenancy was that each partner had an equal right with his partners to possess the partnership property for partnership purposes. Sec. 15025(2) (a). Upon the formation of the partnership all the foregoing rights, privileges and incidents accrued to Masi and Patterson as well as to defendant and the other partners. Defendant's rights were no greater than those of the other partners. When the chattel mortgage was discharged the personal property of the partnership covered by it was released from the lien to the benefit of all partners alike.

[2-5] The crimes of larceny, embezzlement, obtaining money by false pretenses and kindred offenses are now all included under the designation of theft, Penal Code, sec. 484; *People v. Myers*, 206 Cal. 480, 483, 275 P. 219, but the elements of the several offenses have not been changed. *People v. Selk*, 46 Cal.App.2d 140, 147, 115 P.2d 607. In a prosecution for any such offense it is necessary to prove that the accused obtained money, property or services by any of the means denounced by the statute. Defendant did not "obtain" the money of Masi and Patterson as that word is defined. When they paid their funds into the partnership account defendant did not acquire either title thereto or possession thereof. Both title and possession passed to the partnership. "To obtain" means to gain possession of, to procure (Webster's New Int.Dict., 1947 Ed.), to acquire title to or ownership of property. *People v. Shapiro*, 299 Ill.App. 255, 20 N.E.2d 107, 108. To sustain a conviction of obtaining money either by false pretenses or by trick and device the evidence must show that the accused acquired the money or appropriated or converted it to his own use. Where the evidence shows, as it does in the instant case, that the money of the prosecuting witnesses passed

into and became part of the assets of a partnership in which they, defendant and others were partners, the money was not "obtained" by defendant and he is not guilty of obtaining money by false pretenses. *State v. Woerth*, Mo.Sup., 256 S. W. 456, 459; *State v. Smalley*, Mo.Sup., 252 S.W. 443, 445. In a prosecution for obtaining money by false representations it is necessary to prove that the defendant obtained and received the money. Proof that it was received by a third person is insufficient to sustain a conviction. *Willis v. People*, 19 Hun, N.Y., 84, 86.

The fact that Masi and Patterson did not have authority to sign checks on the partnership bank account is not an element aiding the prosecution. (1) The evidence is uncontradicted that when it was suggested by others that they be given such authority both refused, saying there were already sufficient names on the signature card. (2) Their lack of access to the bank account does not qualify their co-ownership of the funds. (3) The vesting of complete control in one partner of the entire business of the partnership enterprise or of any part of it does not negate the existence of a partnership or of the partnership rights of any member of it. *Lyon v. MacQuarrie*, 46 Cal.App.2d 119, 124, 115 P.2d 594; *Thompson v. O. W. Childs Estate Co.*, 90 Cal.App. 552, 554, 266 P. 293.

The cases cited by the Attorney General, in which the accused obtained money or property for his own benefit either by fraudulent representations or by trick and device such as *People v. Hennessey*, 201 Cal. 568, 258 P. 49; *People v. Kirsch*, 204 Cal. 599, 269 P. 447; *People v. Mason*, 86 Cal.App.2d 445, 195 P.2d 60; *People v. Barnett*, 31 Cal.App.2d 173, 88 P.2d 172, do not sustain defendant's conviction since in none of those cases did money or property become an asset of a partnership but in each case the defendant personally received the money or property and appropriated it to his own use.

The order denying defendant's motion for a new trial is reversed and his purported appeal from the "judgment of sentence and conviction" is dismissed.

McCOMB, J., concurs.

MOORE, Presiding Justice.

I dissent.

That the representations made by appellant to both of the complainants were false, that they were believed and relied on by those gentlemen who while believing parted with \$6,000 and \$4,000 respectively—these things were finally determined by the trial court upon abundant evidence. So far as the facts are concerned the appellate court will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the trial court to warrant its implied findings. Before they can be upset the findings must be demonstrable that upon no hypothesis was there sufficient substantial evidence to support the determination of the court below. *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778. Indeed, appellant does not deny that the recited facts were established. His contention is that they are not sufficient to constitute a crime. He maintains that he did not receive the moneys but that instead they were paid to the partnership of which Masi and Patterson were members and that since as such members they had control over the funds after payment to the partnership they did not lose title and possession of their moneys and therefore appellant did no wrong.

In support of such contention appellant cites *People v. Cravens*, 79 Cal.App.2d 658, 180 P.2d 453. That this decision does not support his contention will readily appear. Cravens fraudulently induced one Mrs. Reame to join him in a partnership for the manufacture of adhesive gauze bandage. She deposited funds in the bank subject to withdrawal by herself, her son and Cravens. This was subsequently increased by deposits of other smaller sums by Mrs. Reame. The fund was used in paying her personal expenses as well as those of the partnership. Because the gauze business failed she laid her grievance before the court. The conviction of Cravens was reversed because the title of Mrs. Reame's money was not transferred to Cravens. She had actual control of the funds at all

times while he never withdrew or appropriated to his personal use any part of it.

In the instant case a far different situation obtains. The implied findings mean substantially that appellant not only fraudulently inveigled his victims to join the partnership and pay over their moneys but that he had planned to pay out a large percentage of their investments on old debts of the firm before they would have time to discover his fraud; that he had no intention of purchasing new equipment with their money but stealthily intended to and did cause the mortgage indebtedness to the bank incurred by himself and Stock to be paid promptly with the new funds and acquired no new equipment at all; that neither appellant nor his colleagues took Masi or Patterson into the inner sanctum of their organization but by clever manipulation and suggestion induced complainants to be so occupied with sales and dreams of big profits that the latter were led to believe that the handling of details by appellant, Parsons, and Barnard would operate to the advantage of complainants; that to this end it was arranged for the original partners to write all checks against the bank account to the exclusion of complainants who never checked out a dime; that in so far as complainants are concerned the Sun Supply Company was a mere device, a canopy to give glamour to the representations of appellant as to the earning power of the group; that in order more successfully to enable appellant and his confederates to appropriate the greater portion of the \$10,000 to their own use complainants were not placed in positions of responsibility whereby they might know at once of the disposition of their invested capital; that by the use of the partnership name and pretended business plans appellant and his confederates erected what they deemed a fortress against conviction. Therefore, concluded the court, defendant is guilty of grand theft.

The majority opinion places reliance upon the evidence that when it was suggested by others that complainants be given authority to sign checks on the partnership bank account, they refused the privilege. The implied finding is that when such sug-

gestion was made complainants were still under the spell cast by the representations of appellant. They had been induced to believe that the fields were so ripe unto the harvest that they would be reaping profits every hour of a working day and could therefore not afford to spend time doing clerical work.

The law does not avail appellant. Where a person is induced to part with his money with the understanding that it is to be used by the accused to accomplish a definite object and it is not so used, theft by trick and device has been committed. *People v. Hennessey*, 201 Cal. 568, 582, 258 P. 49; *People v. Mason*, 86 Cal.App.2d 445, 450, 195 P.2d 60; *People v. Barnett*, 31 Cal. App.2d 173, 174, 88 P.2d 172; 32 Am.Jur., p. 914; Corp. Code, sec. 15017. In *People v. Kirsch*, 204 Cal. 599, 269 P. 447, 449, a conviction for grand larceny was affirmed. The defendant's company had purchased certain lead junk to be weighed at the yard of the telephone company. Defendant so ingratiated himself with the employees of the company that they permitted him instead of the seller to weigh the junk. He caused a very heavy load of lead-covered cable to be placed on a truck from which he had 10,000 pounds to be first unloaded into a boxcar, the balance to be weighed and a weight certificate to be issued which he used in reporting the weight of the load, thereafter making no accounting to the seller of the portion removed before weighing. The court held that because the defendant by his acts so ingratiated himself with the employees of the telephone company that they permitted him to supervise the weighing instead of having the same done by the seller as agreed was with the felonious design to place himself in a position to deceive, cheat and defraud the seller out of its property. "That this element of the crime of larceny by trick and device was present can admit of no reasonable doubt." In *People v. Mason*, supra, it was held that Mason's promise that his company would begin drilling again and that the company planned to drill other wells was a trick and device whereby to acquire possession of the complainant's automobile. It thus appears from the last two

cited decisions that a party may by trick and device create a contract with a felonious design and thereby gain possession of the property of such other. Appellant's conviction necessarily implies the court's finding that the false statements of appellant and his promise to acquire a new truck and blower were a trick whereby to ensnare and hold the will and judgment of complainants until their money had been appropriated.

Now, if appellant perpetrated a fraud upon complainants by use of the device of the partnership, can he be immune from conviction by reason of the same device? Stripped of all dialectics nothing remains of the narrative here involved but two men looking foolish at another who got their money, used it for purposes other than those he promised while he in effect exclaims that "their partnership used their money." He suppressed the fact of the outstanding debts which he and Stock and Parsons had incurred and that such debts would be paid with their money. Neither then nor at any other time were complainants' moneys liable for such debts, for the reason that having been obtained by trick and device, ownership thereof did not pass to the partnership. It continued to be the money of complainants, held in trust by appellant and his confederates and embezzled by them by virtue of their payment thereof for uses other than those projected by appellant as inducements to invest. The judgment implies a finding that complainants intended to part with possession merely and not to transfer title as well and from such finding appellant's guilt was correctly concluded. *People v. Fawver*, 29 Cal.App. Supp.2d 775, 77 P.2d 325, 327. Numerous cases are listed by Judge Shaw in the Fawver decision in which he states that "all of these cases adhere to the rule stated. The passing of title referred to in the rule is the *complete* title to the property * * * if the victim retains an interest therein, there may be a larceny." In view of the conversations between appellant and the two complainants the court was warranted in finding an implied agreement of appellant that he would use the money for no purpose other than to purchase new

equipment and if not so used it would be held to the account of investors.

The judgment and the order denying the motion for a new trial should be affirmed.



96 Cal.App.2d 550

KEYSTON et al. v. KEYSTON et al.

Civ. 17554.

District Court of Appeal, Second District,
Division 2, California.

March 20, 1950.

Action by Mary B. Keyston and another against D. W. Keyston and others, to have the terms of a testamentary trust altered. The Superior Court for Los Angeles County, Arnold Praeger, J., entered a judgment denying relief, and the plaintiffs appealed. The District Court of Appeal, Moore, P. J., held that the controversy could only be determined by the probate court.

Judgment affirmed.

1. Courts ⇐198

The probate jurisdiction of the Superior Court is statutory and is strictly limited by terms conferring such jurisdiction although that court has jurisdiction of all controversies which might arise between a trustee and those claiming to be beneficiaries under a testamentary trust. Probate Code, § 1120.

2. Courts ⇐198

The probate court has broad powers over acts of a trustee of a trust created by will; but its jurisdiction over trusts after distribution is limited to trusts created by will. Probate Code, § 1120.

3. Courts ⇐472(4)

Where corpus of testamentary trust consisted primarily of stock of corporation of which trustee was a stockholder in complete control, and beneficiaries alleged that unless corpus was sold, trust would be depleted and rendered worthless, settlement

of controversy involved could be determined only by the probate court, and Superior Court was without authority under its general equity powers. Probate Code, § 1120; Code Civ.Proc. § 1060.

Aides, Fairfield & Schwamb, Los Angeles, Joseph W. Fairfield, Los Angeles, for appellants.

Don Lake, Los Angeles, for respondent.

MOORE, Presiding Justice.

By his last will and testament Alfred J. Keyston created a trust estate with appellants as its beneficiaries and respondent D. W. Keyston as its trustee. The terms of the trust were approved by the probate court in the orders settling the final account and directing distribution. The corpus of the estate consists primarily of 1250 shares of corporate stock valued at \$81,250. D. W. Keyston is a stockholder of the corporation and has complete control of its affairs.

The amended complaint alleges that for the past two years the corporation had been operating at a loss; plaintiffs had received nothing from the trust; the corpus was deteriorating in value; unless the corpus of the trust is sold the trust will become depleted and be rendered worthless. A general demurrer to the pleading was "sustained without leave to amend but without prejudice to filing a petition in the probate court for instructions or to construe said trust." Judgment denying relief was entered; thence this appeal.

[1] Appellants insist that they have stated a cause of action in that the beneficiaries have the right to alter the terms in a trust as fixed by the declaration thereof, citing *Adams v. Cook*, 15 Cal.2d 352, 101 P.2d 484. It is true that the cited case declares that a court of equity has the power to change the method of administering a trust estate when it is shown that such a change is necessary to prevent loss or destruction of the corpus. But the trust in the cited case was created by contract and for that reason the decision is not authority in an action involving a testamentary trust. The

probate jurisdiction of the superior court is statutory and is strictly limited by the terms conferring such jurisdiction. Section 1120 of the Probate Code is so broad in its scope as to give the probate court jurisdiction of all controversies which might arise between the trustees and those claiming to be beneficiaries under the trust. In *re Estate of Marre*, 18 Cal.2d 184, 187, 114 P.2d 586; In *re Estate of Smead*, 12 Cal.2d 20, 24, 82 P.2d 182; In *re Estate of Smith*, 4 Cal. App.2d 548, 41 P.2d 565.

[2] In *Wells Fargo Bank and Union Trust Company v. Superior Court*, 32 Cal.2d 1, 5, 193 P.2d 721, 723, it is said that although "the probate court has broad powers under this section over the acts of the trustee of a trust created by will * * * its jurisdiction over trusts after distribution is limited to trusts created by will. Except for the statute, the superior court sitting as a probate court, would have no jurisdiction over trusts after the final decree of distribution (In *re Estate of McLellan*, 8 Cal.2d 49, 55-56, 63 P.2d 1120), and the statute provides for such jurisdiction only when the trust has been created by will."

Appellants contend that because the second count in the amended complaint seeks declaratory relief the court below sitting as a court of equity had jurisdiction, citing Code of Civil Procedure section 1060, and *Parkman v. Superior Court*, 77 Cal.App. 321, 323, 246 P. 334. In the *Parkman* case it is said that legal problems after the settlement of the estate must ordinarily be administered in a forum other than the probate court but the cited case was decided in 1925, six years prior to the enactment of section 1120 giving the probate court authority to entertain matters beyond the actual settlement of the estate.

[3] Of course, situations could arise in which the superior court's general equity powers may be invoked to prevent injustice to the beneficiaries of a testamentary trust, yet in view of the holding of *In re Estate of Marre*, *supra*, etc., the settlement of such controversy as is here involved should be determined only by the probate court.

Colden v. Costello, 50 Cal.App.2d 363, 370, 122 P.2d 959; Howard v. Bennett, 53 Cal. App.2d 546, 127 P.2d 1012.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.



96 Cal.App.2d 439

CHASE v. LEITER et al.

LEITER v. CHASE et al.

No. 14264.

District Court of Appeal, First District,
Division 1, California.

March 13, 1950.

Action by Samuel J. Chase, as one of the executors of the last will and testament of George L. Leiter, deceased, against Ida Leiter, widow, and another, for declaratory relief, wherein the widow filed a cross-complaint. From judgment of the Superior Court, Alameda County, Ralph E. Hoyt, J., construing joint will and agreement, the plaintiff and the widow appealed. The Court of Appeal, Bray, J., held that joint will had converted property into community property and that the will was a contract which became effective as soon as executed.

Case remanded with instructions to amend judgment, and judgment as so amended affirmed.

1. Executors and administrators ⇨426

Executor was proper party to bring action for declaratory judgment construing will and determining the property to which executors were entitled, and what property belonged to trust.

2. Wills ⇨92

Husband and wife by joint will may convert joint tenancy property into community property.

3. Appeal and error ⇨1008(3)

Where trial court interpreted will without aid of extrinsic evidence, its interpretation was before District Court of Appeal

as a matter of law, and the interpretation even if possible or even reasonable was not binding on the Court of Appeal.

4. Wills ⇨92

Joint will converting joint tenancy property into community property was a contract which became effective as soon as executed, and subsequent removal of moneys by wife from joint tenancy bank accounts and redeposit in joint tenancy account with daughter violated express prohibition in the will.

5. Trusts ⇨94½

United States ⇨91

Treasury Department regulations prohibiting an inter vivos transfer of government bonds cannot be used to perpetrate a fraud, and constructive trusts may be imposed on proceeds in order to achieve a fair result.

6. United States ⇨91

Wills ⇨92

Under joint will converting joint tenancy property into community property, Treasury Department regulations relating to inter vivos transfer of government bonds did not prevent transmutation of series G bonds standing in the names of husband and wife as joint owners into community property, and even if the regulations prevented a holding that title to the bonds was changed, widow could be ordered to act so as to carry out her agreement.

7. Wills ⇨92

Joint will converting property held in joint tenancy with right of survivorship and bank accounts and "other items of property owned by or payable to either of us or to the survivor", into community property, was intended to cover all property of the parties, no matter of what kind, including annuity contracts.

8. Insurance ⇨199

Wills ⇨6

An insurance policy is property, which can be sold, assigned or bequeathed by the owner.

9. Assignments ⇨10

An annuity is a chose in action assignable by the annuitant.

10. Wills ⚡92

Conversion of annuity contracts into community property by joint will was not ineffective on the ground that an additional burden would be imposed on insurance companies without their consent or on the ground that the annuity contracts themselves provided the only method by which they could be assigned.

11. Husband and wife ⚡273(1), 276(1)

All of community property was subject to administration in estate of husband, and awarding widow possession of any of it as against executors was improper.

12. Declaratory judgment ⚡384

In action for declaratory relief with respect to the scope of joint will by which husband and wife converted property into community property, court had broad powers and could, prior to distribution, interpret will on question of whether widow, upon distribution, would be entitled as against trustees to possession of any of property involved. Civ.Code, § 2261; Code Civ.Proc. § 1060.

13. Trusts ⚡182

Wills ⚡727

Will would be taken by its four corners and all portions considered together in determining whether widow was entitled to possession of property as against trustees.

14. Trusts ⚡182

Under joint will which converted property of husband and wife into community property, which provided that bequests of bonds should vest in beneficiaries as of the date of first death, which gave residue to trustees for benefit of survivor, and which gave trustees full power of management and directed that net income be used for support of survivor for life, trust took effect on death of husband and trustees thereupon became entitled to possession of property as against widow, and widow was neither entitled to control of her half of community property during her lifetime or of any of the property, nor empowered to encumber it.

15. Wills ⚡727

Widow who had taken possession of government bonds on the erroneous assumption that she was entitled thereto under joint will would not, upon surrender of the bonds or their proceeds to executors, be required to pay interest on the face or actual value of the bonds.

L. W. Irving, Oakland, for appellant and respondent Samuel J. Chase.

Hagar, Crosby & Crosby, Oakland, for appellant and respondent Ida Leiter.

BRAY, Justice.

In an action for declaratory relief filed by the executor of a will, in which the widow filed a cross-complaint, plaintiff appealed from those portions of the judgment which were contrary to his contentions, and respondent Ida Leiter (the widow) appealed from the whole judgment.

Pleadings.

Plaintiff, executor under the will of decedent, George Leiter, brought an action for declaratory relief, asking the court to determine that in a joint will and agreement, decedent and his wife effectively transformed all their property into community property, and therefore the executors are entitled to its possession. Plaintiff asked title quieted in himself and the executrix for administration, and to carry out the terms of the will. Defendant, widow of the decedent, filed a cross-complaint asking the court to determine that the agreement was ineffective in attempting to transform certain jointly owned property into community property, and that therefore those properties were not subject to administration. At the trial the issue was raised and considered as to the right of the widow, upon distribution, to maintain possession, as against the trustees, of half of the community property.

The trial court found that the parties intended to transform all their property into community property, but were unsuccessful as to certain government bonds. It found that the parties intended only one-

half of the community property to be held in trust by the trustees during the life of the surviving spouse, and that she was entitled to immediate possession of the other half, except such portion as might be necessary to pay administration debts and charges, although she could not dispose of or encumber it.

Facts.

There is no dispute as to the facts. On December 5, 1946, George L. Leiter, of the age of 66 years, and Ida Leiter, his wife, of the age of 68 years, owning property of the value of approximately \$333,000, made and executed a joint and mutual will. The parts important here follow:

"We, George L. Leiter and Ida Leiter, husband and wife, * * * being desirous of ultimately disposing of our property including all our community property and all our respective separate properties which we or either of us may own at the time of death, according to a plan and program for that purpose which we have heretofore orally agreed upon and jointly adopted, do hereby make, publish and declare this instrument to be jointly as well as severally our Last Will and Testament and the Last Will and Testament of each of us * * *

"Second: We hereby declare that although each of us has from time to time had and received property which was or is, or might be considered to be, separate property of one or the other of us and, likewise, we have taken and held and now hold property in joint tenancy with right of survivorship and bank accounts and other items of property owned by or payable to either of us or to the survivor, nevertheless, our property has, during our marriage, become so intermixed that it would be impractical, if not impossible, to trace the strict ownership of, and title to the various items thereof so as to distinguish separate property from community property and we therefore agree and stipulate that all said property is and shall be deemed to be community property."

In paragraph "Third" they give certain United States bonds to their daughter, grandson, and others. "The foregoing bequests shall take effect and shall vest in

the said respective beneficiaries as of the date of the death of the one of us who shall die first, and are to be delivered in proper course in the administration of the estate of the one of us who shall die first."

"Fourth: We and each of us give, devise and bequeath the remainder of our bonds, all our real estate, cash in hand, and all the rest, residue and remainder of our estates of whatsoever kind or nature, whether real, personal or mixed, and wheresoever situate, including all separate property, community property, and property held jointly, to our daughter, Burdeitta L. Forest, and Samuel J. Chase as Trustees, with the powers and duties herein-after set forth, for the benefit of the survivor of us, our said daughter, Burdeitta L. Forest, and our grandson, William George Forest, as follows: * * *

"Said trustees shall hold said property with full power to receive and collect the rents, issues and profits thereof and, also, all other moneys becoming due whether by maturity of bonds or other securities, or otherwise; to lease real property, or any portion thereof, provided always that said Trustees shall not do anything in violation of the provisions of Section 2261 of the Civil Code of California.

"Our daughter, Burdeitta L. Forest, being familiar with our real property and its condition and the rentals and tenants, is particularly instructed to attend to the collection of rentals and the transaction of such other business as may be necessary in connection with rentals and tenants.

"Said Trustees shall pay the expenses of said trust and shall use and pay the net income from said trust estate for the use, benefit, maintenance and support of the survivor of us, our daughter, Burdeitta L. Forest, and for the use, benefit, maintenance, support and education of our said grandson, William George Forest, until he shall reach the age of 50 years as follows:

"Said Trustees shall pay the net income from said trust estate monthly to the survivor of us during the remainder of the life of such survivor, and after the death of such survivor" the trustees shall pay

\$200 per month to their daughter for life and a like sum to their grandson until he reaches the age of 50 years. The trustees are given authority to pay from principal if the net income does not provide sufficient to pay these sums per month.

"Fifth: We and each of us declare that in consideration of the benefit which the survivor of us shall derive from this mutual Will and the reciprocal provisions therein contained, as well as in consideration of the ultimate benefit which will be derived by our said daughter and our said grandson for whose benefit, among other persons, this Will is particularly made, this Will is and shall be our Last Will and Testament and we and each of us agree that we will not hereafter revoke nor attempt to revoke this Will directly nor indirectly, nor will we nor either of us make any subsequent Will nor Codicil, nor will the survivor of us during the period of such survivorship dispose nor attempt to dispose of any of the corpus or principal of any of our said property, and we and each of us further declare that it is our intention and agreement that this Will shall be presented for probate and its admission to probate be requested both as the Will of the one of us who shall die first and, also, as the Will of the survivor of us without change, modification or alteration in any manner whatever."

At the time the will was executed the Leiters owned the following real and personal property: (1) bank account, bonds, business, automobile, stocks, etc., and certain real property—all standing in the name of George L. Leiter; (2) real property standing in the names of George L. Leiter and Ida Leiter, his wife, as joint tenants; (3) savings and commercial bank accounts which stood in joint tenancy in the names of George L. and/or Ida Leiter; (4) United States of America Series G bonds of the face value of \$65,000 which stood in the names of George L. Leiter or Ida Leiter as joint owners; (5) Series G bonds of the face value of \$26,000 which stood in the name of George L. Leiter payable on death to Ida Leiter; (6) certain real property which stood in the name of Ida Leiter; (7) seven life insur-

ance annuity contracts which provided in the aggregate for the payment of \$304.62 per month to George L. Leiter and upon his death to Ida Leiter. Two of these contracts provided for payments after death of Ida to Burdeitta Forrest, the daughter of the parties.

George died on the 23rd day of January, 1947. The will was offered for probate in the superior court in Alameda County and was admitted to probate. Samuel J. Chase and Burdeitta Forrest qualified as executor and executrix. Thereafter, Samuel J. Chase, as one of the executors, filed an action against Ida, the surviving widow, and Burdeitta Forrest. The latter was named a defendant on the basis that her individual and personal interest and property rights were adverse to the things sought to be accomplished by the action, and that as one of the executors she refused to be joined as a party plaintiff. Ida filed an answer and cross-complaint, and amendments thereto, in which she sought to quiet her title to all of the real and personal property which stood in the name of Ida, or in the names of George and Ida as joint tenants, or joint owners and/or in the name of George payable on death to Ida.

The trial court determined that the will of the parties was a contract, and that upon its execution all of the property, except the government bonds which were held in joint tenancy and/or which were payable on death to Ida, became community property of said George and Ida; that the contract was ineffectual to transmute said bonds into community property *only* because the regulations of the United States Treasury Department prohibited an *inter vivos* transfer; that as a contract it was effective at the date of its execution, as the will of George it was effective as of the date of his death, and as the will of Ida it was to become effective upon her death; that the executors were entitled to immediate possession of the government bonds for the purpose of carrying out the provisions of paragraph "Third" of the will, and that after carrying out said provision, Ida was entitled to the possession of the remainder of the bonds, providing that during her lifetime Ida had no right

to dispose of or encumber the corpus or any interest in the corpus of the bonds, except that she could surrender them for payment, but if so surrendered during the pendency of the probate proceedings, the executors were entitled to receive from Ida one-half of the proceeds; that as to the community property, one-half of it was subject to the testamentary disposition of George, was disposed of by his will and is subject to administration in the hands of the executors; that said executors are entitled to immediate possession thereof; that the other one-half of the community property belonged to defendant Ida, as surviving widow, subject to debts, expenses of administration, and taxes properly chargeable thereto, and that Ida was entitled to the possession of her one-half of the community property and was the owner of it, subject to the terms and conditions of the will, but had no right to encumber or dispose of the corpus of said community property during her lifetime, or in any other manner than as provided in said will.

Separate Appeals.

Plaintiff executor appealed from those portions of the judgment which (1) exclude from community property status the government bonds and (2) limit the executors' rights of possession to one-half of the community property.

Defendant Ida also appeals, contending that she is the owner of and entitled to the possession of the following: (1) the moneys which had been withdrawn from the joint bank accounts of Ida and George and redeposited in the joint bank accounts of Ida and Burdeitta Forrest prior to the death of George; (2) the United States government bonds which stood in the names of George or Ida, and those which stood in the name of George payable on death to Ida; (3) the real property which stood in the name of George and/or Ida as joint tenants, and the real property which stood in the name of Ida at the time of George's death; (4) the seven annuity contracts; (5) one-half of all community property at the time of George's death; and that she is entitled to such ownership and possession, subject only to the payment of her

proportionate share of expenses of administration, taxes, etc., in the estate of George, subject to the management and control by her of said property in accordance with the terms and conditions of the will, and that as to said property and her one-half interest in the community property the same should not vest in the trustees under the will until her death.

Can Plaintiff Bring This Action?

[1] Respondent Ida contends that plaintiff, as executor, is not a proper party to bring this action, citing 11b Cal.Jur. 396, § 969, to the effect that after final distribution or where the ultimate trust is for the heirs of a grantor, and not for himself, the heirs and not his representative should sue; *Lee v. Zimmerman*, 75 Cal. App. 617, 243 P. 62, which was a suit to enforce an oral contract to make certain testamentary disposition of property; and *McCabe v. Healy*, 138 Cal. 81, 70 P. 1008, a similar type of action. In neither of those cases was the question of the interpretation of a will involved. A third case, *Field v. Andrada*, 106 Cal. 107, 39 P. 323, has been expressly overruled. *Collins v. O'Laverty*, 136 Cal. 31, 33, 68 P. 327, *Rice v. Carey*, 170 Cal. 748, 151 P. 135. In our case the will has to be construed; the questions of what property the executors are entitled to the possession of, and what property belongs to the trust, are involved. In *re Heydenfeldt's Estate*, 117 Cal. 551, 49 P. 713, referring to the right of executors to appeal from an order of the probate court requiring them to redeem certain land from a foreclosure sale, the court said 117 Cal. at page 553, 49 P. at page 713: "An administrator or an executor is a trustee of an express trust. He is authorized to sue or to be sued without joining with him the beneficiaries of the trust, but the suits which may thus be brought are suits affecting the trust, and not those in which he is individually interested. Among his beneficiaries are creditors. He not only may, but it is his duty, to defend the estate from all unjust and illegal attacks made upon it which affect the interests of heirs, devisees, or legatees or creditors. He cannot

be kept out of such litigation upon the claim that he is not personally injured."

In *Rice v. Carey*, supra, 170 Cal. 748, 151 P. 135, in an action to quiet title to real property brought by the executors, the court sustained the right of the executors to sue, even as against a contention that the executors could only maintain an action to recover real property alleged to belong to the estate upon a showing that the property was needed for purposes of administration.

In *Union Nat. Bank v. Jessell*, 358 Mo. 467, 215 S.W.2d 474, there had been a joint and mutual will in which both spouses agreed that all of their property should go into a testamentary trust. There were some government bonds which bore the names of the deceased husband and three children, each of the latter being the second name on certain bonds. After the death of the husband, in an action brought by the executor for an instruction as to the proper distribution of the estate and particularly for a declaration of whether these bonds were the individual property of the three children or the property of the trust created by the will, the court held that the action by the executor for declaratory relief was proper, and further stated 215 S.W.2d at page 476: "It was only by reference to the joint and mutual will, pleaded and in evidence, and the attendant circumstances that it could be justly determined and declared whether the estate or the children were entitled to the bonds and it was only by relief analogous to specific performance that the court could adequately declare and enforce the rights of the parties. It follows, in all the circumstances of this case, that the court had jurisdiction to construe the joint and mutual will and enforce compliance with its applicable provisions." This action by the executor for declaratory relief was proper.

Community Property.

Respondent contends that the following property either could not be converted into community property or had lost its status as such at the time of the husband's death: (a) joint tenancy bank accounts; (b) certain United States bonds; (c) real prop-

erty of record in joint tenancy; and (d) annuity contracts.

(a) Joint Tenancy Bank Accounts.

[2] At the time of the making of the will these accounts were in the joint tenancy name of George and/or Ida. On January 15, 1947, twelve days prior to George's death, Ida withdrew \$94,800 of these monies and redeposited them in bank accounts with several banks in the joint tenancy accounts of herself and/or Burdeitta L. Forrest. The court found that in so doing Ida was acting contrary to and in disregard of her contract with decedent set forth in the will, and that by reason of the contract contained in the will all joint tenancy bank accounts became and remained community property, subject to the trust in the will. That a husband and wife by a joint will may convert joint tenancy property into community property is well established in California. The leading case is *Estate of Watkins*, 16 Cal.2d 793, 108 P.2d 417, 109 P.2d 1: "It is well settled that a husband and wife may agree with respect to the character of the property which they hold and that they may transmute their property from one status to another by an agreement which ordinarily need not be executed with any particular formality. [Citations.]

"A single written instrument may constitute both a will and a contract [citations], and we believe that the declarations contained in the joint and mutual will must be held to have constituted an agreement between the spouses fixing the status of their property as community property." 16 Cal. 2d at page 799, 108 P.2d at page 419, 109 P.2d 1.

Respondent contends that the rule that a husband and wife by agreement may change the form of their properties into community property has been followed only in divorce cases, with the single exception of *Estate of Watkins*, supra, 16 Cal.2d 793, 108 P.2d 417, 109 P.2d 1. Such contention overlooks such cases as *Estate of Sehabiague*, 47 Cal.App.2d 793, 119 P.2d 30, and *Estate of Wilson*, 64 Cal.App.2d 123, 148 P.2d 390. In these cases the agree-

ment was an oral one. In the Wilson case the court said 64 Cal.App.2d at pages 126-127, 148 P.2d at page 392: "It is now too well settled to justify more than the citation of the authorities that in spite of the mold into which a deed would seemingly press a title, either because of the intent with which the deed was made [citation], or made and received [citation], or because of an oral agreement between a husband and wife, carried into effect, determining their respective interests in real estate [citations] property which, measured by the deed, would not be community property, nevertheless may be just that." At oral argument respondent strenuously urged that we overrule *Estate of Watkins*, supra, 16 Cal.2d 793, 108 P.2d 417, 109 P.2d 1. This we cannot do, first, because as an intermediate court we have no such power, and secondly, because the rule therein stated is good law.

[3,4] The trial court interpreted the will without the aid of extrinsic evidence, and as held in *Estate of Platt*, 21 Cal.2d 343, 131 P.2d 825, and *Estate of Sahlender*, 89 Cal.App.2d 329, 201 P.2d 69, it follows that its interpretation is before this court as a matter of law; that this court must interpret it for itself, and that the trial court's interpretation, even if possible or even reasonable, is not binding on us. A mere reading of the will shows that it was the intent of both parties to transmute all their property, whether separate or held in joint tenancy, into community property. It would be difficult to find a clearer statement of their intention so to do, than appears in the will. They had the right to so change and they did. The will provides: "* * * nor will the survivor of us during the period of such survivorship dispose nor attempt to dispose of any of the corpus or principal of any of our said property * * *" While this clause refers to the period of survivorship, it is apparent from the whole will that it was the intention and the agreement of the parties that the same agreement not to dispose of any of their property was to apply to the period prior to the death of the first one to die. The will refers to their "being desirous of

ultimately disposing of" all their property, "according to a plan and program for that purpose" to which they had agreed. They give, devise and bequeath to the trustees "all our real estate, cash in hand, and all the rest, residue and remainder of our estates of whatsoever kind or nature, whether real, personal or mixed, and where-soever situate, including all separate property, community property, and property held jointly." Therefore, when respondent removed the moneys from the bank accounts and placed them in accounts jointly with her daughter she was violating the express agreements made by her in the will. The will was a contract which became effective as soon as executed. See *Estate of Watkins*, supra, 16 Cal.2d 793, 108 P.2d 417, 109 P.2d 1. In contending that she obligated herself only to refrain from disposing of the property during survivorship, and not prior thereto, respondent relies on *In re Glen's Estate*, 247 App.Div. 518, 288 N.Y.S. 24. There the spouses executed an agreement in which the husband agreed to leave the bulk of his separate estate to the wife. The instrument was itself a will and the husband promised not to revoke it. Thereafter and before he died the husband placed certain funds in a joint tenancy account with his brother. The court held that this action was not in violation of the agreement, since the latter had said nothing about what the husband could do with his property during his life; that the husband had kept his promise by not revoking the will and by leaving to the wife the agreed portion of his estate at the time of his death. The form of agreement in that case was different from that in our case. Here the parties agreed that the then joint tenancy accounts were to be community property, and as such respondent had no right to withdraw them and redeposit them in joint tenancy with her daughter. While respondent contends that the agreement had no effect until after the husband died, the whole tenor of the instrument is that it was to take effect at once. Had there been a divorce proceeding prior to the husband's death there can be no doubt that a court would have been re-

quired to consider these moneys, as well as all other property of the spouses, community property.

The joint and several will in Estate of Rolls, 193 Cal. 594, 226 P. 608, upon which case respondent relies, and in which the court held that the wife could revoke it after the husband's death and dispose of her one-half of the community property, did not contain an agreement, as here, not to revoke, nor did it constitute, as here, a contract. It was expressly so held in Rolls v. Allen, 204 Cal. 604, 269 P. 450. The court, however, in the latter case, recognized that the parties could have made a binding agreement not to revoke, had they so desired, for the court said 204 Cal. at page 607, 269 P. at page 451: "It is undoubtedly true that one may make a contract binding upon himself to make a particular testamentary disposition of his property and he may validly renounce the power to revoke his will, and equity will enforce such an agreement and not suffer him to defeat his obligation by the making of another will. The same rule applies to the case of mutual wills as equity likewise will assume enforcement of the same when attempt is made by the survivor to impair the terms thereof by subsequent testamentary disposition." As said in 1 Annual Survey of California Law, p. 110: "The cases of the last year [1948-49] continue to reflect the view that * * * agreements or understandings entered into during marriage as to property acquired or to be acquired may be * * * effective to constitute it community property * * *" The trial court was correct in finding that the \$94,800 was community property subject to the terms of the will.

(b) United States Bonds.

[5, 6] The court found that the Series G bonds standing in the name of George or Ida as joint owners, and in the name of George payable on death to Ida, were not transmuted into community property (although it found that the parties intended by the will to so transmute them) solely because it claimed that the regulations of the United States Treasury Department prohibited an inter vivos transfer. Re-

spondent contends that she is the owner of those bonds.

Government bonds provide for a type of coownership similar to joint tenancy. Whether the bonds are payable to "A or B," or "A, payable on death of A to B," it is clear that the government does not want A wrongfully to defeat the rights of B. There are many cases holding that as between B and the estate of A, B is entitled to payment. The leading California case is Conrad v. Conrad, 66 Cal.App.2d 280, 152 P.2d 221, which contains a discussion of the nature of the bonds and the effect of the Treasury Department regulations. Another case on the same subject is Davies v. Beach, 74 Cal.App.2d 304, 168 P.2d 452. Such cases involved no voluntary agreement between A and B that someone other than B shall take, upon the death of A.

The applicable regulations include the following:

"Sec. 315.13 *Judicial proceedings (judgment creditors, trustees in bankruptcy, receivers of insolvents' estates and conflicting claimants).*—A claim against an owner or coowner of a savings bond and conflicting claims as to ownership of or interest in such bond as between coowners or the registered owner and a designated beneficiary, will be recognized when established by valid judicial proceedings and payment or reissue will be made, upon presentation and surrender of the bond, except as follows:

"(1) No such proceedings will be recognized if they would give effect to an attempted voluntary transfer inter vivos of the bond or would defeat or impair the rights of survivorship conferred by these regulations upon a surviving coowner or beneficiary.

"(2) A judgment creditor, a trustee in bankruptcy or a receiver of an insolvent's estate will have the right to payment (but not to reissue) and a judgment creditor will be limited to payment at the redemption value current thirty days after the termination of the judicial proceedings or current at the time the bond is received, whichever is smaller.

"(3) * * * A divorce decree ratifying or confirming a property agreement

between husband and wife or otherwise settling their respective interests in savings bonds, will be recognized and will not be regarded as a proceeding giving effect to an attempted voluntary transfer for the purpose of this section."

This last sentence is important. If the parties voluntarily enter into an agreement concerning interests in the bonds, which agreement is approved in a divorce decree, the government will recognize such an agreement. It is logical that if the parties voluntarily agree to a particular treatment of bonds and such agreement is approved in this action, the government could and would have no objection. The principal thing that the government wants to prevent is A giving away B's rights without B agreeing to it.

The regulations cannot be used to perpetrate a fraud. The cases have not hesitated to impose constructive trusts on the proceeds in order to achieve a fair result. As was said in *Katz v. Driscoll*, 86 Cal.App. 2d 313 at page 320, 194 P.2d 822, 827, after a review of the *Conrad* and other cases: "While the cases above cited hold that as between the government and the survivor or beneficiary of the bonds and all other claimants the courts will recognize only the survivor or beneficiary, there is no case that holds that where the bonds are the result of fraud, the persons defrauded cannot pursue the proceeds of such bonds in the hands of one who is a party to the fraud."

In the following cases it was held that the treasury regulations did not prevent a court of equity from ordering the named co-owner of beneficiary to pay over the proceeds of the bonds to some other person: *Succession of Geagan*, 212 La. 574, 33 So.2d 118. (Deceased used community funds to purchase bonds in name of son. Son ordered to turn over half of proceeds to widow.) *Olsen v. Olsen*, 189 Misc. 1046, 70 N.Y.S.2d 838. (Joint and mutual will held to be a binding contract. Surviving husband was held bound to conform to it, even with respect to property he took as surviving joint tenant or surviving coowner of government bonds.) *United Nat. Bank v.*

Jessell, supra, 215 S.W.2d 474. In this case, mentioned previously, the spouses executed a joint and mutual will in which it was agreed that the survivor would leave his property to a trust set up by the will. The husband survived and during his survivorship purchased government bonds in the name of himself and some children. In spite of the treasury regulations, the appellate court affirmed a judgment ordering the children to cash the bonds and turn the proceeds over to the executor, saying: "The court has decreed that the named payees cash the bonds and deliver the proceeds to the executor in accordance with the will and there is nothing in this phase of the decree contrary to either the laws of the United States or the regulations of the United States Treasury Department. Those laws and regulations do not prevent the declaration of a resulting trust in bonds purchased in fraud of marital rights. [Citations.] And they do not prevent the recovery of the proceeds of bonds if they have been purchased with fraudulently acquired funds or funds expended in fraud of creditors. [Citations.] In this connection it is not necessary to characterize the conduct of the testator. It is sufficient to say that the testator was obligated by the compact of the joint and mutual will with his wife to devise and bequeath their property to the trust regardless of his subsequent good intentions and changed circumstances. The purchase and gift of the bonds to the children was in direct violation of that compact." 215 S.W.2d at page 477.

In view of the above decisions, the trial court gave too much effect to the treasury regulations. They would not have prevented an order that the surviving widow, respondent, cash the bonds and turn the proceeds over to the executor, in view of the finding by the trial court that "The parties to said contract intended to transmit all of the United States Government Bonds described in Schedules 'E' and 'F' into community property * * *" Even if the regulations prevent the court from holding that title to the bonds was changed, the court can order the widow to act so as to carry out the agreement she entered into.

Respondent, in her reply brief, cites the case of *Kauffman v. Kauffman*, 93 Cal. App.2d 808, 210 P.2d 29. The case concerns United States war risk insurance. The holder of the policy and his wife entered into a property settlement agreement in which he promised that if they were divorced he would name their children as beneficiaries. They were divorced and he changed the beneficiaries accordingly, but thereafter he married again and named his new wife as beneficiary, in violation of the agreement. The government, upon the death of the policyholder, began making payments to the widow. The children, born of the policyholder and the former wife, with whom he had executed the agreement, sued to impress a trust upon the proceeds. The court held in favor of the widow. The decision is not controlling in our case, however, since it pertained to insurance proceeds, which are exempt from creditors, taxation, etc., under the following provision: "Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." 38 U.S.C.A. § 454a. As the court said: "The provision in § 454a that the payments and benefits due or to become due are exempt from taxation and the claims of creditors, and are not subject to legal or equitable process indicates that Congress intended to control the title to such payments and benefits *both before and after payment*." 210 P.2d at page 33, emphasis added. There is no such control of the proceeds of government bonds, as has been seen.

(c) Real Property in Joint Tenancy.

The right of the parties to transmute real as well as personal property held in joint tenancy into community property and the fact that here by a binding contract they did so, has been fully covered under the heading (a) Joint Tenancy Bank Accounts. The court properly found that the real property had been so transmuted.

(d) Annuity Contracts.

[7] The court found that the seven annuity contracts with various insurance companies, six in the name of the husband, one in the name of the wife, became community property and were subject to the terms of the will. Respondent contends (1) that the parties did not intend these contracts to be so converted; and (2) that they could not be converted without the consent of the respective insurance companies who were parties to the respective contracts.

(1) As to the first contention, the will includes "other items of property owned by or payable to either of us or to the survivor * * *" It is obvious from the terms and plan of the will that the parties intended all of their property, no matter of what kind, to be covered by the will. This matter has been considered extensively under other headings. A somewhat similar situation is disclosed in *Sullivan v. Union Oil Co. of Cal.*, 16 Cal.2d 229, 105 P.2d 922. There, the wife was named as beneficiary of a "provident fund" maintained by the husband's employer. Prior to his death, during the pendency of divorce proceedings, the parties executed a property settlement agreement in which each waived all right to the estate of the other left at time of death and agreed that henceforth they would have, as to each other, the status of single persons. On the husband's death, the wife claimed to be still entitled to the provident fund, as named beneficiary. The court held that under the agreement she had waived her right to the fund. While the agreement there contained the language that the wife accepted the provisions of the agreement made for her in full satisfaction of her right to the community property (a provision which does not appear in the will in our case), nevertheless, the case is strong support for the construction given to the intention of the parties here.

[8,9] (2) Respondent contends that including these contracts in the provisions of the will added an additional burden on the insurance companies without their consent, and that the annuity contracts provided the only method by which they could be as-

signed. So far as the method of transfer of the annuity contracts not being that provided therein, the following language from *Sullivan v. Union Oil Co. of Cal.*, supra, 16 Cal.2d 229, 237, 105 P.2d 922, 927, is appropriate "Neither insurance policies nor rights arising thereunder are either sacred or 'untouchable'. As far as present consideration is concerned, an insurance policy is but a form of contract. An insurance policy in legal contemplation is property, which can be sold, assigned or bequeathed by the owner thereof." To the same effect, *Mutual Life Ins. Co. of New York v. Henes*, 8 Cal.App.2d 306, 47 P.2d 513. An annuity is a chose in action assignable by the annuitant. 3 C.J.S., Annuities, § 6, page 1383. In *Chilwell v. Chilwell*, 40 Cal. App.2d 550, 105 P.2d 122, the property settlement agreement between husband and wife provided that the husband would designate the children as beneficiaries of an insurance policy, which he did not do. Upon his death the children sued the executor to establish their rights under the agreement. In holding for the children the court, referring to a contention similar to the one here, said, 40 Cal.App.2d at page 553, 105 P.2d 122, 123. "The appellant contends that since the insured had not changed the beneficiary in the manner provided for in the policy and since the original beneficiary died before the insured, the insurance was payable to his estate, and that nothing in connection with the divorce proceeding changed this result or affected this legal situation. We are here concerned, however, not merely with the terms of the insurance contract, but with the terms and effect of a property settlement between parties to a divorce proceeding which was carried into and made a part of a judgment of divorce. * * * This property settlement agreement was entered into by all of the parties who had any interest in the proceeds of the policy, and the making of such an agreement has frequently been held to be, in effect, an equitable assignment of such insurance money."

[10] The burden which respondent contends is placed on the annuity companies, not contemplated by them in their contract, is that, under the terms of the will, the

payment might have to be divided between two persons, while the annuity contracts provide for payment to only one person, i. e., the survivor. If this is a burden, it is of such a minor character as not to bring this case within the principle that a third party to a contract may not be required to assume an additional burden without his consent. Moreover, if this were a burden, it could be relieved by the company making one payment direct to the trustees, who would properly apportion it.

Right To Possession By Executors.

[11] The trial court found that possession of one-half of the community property might be held by the widow, and all of the government bonds except those specifically bequeathed, subject, however, to the right of the executors to receive from such portion thereof as is necessary to pay the portion of the debts of decedent, expenses of administration, and taxes chargeable by law against that one-half of the community property, and subject also to the requirement that she not encumber or dispose of the corpus of any of such property other than as provided in the will. The action of the trial court in awarding the widow possession of any of the community property as against the executors was erroneous. All of the community property is subject to administration in the estate of the husband. See *Colden v. Costello*, 50 Cal.App.2d 363, 122 P.2d 959.

Having in mind that both spouses were getting along in years, that they say in their will that the executrix and trustee daughter is familiar with "our real property and its condition and the rentals and tenants" and "is particularly instructed to attend to the collection of rentals and the transaction of such other business as may be necessary in connection with rentals and tenants" (a clause which indicates that she rather than the survivor was to take possession of the real property, at least), and all the other terms of the will, the most reasonable interpretation is that the parties intended that all their property should be community property to be held in their lifetime for the trust which would take effect upon the first death.

Right To Possession By Trustees.

[12] The court found that the widow was entitled as against the trustees to the possession of all the government bonds (except those bequeathed to individuals) and to one-half of the community property, and to one-half of the income from the bonds and community property. Both parties, while expressing some doubt upon the right of the court in this action and before distribution to interpret the will on the question of whether the widow on distribution will be entitled as against the trustees to the possession of any of the property, have requested that if possible an interpretation be made. This is an action for declaratory relief, in which the court has broad powers. Section 1060 of the Code of Civil Procedure provides: "Any person interested under a deed, *will* or other written instrument, or under a *contract*, or *who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property* * * * may, in cases of actual controversy relating to the legal rights and duties of the respective parties," bring an action "for a declaration of his rights and duties in the premises" as well as a determination of the construction or validity of the instrument in question. "** * ** the court may make a binding declaration of such rights or duties, *whether or not further relief is or could be claimed at the time.*" (Emphasis added.) Here, there is no question that there is an actual controversy relating to the rights and duties of the various parties. They are all before the court. (The same persons who are executors are also named trustees.) In interpreting the will, and the contract contained therein, the question of the rights of the widow and the trustees after distribution naturally arises. Many of the matters determined now are necessarily included in the determination of the rights of the trustees as opposed to the rights of the widow. Acting now will avoid the necessity of another proceeding after distribution. The relief provided by section 1060 of the Code of Civil Procedure is broad enough to permit this court to determine now the rights

after distribution of the trustees and the widow.

[13, 14] It is contended that because in paragraph "Third" (the one specifically bequeathing \$43,000 government bonds) there is an express provision that these bonds shall vest in the beneficiaries as of the date of the first death, and there is no similar provision in the rest of the will concerning the vesting of the trust, that necessarily it was intended that the trust should not vest until the death of the survivor. However, taking the will by its four corners, it is plain that on the first death the trust was to take effect. Thus, it says (paragraph "Fourth") that the trustees "shall use and pay the net income from said trust estate for the use, benefit, maintenance and support of the *survivor* of us * * *." (Emphasis added.) Again, "Said Trustees shall pay the net income from said trust estate monthly to the survivor of us during the remainder of the life of such survivor * * *." Each of the spouses gave all their property to the trust. If the trustees do not have the custody and control of all the trust property then they could not comply with the requirement that they pay all the net income to the survivor. In paragraph "Fifth" the survivor agrees not to dispose or attempt to dispose of any of the corpus or principal of any of the property. The widow contends that this provision shows that the survivor was to have control of her half of the community property during her lifetime. Such provision must be considered with the other provisions of the will showing that the trust was to operate immediately upon the first death. All the portions of the will must be considered together, and when so viewed, they comprise a harmonious pattern of testamentary disposition under which husband and wife desired their holdings to be administered in trust, commencing upon the first death. The will shows definitely that the trustees were to maintain the property intact so as to conserve it for the benefit of the survivor in his lifetime and of the daughter and grandson. This could not be done if the survivor was to retain any portion of it.

Has The Widow The Power To Encumber One-Half Of The Property?

Inasmuch as we have held that the widow has no right to the possession of any of the property, it necessarily follows that she has no power to encumber it. She concedes that the trial court correctly held that she had no right to dispose of any of the property, but contends that the court erred in preventing her from encumbering it. It necessarily follows from her inability to dispose of the property that she has no right to encumber it, for, if encumbered, the holder of the encumbrance, under certain conditions, could foreclose and sell the property, and hence the widow could bring about indirectly that which was directly prohibited.

Interest.

[15] Respondent contends that the trial court erroneously decreed that she pay the executors interest on the government bonds which she is ordered to return to them. Paragraph 16 of the judgment provides: "Said executors are entitled to interest at the legal rate on any and all of the property designated in paragraph 12th hereof from the date of service of the Notice of Entry of Judgment herein to the date of payment or delivery of said property to said executors * * *" Included in paragraph 12 are the bonds and the interest received by the widow thereon since the death of decedent. Under the circumstances of this case, when the widow surrenders the bonds (or the amounts paid thereon by the government as hereinafter set forth) and all interest paid and hereafter payable on the bonds, it would be inequitable to require the widow to pay interest on the face or actual value of the bonds. The judgment, if it meant to include such interest, which is doubtful, should be amended accordingly.

The case is remanded to the trial court with instructions to modify its findings of fact, conclusions of law, and judgment in accordance with the views herein expressed, namely: all of the property referred to herein is community property; the executors are entitled to the possession of all of said community property; if the widow cashes the government bonds

and delivers the proceeds to the executors, the provision for payment of interest on the value of the bonds is stricken from the judgment; on distribution, the trustees will be entitled to possession of all the community property. The judgment as so amended is affirmed. Each party will bear his own costs.

PETERS, P. J., and SCHOTTKY, J.,
pro tem, concur.



96 Cal.App.2d 467

JOHNSON v. ALTMAN et ux.

Civ. 17489.

District Court of Appeal, Second District,
Division 1, California.

March 15, 1950.

Rehearing Denied April 3, 1950.

Hearing Denied May 11, 1950.

Action by Della N. Johnson against Ralph B. Altman and Cora S. Altman, his wife, to establish a trust in an undivided one-half interest of a parcel of realty together with household equipment and certain livestock located upon the premises. The Superior Court of Los Angeles County, J. F. Moroney, J., entered judgment for defendants and plaintiff appealed. The District Court of Appeal, Drapeau, J., held that plaintiff's oral agreement to surrender her interest in realty in consideration of defendants' promise to pay her amount she had contributed, was effective under doctrine of equitable estoppel since defendants, in reliance thereon, had paid all taxes on and expenses of maintaining property, and installments on trust deed.

Judgment affirmed.

1. Trusts 154

Where transfer of an interest in land is made to one person and the purchase price is paid by another, the resulting trust arising in favor of the payor can be extinguished by an oral conveyance or surrender of his interest by beneficiary of the resulting trust to the trustee.

2. Trusts ⚖️154

Where plaintiff contributed toward purchase price of realty with defendants, title to which was taken in name of defendants, after which she orally agreed to surrender her interest therein to defendants in consideration of their promise to pay her the amount she had contributed and defendants thereafter paid all taxes and expenses of maintaining property and installments on trust deed, surrender of plaintiff's interest was effective under doctrine of equitable estoppel.

3. Frauds, statute of ⚖️129(3)

Where transfer of an interest in land is made to one person and purchase price is paid by another who subsequently agrees orally to surrender his interest and there has been some performance by trustee in accordance with such oral contract, or his position has been changed as a result of it, the surrender is effective irrespective of requirements of Statute of Frauds.

Ratzer & Bridge, Los Angeles, for appellant.

Lee J. Myers, Los Angeles, for respondents.

DRAPEAU, Justice.

By the instant action, plaintiff seeks to establish a trust in an undivided one-half interest of a parcel of realty together with the household equipment and certain livestock located upon the premises.

It appears to be undisputed that pursuant to an oral agreement between them, the parties hereto purchased the property on February 21, 1946, for \$14,000 cash. Plaintiff and defendants each contributed \$5,000 of their own money and defendants borrowed \$4,500, payable at the rate of \$47.73 per month, secured by a trust deed on the property. Four Thousand dollars of this loan was used to complete the purchase price, the balance of \$500 was retained by defendants. It was also agreed that each of the parties was to pay one-half of the purchase price and that title to the property should be taken in the names of the defendants. It is conceded that plaintiff never

paid the remaining \$2,000 which she assumed to pay on the purchase price.

Plaintiff testified that she repeatedly requested defendants between February 21 and July 5, 1946, to give her some written evidence of her ownership of an undivided one-half interest in the property. Defendant Ralph B. Altman, who is plaintiff's brother, testified that he had a conversation with plaintiff on July 5th at which time the latter stated that she "wanted to get out of the deal. She didn't want any part of the property. All she wanted was her money back with interest." As a result the following instrument was executed by defendants and delivered to plaintiff:

Feb. 21, 1946

"Received of Della N. Johnson the sum of Five Thousand no/100 dollars (\$5,000.-00) as a loan with interest at 6%. To be paid in part or in full as soon as possible.

"R. B. Altman

"Cora S. Altman"

With respect to this document the trial court questioned plaintiff as follows:

"The Court: Let me ask you a question, Mrs. Johnson. When he handed you this paper you testified he said, 'Suppose we make this a straight loan.' You said, 'All right'?

"The Witness: I said all right because I didn't have anything at all to show that I had given him \$5,000.00.

"The Court: I understand. When you were given this paper you understood that your \$5,000 was then a loan which they were to pay you back in cash. Was that the idea?

"The Witness: Cash plus interest, yes.

"The Court: Which would take the place of your interest in the property?

"The Witness: Yes."

Thereupon the court found that after February 21, 1946 difficulty and disagreements arose between the parties regarding the property and on July 5, 1946, plaintiff "orally agreed to transfer and surrender to defendants her interest in said property" in consideration of the defendants agreeing to pay her within a reasonable time after that date the sum of \$5,000, with in-

terest at 6% computed from February 21, 1946. That defendants "thereupon agreed to pay to plaintiff said sum of \$5,000, within a reasonable time after July 5, 1946," with interest at 6% from February 21, and the plaintiff "thereupon released and relinquished to said defendants all of her interest" in said property, which agreement was evidenced by the memorandum in writing heretofore quoted in full.

From the ensuing judgment in favor of defendants, plaintiff appeals, urging that since her interest could be transferred only by an instrument in writing in the manner and form prescribed by statute, she has never lost her right to an undivided one-half interest in the property.

[1] While, as stated by the trial court, "there is no satisfactory decision in California upon the subject," section 460, Restatement of Trusts, recites the rule commonly followed:

"Where a transfer of an interest in land is made to one person and the purchase price is paid by another, the resulting trust which arises in favor of the payor can be extinguished by an oral conveyance or surrender of his interest by the beneficiary of the resulting trust to the trustee.

"*Comment: a.* The resulting trust in this situation arises from the fact of the payment of the purchase price and without any writing. As has been stated the inference that a resulting trust arises from the payment of the purchase price can be rebutted without a writing (see sec. 441, *Comment b*). Similarly, it can be extinguished without a writing."

In the California annotations to this volume it is said regarding section 460, *supra*, that no case in point was found, but that *Millard v. Hathaway*, 27 Cal. 119, contains *dicta* that a release by the payor of his interest under a resulting trust must be proved in writing.

Appellant here relies upon *Millard v. Hathaway*, *supra*. Respondents cite *Carter v. Hopkins*, 79 Cal. 82, 21 P. 549, in which money had been advanced by one Bouldin, plaintiff's intestate, to purchase a lot in San Francisco, title to which was taken in the name of Hopkins. In the ac-

tion brought to establish a resulting trust, there was testimony that there had been a settlement between Bouldin and Hopkins in which the latter had conveyed to Bouldin certain property in San Bernardino County in payment of all advances made by Bouldin, although there was no conveyance by Bouldin of his interest in the trust property. A nonsuit granted at the close of plaintiff's evidence was sustained. Upon appeal *Millard v. Hathaway*, *supra* was cited and relied upon, but the court stated: "Conceding that a resulting trust was established as to the lot in the city and county of San Francisco, the court is of the opinion that this trust was extinguished by the conveyance by Hopkins to Bouldin of the land in the county of San Bernardino, and that the statute of frauds does not require a conveyance by Bouldin to Hopkins of his equitable interest in the San Francisco lot."

An interesting discussion of the point here at issue may be found in *Nicolds v. Storch*, 67 Cal.App.2d 8, at pages 14-16, 153 P.2d 561. The question is not there directly decided however, because of the applicability of the doctrine of equitable estoppel to the facts presented.

[2, 3] In the cause here under review, it is clear that after the agreement of July 5, 1946, was made, respondents paid all taxes and other expenses of maintaining the property as well as the installments on the trust deed, and that appellant made no contributions of any kind, testifying at the trial that after the agreement was made she considered she was no longer responsible for payments on the trust deed. Such factual situation comes within the doctrine of equitable estoppel stated in 106 American Law Reports 1318, to-wit: "Whatever may be the nature of the trust relation, all courts agree that where there has been some performance by the trustee in accordance with the oral contract, or where his position has been changed as a result of it, the surrender is effective irrespective of the requirements of the Statute of Frauds."

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

96 Cal.App.2d 521

PEOPLE v. SELL.**Cr. 734.**

District Court of Appeal, Fourth District,
California.

March 17, 1950.

James Clifford Sell was held to answer after preliminary hearing upon a charge of violation of the Vehicle Code, § 480. The Superior Court of San Diego County, Dean Sherry, J., granted defendant's motion to quash and dismiss the information which had been later filed and the people appealed. The District Court of Appeal, Barnard, P. J., held that statute requiring driver involved in accident to stop, render assistance and give information was intended to require certain things from driver of vehicle involved in automobile accident of any kind, resulting in injury to another, regardless of whether another vehicle was involved.

Order reversed.

1. Automobiles ⇐336

In statute requiring driver "involved in an accident" to stop, render assistance and give information, the word "involved" is used in the sense of being connected with an accident in a natural or logical manner. Vehicle Code, §§ 480, 482.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Involved".

2. Automobiles ⇐336

Statute requiring driver "involved in an accident" to stop, render assistance and give information is in no way made dependent upon whether or not control of a vehicle is retained or lost, or upon who may ultimately be found to have been most at fault. Vehicle Code, §§ 480, 482.

3. Automobiles ⇐336

Statute requiring driver involved in accident to stop, render assistance and give information was intended to require certain things from driver of vehicle involved in automobile accident of any kind, resulting in injury to another, regardless of whether or not another vehicle was involved. Vehicle Code, §§ 480, 482.

4. Criminal law ⇐238

Where defendant suddenly pulled left into inside lane "side-swiping" overtaking automobile which swerved to left and collided with on-coming vehicle, and defendant allegedly failed to stop, evidence at preliminary hearing was sufficient to show reasonable or probable cause for holding him to answer charge of violation of statute requiring driver involved in accident to stop, render assistance and give information, even though driver of automobile which had been "sideswiped" testified that he had not lost control of his vehicle. Vehicle Code, §§ 480, 482.

Fred N. Howser, Attorney General,
Frank Richards, Deputy Attorney General,
for appellant.

William Henry Daubney, Oceanside, for
respondent.

BARNARD, Presiding Justice.

The defendant was charged with a violation of section 480 of the Vehicle Code, it being alleged that while driving an automobile on June 19, 1949, he collided with another automobile, thereby causing injuries to four people, and that he failed to stop, to render reasonable assistance, and to give the information required by section 482. After a preliminary hearing the court found there was probable cause and held him to answer. The People have appealed from an order granting the defendant's motion to quash and dismiss the information which was later filed.

From the evidence received at the preliminary examination the following facts appear. The accident occurred on Highway 101, a short distance north of Encinitas. The highway consisted of four lanes, the easterly two being for northbound travel and the westerly two for southbound travel. Just before the accident the defendant was driving north in the easterly lane, with a car in front of him and one behind him driven by one Deines. These cars were proceeding at about 35 miles per hour. After sounding his horn, Deines

drove into the westerly of the northbound lanes for the purpose of passing the other cars. When he was nearly opposite the defendant's car the defendant suddenly pulled over into that lane, striking or "sideswiping" the Deines car. The Deines car swerved to the left and across the double line. At the same time two other cars were coming south, one on the inside lane and one on the outside lane. By maneuvering his car Deines managed to "miss" the first of these cars, but collided with the other one. Deines and three members of his family suffered serious injuries.

In a statement which he signed the next day, the defendant stated that he did not know what happened after his car collided with another car, and that "I just drove on. I guess I should have stopped." Two witnesses who were riding in a car immediately to the rear of the Deines car, and who saw the accident, testified that the driver of the defendant's car went on a short distance, "halted" or "hesitated a moment," and then drove away. These witnesses followed the defendant's car and secured its license number, which they turned over to an officer at the next town. In reply to a question Mr. Deines testified, on cross-examination, that he did not lose control of his car when it was sideswiped by the defendant's car.

The motion to quash and dismiss the information was based on the contention that section 480 of the Vehicle Code was not applicable under the facts thus appearing. In support of the motion it was argued that since Deines did not lose control of his car by reason of its collision with the defendant's car, the injuries subsequently received by those in the Deines car resulted entirely from the second collision; that it thus appears that the injuries were not the result of any collision with the defendant's car; and that it follows that no offense was committed by the defendant. In passing upon the motion the trial judge stated that the case turned on the matter of control, and that since Deines had testified at the preliminary hearing that he did not lose control of his car as a result of the first collision it necessarily followed

that he, and not the defendant, was responsible for what took place thereafter.

[1-3] Section 480 of the Vehicle Code is, by its terms, made applicable to the driver "of any vehicle involved in an accident resulting in injury" to another person. It seems clear that the word "involved" is there used in the sense of being connected with (an accident) in a natural or logical manner. The statute relates to a driver thus involved in such an accident and is in no way made dependent upon whether or not control of a vehicle is retained or lost, or upon who may ultimately be found to have been most at fault. The statute was intended to require certain things from the driver of a vehicle involved in an automobile accident of any kind, resulting in injury to another, regardless of whether or not another vehicle was involved. *People v. Kinney*, 28 Cal. App.2d 232, 82 P.2d 203.

By turning into the lane occupied by the Deines car and striking that car, the defendant's car inevitably caused the driver of the Deines car to swerve to his left and into the paths of the other vehicles. There were not two accidents, within the meaning of section 480, but there was one accident with which the defendant's car was connected in a natural and logical manner. While Mr. Deines retained some control of his car the evidence clearly shows that this was not a complete control as he was not free to immediately proceed in the same lane, or turn to the right, but was forced to swerve to his left across the center line. Having been forced into this position of danger by the defendant's car, it is immaterial that he was able to use some control of his own car in attempting to avoid the on-coming vehicles. In modern traffic, accidents of this nature occur in seconds or split seconds, and section 480 was never intended to have the limited application which is inherent in the construction placed upon it by the trial court. Whether or not the defendant was entirely responsible for this accident his vehicle was involved therein, within the meaning of the statute.

[4] The evidence is amply sufficient to show reasonable or probable cause for holding the defendant to answer, *People v. Thomas*, 90 Cal.App.2d 491, 203 P.2d 567, and the trial court's conclusion to the contrary cannot be sustained.

The order appealed from is reversed.

GRIFFIN and MUSSELL, JJ., concur.



96 Cal.App.2d 481

DIVISION OF LABOR LAW ENFORCEMENT DEPARTMENT OF INDUSTRIAL RELATIONS v. SAFEWAY STORES, Inc.

Civ. No. 4019.

District Court of Appeal, Fourth District,
California.

March 15, 1950.

Hearing Denied May 11, 1950.

Action by Division of Labor Law Enforcement, Department of Industrial Relations, State of California, against Safeway Stores, Incorporated, on behalf of two employees to recover wages allegedly due under a union contract. The Superior Court for Kern County, Robert B. Lambert, J., rendered a judgment for plaintiff, and the defendant appealed. The District Court of Appeal, Mussell, J., held that defendant's compilation of bonus under its compensation plan did not violate a minimum weekly salary provision of the union contract.

Judgment reversed.

1. Master and servant ⇨72

Promise of employer to pay employees a bonus in accordance with a stated compensation plan whereby certain employees would receive quarterly a stated percentage of sales if a certain sales volume was reached was a promise to pay additional compensation over the weekly salary and was to be considered as additional salary.

2. Master and servant ⇨70(1)

A union contract determining minimum weekly salary to be paid to employees, and a bonus compensation plan promulgat-

ed by the employer were to be considered and construed together and effect was to be given to provisions of both. Civ.Code, § 1642.

3. Contracts ⇨154

Where a contract is susceptible of two interpretations, one of which is reasonable and fair and the other unreasonable and unfair, the latter interpretation must be rejected, and the first accepted.

4. Master and servant ⇨72

Under union contract establishing a minimum weekly salary of \$85.00 for head meat cutters and providing that bonuses should not be compiled into salary schedule so as to defeat purpose of contract, and under employer's compensation plan providing bonus based on quarterly percentage of sales subject to prepaid bonus deductions in amount of payments in excess of employer's base pay scale of \$65.00 per week, head meat cutters were entitled to \$85.00 per week without deductions, and thereafter employer was free to pay additional compensation according to any formula so long as weekly payments were not reduced below \$85.00.

5. Evidence ⇨448

Where a contract is clear and unambiguous, testimony of prior oral negotiations is inadmissible to vary contract terms.

6. Appeal and error ⇨1010(1)

A finding of fact unsupported by or contrary to evidence is not binding upon an appellate court; and where there is no conflict, finding of trial court amounts to a conclusion of law.

Norman S. Sterry, Los Angeles, Calvin H. Conron, Jr., John W. Heard, Jr., Bak-ersfield, Gibson, Dunn & Crutcher, Los Angeles, William French Smith, Los Angeles, of counsel, for appellant.

Pauline Nightingale, Edward M. Belasco, Leon H. Berger, Los Angeles, for respondent.

MUSSELL, Justice.

Defendant appeals from a judgment in favor of plaintiff in an action brought on

behalf of two employees of defendant to recover wages which it was alleged were due them under the provisions of a contract between defendant and the Butchers' Union Local 193 of the Amalgamated Meat Cutters and Butcher Workmen of North America, hereinafter referred to as the "Union".

For many years prior to June 20, 1946, the defendant, throughout its Los Angeles Division, had paid its market managers or head meat cutters a weekly salary which had been fixed by contracts with the Union, and had in addition to said weekly salary, paid quarterly to its market managers or head meat cutters a bonus. No contract had provided for or required such bonus and the method of its computation had always been prescribed by the defendant. During the whole of the year 1946 the contract between the Union and the defendant called for a minimum weekly pay to market managers of \$65.00 per week for a 48-hour week; prior thereto, the weekly payments having been based on a 54-hour week. In 1947, a new bargaining agreement was executed between defendant and the Union in which the minimum weekly pay of market managers was fixed at \$85.00.

In June, 1946, defendant inaugurated a bonus plan whereby head meat cutters could receive quarterly $\frac{3}{4}$ of 1% of their meat section sales, if a certain sales volume was reached; such bonuses were paid to plaintiff's assignors quarterly when they properly earned under the terms of the plan. The pertinent provisions of this plan were as follows:

"Head Meat Cutters' Compensation Plan

"The Company's plan for compensating Head Meat Cutters provides for each Head Meat Cutter to receive the following:

"1. A weekly salary, as established by the Distribution Division Manager.

"2. A quarterly bonus based on Meat Section sales, providing he qualified as hereinafter outlined.

"Safeway Base Pay

"The Distribution Division Manager shall designate the Safeway Base Pay for the Safeway Workweek, which is the

number of hours regularly required to be worked as established by the Distribution Division Manager. The amount of the Safeway Base Pay and the number of hours to be worked for such pay shall be announced in the usual manner for each Zone or area.

"Such Safeway Base Pay may or may not be the same as the weekly salary the Head Meat Cutter receives for the same number of hours of work. Any weekly salary the Head Meat Cutter receives for the Safeway Workweek, which is in excess of the Safeway Base Pay shall be considered Prepaid Bonus and deducted from the quarterly bonus when settlement is made.

"For example, a Distribution Division Manager may establish a Safeway Base Pay of \$50.00 for a Safeway Workweek of 54 hours of work. In such cases, any amount the Head Meat Cutter receives in excess of \$50.00 for 54 hours work, regardless of how such pay is calculated, would be Prepaid Bonus and deducted from the bonus due, if any, when the quarterly settlement is made."

* * * * *

"Prepaid Bonus Deductions, If Any

"As previously outlined, all payments in excess of the Safeway Base Pay, other than pay for hours worked in excess of the Safeway Workweek, shall be deducted from the quarterly bonus when settlement is made."

"Subject To Change Without Notice

"The plan outlined above can be abandoned or amended by the Company at any time without notice, and notwithstanding such plan or the payment of compensation thereunder, the Company shall have the right to terminate or change the employment of any employee at any time it decides such change is desirable and in the best interests of the company."

It was stipulated that in February, 1946, the defendant issued a bulletin, which was sent to all its stores, in which it was announced that as of February 11, 1946, the base pay of head meat cutters (market managers) would be \$65.00 per week; that the bulletin has never been revoked or

cancelled; that the compensation plan was sent to each of defendant's stores and was not superseded or changed until some time in the year 1948.

The bargaining agreement of 1946 contained the following provision: (sub. par. J)

"In no case will bonuses be compiled into the salary schedule." and in the 1947 agreement, a change was made in this provision so that it read: "(i) In no case will bonuses be compiled into the salary schedule *so as to defeat the purpose of this contract.*" (Italics ours.) There was no reference in either of the agreements to the bonus plan and the word "bonuses" was used only in the paragraphs quoted.

In calculating the amounts due as bonuses during 1946, the defendant used the base pay of \$65.00 per week as fixed by its bulletin and paid those who earned bonuses the weekly wage of \$65.00, less required legal deductions. During each week of their employment in 1947, the period for which this action was brought and after the execution of the 1947 Union contract, defendant paid to plaintiff's assignors their weekly wage of \$85.00, less required legal deductions, and as in 1946, all payments made in excess of the base pay of \$65.00, as established by the bulletin, were deducted from the quarterly bonus when settlement was made. In the period involved in 1947, the increase of \$20.00 per week in the minimum wages, as established by the Union contract, was treated as a payment in excess of the base pay established by defendant in its bulletin and deducted from the quarterly bonus. In addition to the written statement of facts, which was submitted to the trial court, testimony was introduced, over objection, as to oral negotiations between the Union and the defendant preceding the contract of 1947 and testimony of the plaintiff's assignors that the sums due them had not been paid.

It was the contention of plaintiff in the court below, and is here, that in calculating the amount of bonus to be paid to those market managers who qualified for it, Saway violated the provision of paragraph (i) of the contract in deducting from the

$\frac{3}{4}$ of 1% of the assignors' gross sales the difference between Saway's established base pay of \$65.00 per week and the Union contract of \$85.00 per week.

The trial court found in part as follows:

"(5) That during the aforesaid employment periods the defendant paid each of plaintiff's assignors the sum of \$85.00 per week, \$65.00 of said sum being wages and \$20.00 of said sum being advance payment on bonus.

"(6) That at the end of the first three months period in March, 1947 the defendant presented a document to each of plaintiff's assignors, setting forth the bonus wages earned; that the said \$20.00 per week payment was reflected on the document as prepaid bonus; that the calculations of the defendant showed that the total bonus wages earned were in excess of \$20.00 per week times the number of weeks in the said three months period; that plaintiff's assignor Bese was given an additional bonus wage payment of \$41.42 and plaintiff's assignor Blomquist was given an additional bonus wage payment of \$31.45; that at the termination of the employment of plaintiff's assignors at the date set forth above, another calculation was made and similar documents were presented to plaintiff's assignors showing the bonus wages earned and the \$20.00 weekly bonus payments as having been prepaid; and that plaintiff's assignor Bese was given an additional check of \$27.33 and plaintiff's assignor Blomquist was given an additional check in the sum of \$30.39, covering the amounts of bonus wages in excess of the \$20.00 per week bonus wage advance given them.

* * * * *

"(8) That the said collective bargaining agreement contains a provision designated as (i) of Art. 17, which provides the following: 'In no case will bonus be compiled under the salary schedule so as to defeat the purpose of this contract.'

"(9) That the said collective bargaining agreement was entered into by and between the above designated union and the defendant for the benefit of defendant's employees, including plaintiff's assignors.

"(10) That the defendant violated the terms of the said collective bargaining agreement in that it calculated bonus and salary in a manner which defeated the purpose of the contract by causing one payment of \$20.00 per week each to plaintiff's assignors to cover bonus wages and regular wages at the same time."

Judgment was rendered in favor of plaintiff for \$940.00, which sum was the amount deducted by defendant from the bonus settlements of plaintiff's assignors in excess of the base pay established by defendant in its compensation plan.

The single question presented by this appeal is whether the "quoted findings" were supported by or contrary to the evidence.

Defendant argues that "the so-called findings are not findings at all, but the court's conclusions of law, its interpretation of the contract and plan", and that whether considered as conclusions of law or findings of fact, they are unsupported by and contrary to the record, for the following reasons:

"1. That the appellant's method of computing the bonus did not constitute a compilation of the bonus into the salary schedule or constitute any part of the weekly salary as other than salary. On the contrary it constituted a compilation of the salary schedule into the computation of the bonus.

"2. That even if it should be conceded that there was a compilation of the bonus into the salary schedule, it was not compiled so as to defeat the purpose of the contract, it being obvious that the purpose of the contract was to insure a minimum weekly wage of \$85.00 per week to each head meat cutter, regardless of whether he received further or additional compensation then or later.

"3. That the construction of the contract and the bonus plan contended for by the plaintiff and adopted by the court is obviously against the manifest intent of the parties.

"4. Even if the documents were subject to the construction contended for by the plaintiff and adopted by the court,—and

they are not,—it must be rejected under the rule that where instruments are susceptible of two interpretations, one which is unreasonable, unfair and will lead to unjust results, and the other reasonable and fair and leading to just results, the first interpretation must be rejected and the latter accepted."

This action is based solely on the provisions of paragraph (i) of the 1947 Union contract and under the provisions of that paragraph, plaintiff, to prevail, must have established that defendant's method of computing the bonus amounted to a compilation of its bonus payments into its salary schedule and further that such compilation defeated the purpose of the contract.

The word "compile" is defined in Webster's New International Dictionary as follows: "Compile: 1. To collect together (literary materials) into a treatise or volume. 2. To put together in a new form out of materials already existing; esp., to compose out of materials from other books or documents; as, to compile a history of Rome. 3. Obs. a. to write; to compose. b. To put together; to heap up; to construct; build. c. To contain; specif., to contain on account of."

It is apparent that the bonus payments were not added to, projected into, or included in the salary schedule. There was no deduction made in the amounts due as wages in the salary schedule. Plaintiff's assignors received a minimum wage of \$65.00 per week in 1946 and \$85.00 per week in 1947, and there is no contention that these amounts were not paid as provided in the contract.

It is also apparent that the purpose of the 1947 contract was to require the defendant to pay each of its market managers a minimum of \$85.00 per week, regardless of whether at the end of any quarter he did or did not qualify for a bonus. The defendant's obligation to its market managers, considering the contract alone, was fully satisfied by the payment to them of \$85.00 per week. Under the plain terms of the compensation plan, the defendant was authorized to change it at any time without notice and could have discontinued the payment of any bonus whatever. Fur-

thermore, there was nothing in the Union contract requiring the payment of any bonus. It seems clear to us that the purpose of paragraph (i) was to make sure that the minimum weekly wage of \$85.00 was paid without deductions and to prevent the defendant from paying weekly to its market managers less than \$85.00 per week and contending that the difference was made up by a bonus. Any other interpretation would mean that the defendant, after the execution of the contract, could not reduce or change the bonuses then being paid. In this connection it should be noted that in the testimony concerning the negotiations with reference to paragraph (i) of the contract, it appeared that the paragraph as first submitted read as follows: "Any bonus, when issued, shall not be altered or reduced after the signing of this contract." This provision of the contract was not satisfactory to defendant and it refused to execute the contract with such a provision in it. Obviously, there was no agreement limiting the defendant as to its right to change, modify or abandon the bonus plan.

[1] We cannot find substantial evidence in the record to support the trial court's finding (5) to the effect that defendant paid plaintiff's assignors \$85.00 per week, of which \$65.00 was wages and \$20.00 advance payment on bonus. Defendant's promise to pay a bonus in accordance with its plan was a promise to pay additional compensation, *Hunter v. Ryan*, 109 Cal.App. 736, 737, 738, 293 P. 825, and such compensation is to be considered as additional salary. *Walling v. Stone*, 7 Cir., 131 F.2d 461, 464.

While in the statements sent to plaintiff's assignors the words "prepaid bonus" were used to describe the deduction of \$20.00 per week from the bonus amount, it does not follow that the amounts so deducted were a part of the minimum salary payment required by the contract. The bonus was payable quarterly and was conditioned upon the total gross sales of any market equaling a specified percentage of the total gross sales of all markets in that division. The record shows that in the two

quarters of 1946, after the adoption of the plan, a number of market managers received no bonus payments because of failing to qualify therefor, assignor Bese being one who failed during the last quarter. In the first two quarters of 1947, twelve out of twenty-five managers in the first quarter and nine out of twenty-six in the second quarter failed to maintain the required volume of sales and were paid no bonus. As to those managers whose volume of gross sales did not reach the required percentage to entitle them to the bonus, the whole of the weekly payments which had been made them was salary and no part of it could be considered as prepaid bonus, for the reason that they earned and were paid no bonus whatever. Furthermore, at the time the weekly wage payments were made, neither the market manager nor the defendant could have known whether a manager would earn or be paid a bonus. It therefore appears that \$20.00 of the weekly payments was not paid as prepaid bonus, but was designated as such in the calculation of bonus earned under the plan to show the deduction allowed by the plan over the base pay fixed by the terms thereof. The words "prepaid bonus" appear only in the plan and in the statements sent to the market managers and they were not intended to and did not apply to or limit the contract for the payment of wages or salary.

The compensation plan, in plain terms, provided for the designation and establishment of a "Safeway base pay", which might or might not be the same as the weekly salary of a head meat cutter. It was further specifically provided therein (for the purpose of bonus computation only) that all payments in excess of the "Safeway base pay" were to be deducted from the quarterly bonus when settlement was made and that the plan could be abandoned or amended by the company at any time without notice.

[2] The contract of 1947 and the compensation plan must be considered and construed together and effect given to the provisions of both documents. *Hawes v. Lux*, 111 Cal.App. 21, 23, 24, 294 P. 1080;

Civil Code, Sec. 1642; Flinn & Treacy v. Mowry, 131 Cal. 481, 484, 485, 63 P. 724, 1006; Lynch v. Bank of America, etc., 2 Cal.App.2d 214, 222, 223, 37 P.2d 716; Citizens Nat. Trust & Savings Bank v. Arrowhead Springs Bev. Co., 126 Cal.App. 550, 554, 14 P.2d 821; Cobb v. Doggett, 142 Cal. 142, 144, 75 P. 785; Daniels v. Daniels, 3 Cal.App. 294, 297, 298, 85 P. 134.

Construing the contract and plan together, it clearly appears that the defendant was obligated to pay its market managers a weekly salary of \$85.00; that in addition to the \$85.00 salary, it was required to pay a bonus when earned according to the plan. The bonus payments were to be over and above the \$85.00 per week salary, and the defendant could not alter or amend the plan so that bonus payments would reduce the salary below \$85.00 per week.

The defendant's method of computing the bonus payments under the compensation plan did not defeat the purpose of the contract for the reason that the purpose of the contract was to raise the weekly pay from \$65.00 to \$85.00, irrespective of whether certain additional compensation by way of bonuses was or was not paid. It is apparent that upon paying each market manager \$85.00 per week, the defendant was free to pay additional compensation or not, and, if it elected to do so, use any formula that it desired in computing it, so long as it did not in paying additional compensation reduce the weekly payments below the stipulated amount of \$85.00.

[3,4] Where a contract is susceptible of two interpretations, one of which is reasonable and fair, and the other is unreasonable and unfair, the latter interpretation must be rejected and the first accepted. Cohn v. Cohn, 20 Cal.2d 65, 70, 123 P.2d 833; Stein v. Archibald, 151 Cal. 220, 223, 90 P. 536. We are impelled to the conclusion that the construction adopted by the court was not reasonable, fair and just in the instant case, for under the rule of construction adopted by it, the right of the defendant to change, modify or alter its compensation plan was definitely curtailed.

[5] The evidence introduced as to negotiations prior to the execution of the 1947 contract does not in our opinion aid the plaintiff and, on the contrary, it supports the contentions of the defendant. The contract is clear and unambiguous and, therefore, the testimony of prior oral negotiations is inadmissible. Courtwright v. Dimmick, 22 Cal.App.2d 68, 70, 70 P.2d 269; Payne v. Commercial Nat. Bank, 177 Cal. 68, 72, 169 P. 1007, L.R.A.1918C, 328.

As heretofore noted, prior to the opening of the negotiations the Union had submitted a proposed contract in which paragraph (i) read: "In no case will bonuses be compiled into the salary schedule *neither shall they be reduced after the signing of this contract* so as to defeat the purpose of this contract." (Italics ours.) Opposite this proposal the industry representatives had written the word "no" and in the ensuing conferences, the industry representatives refused to agree to the clause as proposed and the italicized words were, by agreement of the parties, omitted from paragraph (i).

A witness called by the plaintiff, who was secretary and treasurer of a butchers' local and represented the Union, testified:

"A. There had been inserted into the previous contract, the wording which was slightly different at this particular time, which said 'Any bonus, when issued shall not be altered or reduced after the signing of this contract.' There were objections on their part to that which at that particular time I said we would carry it on, and there would be further discussion. That ended up at that time, and we arrived at a deadlock.

"Q. What was the dispute over—give us an example?

"A. The conclusion was at the next meeting a certain portion be stricken out 'to be altered or changed', that is to change the plan of the bonus, the objections which we had to it was the fact we didn't wish them to pay the individuals a certain basic wage, and then count the difference between the basic wage and that wage, which would cut down contractual negotiations. He didn't feel it would be right to pay the

individual \$65 a week on a basis which was not part of the contract, and which appeared had no bearing whatsoever, and was strictly a merit program offered by Safeway to their employes, that they would take that merit program and include that into the salary schedule, and claim that was part of the salary that was arrived at in the negotiations. We wanted the \$85, so the wages would be \$85 salary, not \$65 salary and \$20 bonus, but \$85 salary, and this clause was arrived at and inserted according to the negotiations.

"Q. And this clause was put in subsequent to the Safeway plan being in operation?

"A. That is right."

The uncontradicted testimony of the authorized representative of the industry was in part:

"* * * that we felt the bonus was a managerial prerogative, and I would not agree that they take that. In the negotiations we were strictly dealing with Union wages and so on account of the clause being in the 1946 contract, there was no objection made if the center part of the clause was stricken out 'To defeat the purpose of the contract', because we were dealing with the minimum rate of pay, and as long as they got \$80 or \$85 there was no bearing on beating the purpose of the contract.

"Q. When you say \$80 and \$85, you are referring to \$80 for the journeymen and \$85 for the head meat cutters? A. Yes.

"Q. Was that what you told the Union representatives? A. That has always been our position.

"Q. Is that what you told them, in substance? A. That is right."

From the foregoing testimony it is quite evident that the Safeway representative understood that if the company paid the increased amount of \$85.00 each week to its market managers, it could continue to compute its bonuses in accordance with its published and promulgated plan.

We think that the oral testimony was inadmissible to vary the terms of the contract. *Dollar v. International Banking*

Corp., 13 Cal.App. 331, 336, 343, 109 P. 499.

[6] It is contended by the plaintiff that it is the province of the trial court to determine disputed issues of fact and that the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence to support the trial court's findings. *Overton v. Vita-Food Corp.*, 94 Cal.App.2d 367, 210 P.2d 757, and that this court is bound by the trial court's construction of the contract where parol evidence is introduced in aid of interpretation of the contract, and where the evidence is such that conflicting inferences may be drawn therefrom. However, a finding of fact unsupported by or contrary to the evidence is not binding upon an appellate court. Where there is no conflict in the evidence, the finding of the trial court amounts to a conclusion of law. *San Diego Trust & Savings Bank v. County of San Diego*, 16 Cal.2d 142, 153, 105 P.2d 94, 133 A.L.R. 416. As said in *Leis v. City and County of San Francisco*, 213 Cal. 256, 258, 2 P.2d 26, 27: "The evidence thus educed before the trial court being, as to the essential factors thereof, undisputed and indisputable, the findings and conclusions of the trial court thereon amounted to merely conclusions of law, and, as such, the proper subject of review upon this appeal."

There is nothing in the record showing that the \$20.00 a week was paid as bonus, as stated in the court's fifth finding. The record is to the contrary, it being stipulated that each week \$85.00 was paid to plaintiff's assignors and each and every other head meat cutter. The statement of the trial court that \$20.00 of each week's payment was an advanced bonus payment was the court's conclusion as to what was the legal effect of the stipulated acts of the parties.

It seems clear to us that the trial court's finding (10), wherein it is stated that the defendant violated the terms of the contract by its method of payment, was also a conclusion. Particularly is this true, where, as here, there was no declaration by the trial court, either as a purported

finding or as a conclusion, of the purpose of the contract.

We conclude that the findings are not supported by substantial evidence. Judgment reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; CARTER, J., dissenting.



96 Cal.App.2d 503

DE SYLVA v. BALLENTINE et al.
Civ. 17112.

District Court of Appeal, Second District,
Division 2, California.

March 17, 1950.

Rehearing Denied April 3, 1950.

Hearing Denied May 15, 1950.

George G. DeSylva brought action against Marie Ballentine and Stephen William DeSylva for a determination of rights and duties of the respective parties under statute making father as well as mother of an illegitimate child liable for support and education of the child and under a contract entered into between plaintiff and defendant Marie Ballentine, wherein the defendants filed cross-complaints. Judgment was entered by the Superior Court of Los Angeles County, Stanley Mosk, J., and the plaintiff and defendants appealed from portions of judgment adverse to them. The District Court of Appeal, Wilson, J., held that the agreement entered into by plaintiff and defendant Marie Ballentine was not obtained by fraud and that such defendant did not repudiate the agreement either in her own behalf or on behalf of her illegitimate child.

Judgment affirmed.

McComb, J., dissented.

See also 87 Cal.App.2d 643, 197 P.2d 359, 215 P.2d 791.

1. Appeal and error ⇐931(1), 1011(1)

Any conflicts in evidence are for determination of trial court, and every substantial conflict must be resolved on appeal in favor of the findings.

2. Appeal and error ⇐994(3)

Question of credibility of witnesses is for trial court.

3. Bastards ⇐17

Evidence supported finding that contract entered into by putative father and mother of illegitimate child for child's support was not induced by fraud or coercion on mother's part. Civ.Code, §§ 137 et seq., 196a.

4. Bastards ⇐17

Evidence supported finding that mother of illegitimate child did not repudiate contract which she entered into with putative father for child's support. Civ.Code, §§ 137 et seq., 196a.

5. Bastards ⇐17

Negotiations by mother of illegitimate child with putative father for establishment of a trust fund for child's future support did not constitute a repudiation of prior contract entered into by mother and putative father for child's support by mother on behalf of the child. Civ.Code, §§ 137 et seq., 196a.

6. Bastards ⇐17

A contract entered into by putative father and mother of illegitimate child for child's support, which had not been approved by court, was valid between parties although not binding upon child. Civ.Code, §§ 137 et seq., 196a.

7. Bastards ⇐16

Under statute, the court had power to require both putative father and mother of illegitimate child to contribute to child's support. Civ.Code, § 196a.

8. Bastards ⇐16

Maintenance of the mother of illegitimate child is a necessary part of support of the child. Civ.Code, § 196a.

9. Bastards ⇐17

Where contract entered into by putative father and mother of illegitimate child for child's support contained no provision for a reduction in payments in event of death of either mother or child, and contract, though binding on parties, was not binding on child because not approved by

court, subsequent order of court based on finding that child's needs were \$350 a month in addition to any benefits which he might receive under the contract requiring putative father to pay \$250 a month of the amount and the mother to pay the other \$100 was not improper as an attempted allocation of payments under the contract between mother and the child. Civ.Code, §§ 137 et seq., 196a.

10. Bastards ⇨17

Action of mother of illegitimate child in seeking appointment of a guardian in connection with establishment of a trust fund for the child or for purpose of bringing action under statute for enforcement of obligations of putative father did not constitute a repudiation of contract previously entered into by putative father and mother either on behalf of the child or in mother's own behalf. Civ.Code, §§ 137 et seq., 196a.

11. Bastards ⇨17

Where putative father and mother of illegitimate child entered into contract for child's support, mother's refusal to accept tender of checks made by putative father purportedly under the contract did not constitute either a breach of contract or an act of repudiation upon mother's part, where it appeared that checks proffered were in a form other than that required by terms of the agreement, so as not to constitute a proper tender. Civ.Code, §§ 137 et seq., 196a.

12. Bastards ⇨17

Where putative father filed complaint for declaratory relief in which he contended that contract entered into with mother of illegitimate child for child's support was no longer valid and asked a declaration of his rights under statute, mother, by filing cross-complaint, also seeking declaratory relief under the statute, did not thereby repudiate the contract. Civ.Code, §§ 137 et seq., 196a.

13. Bastards ⇨16

Under common law the father of an illegitimate child was under no obligation to provide for its support and education.

14. Executors and administrators ⇨202(1)

Under common law, liability of father of a legitimate child to support his child terminated with his death, but under statute an order for support for legitimate child may survive father's death and continue as a charge against his estate. Civ. Code, § 137 et seq.

15. Executors and administrators ⇨202(1)

Under statute, an order requiring putative father to contribute to support of illegitimate child could survive death of father and continue as a charge against his estate. Civ.Code, §§ 137 et seq., 196a.

16. Bastards ⇨92, 94

The value to be placed on services rendered by counsel to mother of illegitimate child and the child in putative father's action under statute for determination of rights and duties of the parties was within trial court's discretion, and District Court of Appeal would not substitute its opinion for that of trial court unless as a matter of law trial court abused its discretion. Civ.Code, § 196a.

17. Appeal and error ⇨946

Discretion is "abused" and thereby subject to review, whenever in its exercise the court exceeds the bounds of reason, all circumstances before it being considered.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Abuse of Discretion".

18. Attorney and client ⇨140

In determining reasonable compensation for an attorney who has rendered services in connection with a legal proceeding, court must consider nature of litigation, its difficulty, amount involved, skill required and skill employed, attention given, success of attorney's efforts, his learning, age and experience in particular type of work, intricacies and importance of litigation, labor and necessity for skilled legal training, and ability in trying cause and time consumed.

19. Bastards ⇨94

An award of \$11,990 to attorneys for mother of illegitimate child and the child in putative father's action for determina-

tion of rights and duties of the parties under statute and under contract entered into by putative father and mother, in addition to amount of \$5,300 previously paid by putative father pursuant to pendente lite orders, was not so excessive as to constitute abuse of discretion. Civ.Code, § 196a.

20. Bastards ⇨82

Where order was entered requiring putative father to pay \$250 per month for support of illegitimate child in addition to amount which he had agreed to pay in contract entered into by child's mother, which contract was not approved by court, trial court did not abuse its discretion in failing to require father to provide security for payments ordered by the decree to insure payments in event of putative father's death. Civ.Code, § 196a.

21. Bastards ⇨75

Failure to adjudge that plaintiff had acknowledged himself to be father of illegitimate child within purposes contemplated by statute relating to successions in putative father's action for determination of rights and duties of the parties under statute and under contract entered into between himself and mother of the illegitimate child was not error, where such issue was not raised by the pleadings. Civ. Code, § 196a; Probate Code, § 255.

22. Bastards ⇨78

In making order for support and education of illegitimate child, the court should consider needs of the child and financial ability of the father, and father's duty to support child does not end with furnishing of mere necessities if he is able to afford more. Civ.Code, § 196a.

23. Bastards ⇨78

Award for support of illegitimate child of \$350 a month, \$250 of which to be paid by putative father and \$100 of which to be

paid by mother, in addition to any benefits child might receive under contract entered into by putative father and mother, was not so inadequate as to constitute abuse of discretion. Civ.Code, § 196a.

24. Bastards ⇨94

Trial court did not abuse its discretion in reducing amount originally awarded counsel for mother of illegitimate child and the child in putative father's action for determination of rights and duties of the parties under statute and under contract entered into by putative father and mother from sum of \$21,110, including sums paid pursuant to pendente lite orders in amount of \$5,300, to sum of \$11,990 in addition to amount previously paid pursuant to the pendente lite orders. Civ.Code, § 196a.

Pacht, Warne, Ross & Bernhard, Isaac Pacht, Clore Warne and Bernard Reich, Beverly Hills, for plaintiff, appellant and cross-respondent.

Fink, Rolston, Levinthal & Kent, Los Angeles, for defendants, cross-respondents and appellants.

WILSON, Justice.

This action was brought by the father of an illegitimate child for a determination of the rights and duties of the respective parties under section 196a¹ of the Civil Code and under a contract entered into between plaintiff and defendant Marie Ballentine, the child's mother.

In his complaint as amended plaintiff alleges, on information and belief, that he is the father of defendant Stephen William Ballentine; he is willing and able to give and has given the infant suitable support; defendant Marie Ballentine is the mother of the infant; on October 30, 1945, plaintiff and Marie Ballentine entered into an

1. Section 196a: "The father as well as the mother, of an illegitimate child must give him support and education suitable to his circumstances. A civil suit to enforce such obligations may be maintained in behalf of a minor illegitimate child, by his mother or guardian, or by a guardian ad litem appointed upon the written application or with the consent of his

mother; provided, that such application or consent shall not be necessary if the mother is dead or incompetent, and in such action the court shall have power to order and enforce performance thereof, the same as under sections 137, 137.5, 138, 139 and 140 of the Civil Code, in a suit for divorce by a wife."

agreement which provided for the support and maintenance of Marie Ballentine and the child and also for the transfer by plaintiff to Miss Ballentine of certain real property; the agreement was obtained by defendant Marie Ballentine by fraud and deceit; she had engaged in a course of threats and intimidation against plaintiff for the purpose of obtaining money and property for herself and threatened to subject plaintiff and his wife to public scandal and disgrace; she had promised she would cease such threats and intimidations and would not publicize their relationship if allowances were made for the benefit of herself and the child and would discontinue her demands for money and property for herself; in reliance on such promises plaintiff entered into the contract of October 30, 1945; defendant Marie Ballentine never intended to fulfill her promise and instead intended to continue to coerce and intimidate plaintiff for her own benefit; she subsequently repudiated and rescinded the agreement by refusal to accept plaintiff's tender of payments and by demanding additional sums.

Defendants filed an answer denying the allegations of fraud and that there was any repudiation or rescission on the part of defendant Marie Ballentine of the contract. Defendants also filed a cross-complaint by which they sought a determination that plaintiff is the father of the child, reasonable support of the child, security for plaintiff's compliance with the order of court and counsel fees. Plaintiff filed an answer to the cross-complaint.

The trial court found that plaintiff is the father of Stephen William Ballentine; both plaintiff and defendant Marie Ballentine dealt at arm's length in the negotiations immediately preceding the execution of the contract of October 30, 1945, and both had advice of counsel; plaintiff was not influenced nor imposed upon by any representations made to him by Marie Ballentine nor was there any fraud, deceit, coercion or intimidation committed or exercised by her in the inducement or execution of the contract; the contract was not repudiated, rescinded or abandoned by Marie Ballentine; the parties have not

considered negotiations for additional provision for the minor to be inconsistent with the validity and continued existence of the contract; the minor child requires \$350 a month for support and maintenance; it is not necessary that plaintiff provide security for the performance of the order of court.

The court adjudged that the contract of October 30, 1945, is a valid and existing contract; that the minor child is not bound by it nor are his rights limited thereby. Plaintiff was ordered to pay \$250 a month for the support, maintenance and education of the child until March 10, 1949, and \$350 a month thereafter during the minority of the child and until further order of court. Defendant Marie Ballentine was ordered to pay \$100 per month for the support, maintenance and education of the child until March 10, 1949; to pay during the minority of the child all rent, taxes and costs of repairs to any permanent residence occupied by her and the child, and to make payments on the encumbrance on the residence now occupied by them and all payments required by any purchase price indebtedness on any future home in which they may reside. She was further ordered to establish a bank account for the child, which would be subject to certain limitations and restrictions. Plaintiff was ordered to pay attorneys' fees in the sum of \$15,810.

Plaintiff moved for a new trial. His motion was denied but the court modified its judgment and ordered plaintiff to pay \$250 a month and defendant Marie Ballentine \$100 a month for the support of the minor child throughout his minority and until further order of court. The attorneys' fees which plaintiff was ordered to pay were reduced to \$11,900.

Both plaintiff and defendants have appealed from portions of the judgment as modified.

Plaintiff's Appeal

Plaintiff contends that the trial court erred (1) in not finding and ruling, as a matter of law, that the agreement of October 30, 1945, was obtained by the fraud of defendant Marie Ballentine and that she

repudiated the agreement in behalf of the child and herself, or at least in her own behalf, by (a) making unreasonable demands inconsistent with the terms and conditions of the contract, (b) causing a guardian of the estate of the child to be appointed for the purpose of prosecuting a claim against plaintiff for the support and maintenance of the child, (c) refusing plaintiff's tender of performance in March and April of 1947, and (d) cross-complaining under section 196a of the Civil Code; (2) in indirectly modifying the agreement of October 30, 1945, instead of setting it aside and relegating the defendants, or at least the mother, to an election between the contractual rights and the statutory rights under section 196a of the Civil Code; (3) in allocating four fifths of the benefits of the contract to the mother and only one fifth to the child; (4) in failing to rule that plaintiff's obligation to support and maintain the infant is limited to the father's lifetime and (5) in the amount of counsel fees awarded.

[1-3] In support of his contention that there was fraud in the execution of the contract of October 30, 1945, plaintiff asserts that Marie Ballentine made repeated demands upon him for support and maintenance for the child and herself; that as a result of her coercion and intimidation she obtained the contract; that she promised when it was signed she would make no further demands but that at that time she had the secret intention and reservation to make further demands on the part of the child which in turn would benefit her. The trial court, however, found in favor of defendant Marie Ballentine and against plaintiff upon the issue of fraud and specifically found that the parties dealt at arm's length in the negotiations preceding the execution of the contract and that both had advice of counsel; that plaintiff was not influenced nor imposed upon by any representations made to him by Marie Ballentine and there was no fraud, deceit, coercion or intimidation committed or exercised by her in the inducement or execution of the contract. These findings are supported by the evidence. According to the evidence the agreement

was prepared by plaintiff's attorney and originally provided for payments to Miss Ballentine of \$100 weekly. Plaintiff asked her to sign the agreement and she refused. Plaintiff had been paying her \$1000 a month. The agreement was then changed to provide for payments of \$500 monthly until March 10, 1949, and \$100 a week thereafter until March 10, 1965. Miss Ballentine also refused to sign this agreement but later agreed to and did sign it on October 30, 1945.

Any conflicts in the evidence are for the determination of the trial court and every substantial conflict must be resolved in favor of the finding. *Buckhantz v. R. G. Hamilton & Co.*, 71 Cal.App.2d 777, 779, 163 P.2d 756; *In re Estate of Pohlmann*, 89 Cal.App.2d 563, 568, 201 P.2d 446; *Kircher v. Atchison, T. & S. F. Ry. Co.*, 32 Cal.2d 176, 183, 195 P.2d 427. The same is true of the question of credibility of the witnesses. *Kircher v. Atchison etc. Co.*, *supra*. Much of the evidence consists in the testimony of Marie Ballentine. Plaintiff suffered a heart attack and his physical condition was such that he could neither give his deposition nor appear at the trial.

It is plaintiff's contention that Miss Ballentine's secret intention not to keep her promise to make no further demands upon him is borne out by her testimony and her subsequent actions in having a guardian appointed for the child's estate and in making a demand upon him to set up a trust fund for the child. The testimony to which plaintiff adverts does not support his contention. Miss Ballentine testified that she told plaintiff she had no further claim on him; that the question of further demands for the child was not brought up. Furthermore, the court found that the parties did not consider negotiations for additional provisions for the minor to be inconsistent with the validity and continued existence of the contract. *Neilsen v. Neilsen*, 216 Cal. 150, 13 P.2d 715, and *Longway v. Newbery*, 13 Cal.2d 603, 91 P.2d 110, cited by plaintiff, are of no assistance to him. In the *Neilsen* case the findings of the trial court that the agreement was entered into by defendant without any intention of performing it was based on conflicting evi-

dence and its finding was not disturbed. In the Longway case the court held that the evidence did not support the findings.

[4] As to plaintiff's contention that defendant Marie Ballentine repudiated the contract, the court made specific findings adverse to plaintiff's contentions and since they are supported by the evidence they will not be disturbed by this court. Miss Ballentine testified that she never asserted that the provisions of the contract of October 30, 1945, were for her alone but she always assumed they were and that she would take care of the child; that she had frequently discussed with plaintiff, both before and after the birth of the child, the setting up of a trust fund for its education; that in the fall of 1946 she told plaintiff she had been offered a position in New York and wanted to take the child with her; defendant objected and stated if she insisted on taking a position in New York and taking the child with her he would stop her payments under the contract; she then sought legal advice with respect to her rights under the contract; during the course of her conferences with her attorneys in connection with its validity and effect the matter of setting up a trust fund for the child was discussed and at the suggestion of her attorneys a trust company was appointed guardian of the estate of the child. Discussions and negotiations were

entered into in January and February, 1947, between Miss Ballentine's attorneys and plaintiff's attorney. Plaintiff continued to make his payments under the contract.

[5,6] Any negotiations for the establishment of a trust fund for the future support and care of the minor would not constitute a repudiation of the contract by defendant Ballentine on behalf of the child. The contract, although valid between the parties, had not been approved by the court and was therefore not binding upon the minor. *Berry v. Chaplin*, 74 Cal.App.2d 652, 657, 169 P.2d 442. At the time the contract was drawn and executed plaintiff had the advice of counsel and should have known that the rights of the child could not be limited by any contract which did not have the approval of the court. Manifestly, the minor was not compelled to make an election between his statutory rights and any rights which he might have under the contract.

[7-9] There is no allocation in the contract² as between defendant Marie Ballentine and the child of the payments plaintiff agreed to make. Nor is there any provision in the agreement for a reduction in the payments in the event of the death of either Miss Ballentine or the child. Plaintiff does not claim the contract is void for uncertainty for that or for any other reason but asserts that the court indirectly modi-

2. "This Agreement made and entered into at Los Angeles, California this 30 day of October, 1945, between Marie Ballentine Moskovita, First party and George G. DeSylva, Second Party,

"Witnesseth

"Whereas First Party has made a claim on Second Party for the support and maintenance of herself and her child, Stephen William Moskovita believing she has a legal claim, and

"Whereas Second Party does not believe that First Party has a legal claim, but nevertheless desires to effect a compromise and settlement thereof,

"Now Therefore, in consideration of the promises and agreement on the part of the parties hereto, It Is Hereby Mutually Understood and Agreed As Follows:

"I

"Second Party shall pay First Party the sum of Six Thousand Dollars (\$6,000.00) per year, in equal monthly in-

stallments beginning upon the execution of this agreement and continuing until Mar. 10, 1949, and thereafter the sum of \$100.00 per week until Mar. 10, 1965, which payments are made for the support and maintenance of First Party and for the support, maintenance, care and education of Stephen William Moskovita.

"II

"Second Party agrees to transfer to First Party the house and lot known as No. 152 Glenroy Avenue, West Los Angeles, California, free and clear of encumbrance, except conditions, restrictions, reservations and rights of way of record, if any; said property is legally described as Lot 17, Block 1 of Tract 10421, as per map recorded in Book 54, pages 3 and 4 of Maps, records of Los Angeles County; and Second Party also agrees to transfer to First Party the furnishings of said house, and agrees to expend the sum of \$1,000.00 for repairs

fied the agreement by allocating four fifths of the benefits to Miss Ballentine and one fifth to the child. Contrary to plaintiff's contentions the court did not make any allocation of the benefits of the contract, nor has the court modified the agreement. The court determined that the child requires \$350 a month for support and maintenance "in addition to the other benefits accruing herein;" that it is reasonable and within plaintiff's ability to pay "in addition to any and all benefits which the child may receive from its mother or pursuant to the terms of the contract" for the support, maintenance and education of the child the sum of \$250 a month during and throughout the minority of the minor and until further order of court; that defendant Marie Ballentine is able to pay \$100 a month toward the support of the child. The court had jurisdiction and power under section 196a of the Civil Code to require both plaintiff and defendant to contribute to the child's support. The court came to the conclusion that any benefits accruing to the child under the contract were insufficient for his full support and therefore made an additional statutory award. Maintenance of the mother is a necessary part of support of the child. *Berry v. Chaplin*, supra, 74 Cal.App.2d 669, page 674, 169 P.2d 453. The court in considering the needs of Miss Ballentine as the mother took into consideration the benefits accruing to her under the contract and determined that she would be able to contribute \$100 a month toward the support of the child from the income which both of them received from it.

In the case of *Puckett v. Puckett*, 21 Cal. 2d 833, 136 P.2d 1, plaintiff and defendant

entered into a property settlement agreement whereby the defendant agreed to pay the plaintiff \$250 a month for the support and maintenance of the plaintiff and the minor child of the parties. There was no allocation of the payments as between plaintiff and the minor child. Defendant subsequently sought to have the monthly allowance reduced because of his changed financial circumstances. The court stated that while parents may contract with each other with respect to the custody and support of their minor children, the latter are not bound by the contract and the parents cannot thereby abridge the power of the court in appropriate proceedings to provide for the support of the children by their parents. The court held that the amount specified in the contract could not be reduced because it was part of a property settlement and although the payments ordered to be made are not subject to reduction, they could be increased by the court if the child's welfare required it, without regard to what the liabilities of the parties and their rights inter se under the agreement might be. In the instant case the court was of the opinion that the minor's needs were \$350 a month in addition to any benefits which he might receive under the contract.

[10] Plaintiff next contends that defendant Marie Ballentine repudiated the contract in causing a guardian to be appointed of the estate of the child for the purpose of prosecuting a claim against him for the support and maintenance of the child; that if she did not repudiate the contract on behalf of the child she did so in her behalf. The court found that the parties did not consider negotiations for

on said house and the further sum of \$1,000.00 for repairs on the furniture now located in said house.

"III

"First Party agrees that Second Party may see Stephen William Moskovita at all reasonable times.

"IV

"First Party agrees to, and hereby does release Second Party from all claims, known or unknown, which she has or may have against him, his heirs or representatives.

"V

"This agreement shall inure to the benefit of and bind, as the case may be, the parties hereto, their heirs, executors and administrators.

"In Witness Whereof the parties hereto have set their hands the day and year first above written.

"Marie Ballentine Moskovita

-First Party

"George G. DeSylva

-Second Party"

additional provision for the child to be inconsistent with the validity and continued existence of the contract. The evidence indicates that any demands made by Miss Ballentine upon plaintiff after the execution of the contract were for the benefit of the child. The trial court found that she caused a petition to be filed for the appointment of a guardian of the estate of the minor and therein alleged that the minor had a claim. The appointment of a guardian in connection with the establishment of a trust fund for the child or for that matter even for the purpose of bringing an action under section 196a of the Civil Code would not therefore constitute a repudiation of the contract on the part of Miss Ballentine.

[11] Plaintiff maintains that the refusal to accept his tender of the March and April checks constituted either a breach of the contract or an act of repudiation upon the part of Miss Ballentine. The checks in question were made payable jointly to her and the trust company as guardian. She at first refused to accept the checks but later did accept them although she never cashed them. Plaintiff filed this action April 5, 1947. Under the terms of the contract plaintiff agreed to pay Miss Ballentine the sum of \$6,000 a year in equal monthly installments. The purpose of the payments was for the support of Miss Ballentine and the child. There was, as has been heretofore pointed out, no allocation of the payments as between Miss Ballentine and the child. The contract called for the payment to be made to Miss Ballentine alone and her refusal to accept the checks when proffered in a form other than that required by the terms of the contract was justified since it was not a proper tender. Moreover, it would not constitute a repudiation upon the part of Miss Ballentine since her refusal was not of the payment but her objection was to the form of the payment which was not in conformity with the contract.

[12] Plaintiff contends that by cross-complaining under section 196a of the Civil Code defendant Marie Ballentine repudiat-

ed the contract since she had specifically agreed to release plaintiff from all claims, known or unknown, which she had or might have against him. In support of this contention plaintiff cites *Schnurr v. Quinn*, 83 App.Div. 70, 82 N.Y.S. 468. The case is not persuasive. In the *Schnurr* case the mother of the illegitimate child caused bastardy proceedings to be instituted against the child's alleged father while he was still complying with the terms of the agreement which he had entered into with her for the child's support. In the instant case action was instituted by plaintiff's filing a complaint for declaratory relief in which he contended the contract was no longer valid and asking a declaration of his rights under section 196a of the Civil Code.

[13-15] It is plaintiff's contention that the court erred in ordering him to pay \$250 a month "during and throughout the minority of the said minor and until further order of the court"; that the statutory obligation of a father to support his illegitimate child terminates upon the father's death, citing *Myers v. Harrington*, 70 Cal. App. 680, 234 P. 412. Under the common law the father of an illegitimate child was under no obligation to provide for its support and education and the liability of the father of a legitimate child to support his child terminated with his death. Both parties are in agreement, however, that the law is clear in this state that an order for support of a legitimate child may survive the death of its father and continue as a charge against his estate. In *re Estate of Smith*, 200 Cal. 654, 659, 254 P. 567; *Newman v. Burwell*, 216 Cal. 608, 612, 15 P.2d 511. The Legislature has by statute placed upon the father of an illegitimate child the same responsibility for its support as rests upon the father of a legitimate child, Civil Code, sec. 196a, and that statute provides that in an action to enforce such obligation the court "shall have power to order and enforce performance thereof, the same as under sections 137, 137.5, 138, 139 and 140 of the Civil Code, in a suit for divorce by a wife." Thus, since the order for support of a legitimate child pursuant to section 137 et seq. of the Civil Code may

survive the death of the father and continue as a charge against his estate, and since the court has the power to order and enforce performance of the obligation for support upon the part of the father of an illegitimate child in the same manner, there is no reason why the order under section 196a may not survive the death of the father and continue as a charge against his estate. The case of *Myers v. Harrington*, supra, is not contrary to this view. In that case suit was brought under section 196a of the Civil Code for the purpose of securing a decree providing for the maintenance of an illegitimate minor child out of the estate left by its putative father. Defendant's demurrer was sustained without leave to amend. There had previously been no decree ordering the father to support the child. The court approved the rule established in *Stone v. Bayley*, 75 Wash. 184, 134 P. 820, 48 L.R.A.,N.S., 429, that "when a decree has been entered providing for maintenance during minority, it is a continuing one and does not abate simply by the death of the parent against whose estate such maintenance is made a charge." [70 Cal.App. 680, 234 P. 414]. The court pointed out, however, that the remedies under section 140 of the Civil Code are attendant upon the prosecution of an action for divorce and the entry of final judgment therein; that an action for divorce does not survive the death of either party and in such event other provisions of the code must be relied upon whenever maintenance is sought for the minor child. The court stated: "Section 196a does not purport to reach out and charge any decedent's estate in its operation and effect. This is given by sections 138, 139 and 140 of the Civil Code, which are made applicable to the enforcement of section 196a, and, therefore, to the extent that they limit and circumscribe the power of the court, the power of the court coming under section 196a is likewise limited and circumscribed. These sections, as we have seen, and by the authorities which we have cited, make the rights dependent upon, and the enforcement of such rights dependent upon the entry of a decree of final divorce, and do not exist and cannot be enforced

if, by the death of one of the parents, the divorce proceedings abate prior to the entry of judgment." The putative father having died prior to the institution of the proceedings under section 196a, the court found that the minor child had no cause of action against the administrator of his estate.

Finally, plaintiff asserts the trial court abused its discretion in awarding excessive counsel fees to defendants' attorneys. Plaintiff contends that since plaintiff conceded paternity and offered to pay a reasonable sum for the support of the minor child, the services rendered by counsel were for the most part for the benefit of defendant Marie Ballentine; that the services rendered on behalf of the minor child do not warrant the fees awarded, particularly in view of the fact that the work of counsel was made considerably lighter not only by the admissions of plaintiff but also by the production of records and tax returns; that the only issue defendants had to meet was how much should be allowed the child; that although considerable work was undertaken by counsel upon collateral proceedings and points they were unnecessary and without value to the child.

The trial court originally awarded counsel for defendants a total of \$21,110.00, including sums paid pursuant to pendente lite orders in the amount of \$5,300. Upon his motion for new trial plaintiff filed objections to the amount of counsel fees awarded with a detailed memorandum of facts in connection with those fees. Defendants filed a lengthy answer thereto. Thereupon the court, after reconsidering the matter, determined that a reasonable fee for all services rendered since the payment of the pendente lite orders was \$11,990 and modified the award accordingly.

[16,17] The value to be placed on the services rendered by counsel lies in the sound discretion of the trial court. There is room for a difference of opinion in the evaluation and while this court might have placed a different value on the services rendered, it will not substitute its opinion for that of the trial court unless as a matter of law the latter has abused its discretion. *Berry v. Chaplin*, 74 Cal.App.2d 369, 672,

169 P.2d 453; *Brockmiller v. Brockmiller*, 57 Cal.App.2d 623, 625, 135 P.2d 184. In a legal sense that discretion may be said to be abused whenever in its exercise the court exceeds the bounds of reason, all the circumstances before it being considered. *Makzoume v. Makzoume*, 50 Cal.App.2d 229, 231, 123 P.2d 72.

[18, 19] The case of *Berry v. Chaplin*, supra, summarizes the major factors to be considered in determining what constitutes a reasonable compensation for an attorney, namely, the nature of the litigation, its difficulty, the amount involved, the skill required and the skill employed in handling the litigation, the attention given, the success of the attorney's efforts, his learning, his age, and his experience in the particular type of work demanded, the intricacies and importance of the litigation, the labor and the necessity for skilled legal training and ability in trying the cause, and the time consumed. The difficulties in the instant case can scarcely be compared with those in the *Berry* case. In this case paternity is admitted whereas in the *Berry* case it was denied and furthermore that action appeared to be dead when counsel took charge of it. There is also a difference in both the age and experience of the attorneys in the two cases. Nevertheless, the record in this case is voluminous and although some of the collateral proceedings were undoubtedly unnecessary, the trial court was in a better position to evaluate the services than is this court and we cannot say that the fees awarded are so excessive as to constitute an abuse of discretion.

Defendants' Appeal

Defendants contend the court erred (1) in failing to require plaintiff to provide security for the payments ordered by the decree; (2) in failing to adjudge that plaintiff has acknowledged himself to be the father of the defendant minor child within the purposes contemplated by section 255 of the Probate Code; (3) in reducing the total counsel fees awarded to the attorneys for the infant, and (4) in ordering plaintiff to pay an unreasonably inadequate and insufficient amount for the

support, maintenance and education of the minor child.

[20] Defendants admit that under section 196a of the Civil Code the order for security is discretionary with the trial court. They assert, however, that the circumstances of this case require it and the refusal of the court to order plaintiff to provide security constituted an abuse of discretion. The particular circumstances which they maintain support their contention are (1) the fact that plaintiff is suffering from a serious heart condition and that his life expectancy is uncertain, and (2) that Mrs. DeSylva testified all the property owned by plaintiff was in joint tenancy. Defendants do not argue that there is any justification for requiring security for compliance with the order during plaintiff's lifetime but they maintain that even though the order for support and maintenance will survive plaintiff's death, from a practical standpoint it will be of no benefit to the child since upon his death title to all the property will vest in his wife and there will be virtually no estate from which the child could obtain support.

The purpose in requiring security is to ensure compliance with the order. Both parties are in agreement that there is neither necessity nor justification for an order requiring plaintiff to provide security for compliance during his lifetime. He has voluntarily placed himself within the jurisdiction of the court, has acknowledged paternity and the obligation for support, and has manifested great affection for his child. There appears to be no reason to assume that he will fail to make adequate provision for the child upon his death or to speculate upon the possibility that he may not leave an estate. The order, which will survive plaintiff's death, gives the minor child adequate protection and we find no abuse of discretion in failing to require plaintiff to provide security because he might not leave an estate upon his death.

[21] Defendants maintain there should have been an adjudication by the trial court that plaintiff had acknowledged himself to be the father of the minor child within the

purview of section 255 of the Probate Code. They concede there has been no full legitimation but argue that the court should have found that plaintiff acknowledged the child as his thereby giving it under the provisions of section 255 the rights of succession to which it would not be entitled in the absence thereof. Defendants argue that in a declaratory action relief is properly granted where a dispute exists respecting rights or obligations which will come into being at a future time when an anticipated legal situation will have developed. Conceding this to be the law, that issue was not raised by the pleadings and there was, therefore, no error.

[22, 23] Defendants contend that the amount awarded the minor child for his support and education is so inadequate as to constitute an abuse of discretion. In support of their contention they cite the rule laid down in *Kyne v. Kyne*, 70 Cal. App.2d 80, 160 P.2d 910, and *Berry v. Chaplin*, 74 Cal.App.2d 669, 169 P.2d 453, that in making an order for the support and education of an illegitimate child the court should consider the needs of the child and the financial ability of the father; that the father's duty to support the child does not end with the furnishing of mere necessities if he is able to afford more.

Both the mother and the father of an illegitimate child are obligated to give him support and education and in addition to the financial ability of the parents consideration must be given to the needs of the child. It cannot be seriously argued that the sum of \$350 a month does not furnish more than mere necessities and while there is no doubt that plaintiff has the financial ability to pay a sum far in excess of that which he has been ordered to pay, the amount awarded appears to be adequate for a child of tender years and clearly within the bounds of reason. Plaintiff furnished a home for defendants which Miss Ballentine sold for \$55,000. From the proceeds she purchased another home for \$14,750, subject to an encumbrance of about \$5,200. According to the record after the sale of the house, she had in her possession cash in the amount of \$42,909. Out of this sum

she spent about \$15,000 to \$18,000 in renovating and decorating the second house and \$16,000 for clothes and jewels for herself. She spent additional amounts for an automobile and current expenses with the result that at the time of trial she had but \$2,000 remaining out of the proceeds of the sale of the first home. From the extravagant manner in which Miss Ballentine has used the resources which she had, the natural conclusion is that the reason she feels the sum awarded for child support is not adequate is because it will not permit her to live in the luxury to which she has accustomed herself. Her obligation to her child is equal with that of plaintiff and although support of the child necessarily includes support for the mother, there is no reason why under the guise of support for his child plaintiff should be required to furnish sufficient funds for the mother to indulge her extravagant whims.

[24] Finally defendants argue that while the trial court in fixing counsel fees did not exceed the upper limit of its discretion it did abuse its discretion when it reduced the fees which it had previously determined were reasonable. The trial court in evaluating the services of counsel took into consideration that they represented both defendant Marie Ballentine and the child and that the greater portion of their services were rendered for the benefit of Miss Ballentine; that many of the collateral matters undertaken by them were unnecessary; that their burden was lightened considerably by plaintiff's admission of paternity, his stipulation that he was worth in excess of \$500,000 and would be able to comply with any reasonable order of the court. Considering these factors together with all others which must be taken into account and the wide discretion in the trial court, we find no abuse of discretion in the amount of fees awarded to counsel for the minor child.

Judgment affirmed.

MOORE, P. J., concurs.

McCOMB, J., dissents.

96 Cal.App.2d 519

DE SYLVA v. BALLENTINE et al.**Civ. 17111.**District Court of Appeal, Second District,
Division 2, California.

March 17, 1950.

George G. DeSylva brought action against Marie Ballentine and another for declaration of rights and duties of parties under statute making both father and mother of illegitimate child liable for child's support and education and under contract entered into by plaintiff and named defendant, wherein the defendants filed cross-complaints. The Superior Court of Los Angeles County, Stanley Mosk, J., entered orders for support money pending appeal and for attorneys' fees on appeal, and the defendants appealed. The District Court of Appeal, Wilson, J., held that question raised by order providing for support money pending appeal became moot upon affirmation of the judgment, thereby assuring payment by plaintiff of the sum awarded by the judgment from date of its entry.

Orders affirmed.

1. Bastards ⇨92

Where judgment in action for declaration of rights and duties of parties under statute making both father and mother of illegitimate child liable for child's support and education and under contract entered into by putative father and mother of illegitimate child was affirmed, thereby assuring payment by putative father of sums awarded by the judgment from date of its entry, question as to adequacy of order directing putative father to make payments for support of the child pending determination of appeals from portions of the judgment rendered became moot. Civ.Code, § 196a.

2. Bastards ⇨94

In putative father's action for declaration of rights and duties of parties under statute making both father and mother of illegitimate child liable for child's support and education and under contract entered into by putative father and mother of the

illegitimate child, counsel fees awarded for services for the child on appeal were not so unreasonable or inadequate as to constitute abuse of discretion. Civ.Code, § 196a.

Fink, Rolston, Levinthal & Kent, Los Angeles, for appellants.

Pacht, Warne, Ross & Bernhard, Isaac Pacht, Clore Warne, Bernard Reich, Beverly Hills, for respondent.

WILSON, Justice.

This appeal is by defendants from an order directing plaintiff to make payments for the support of the minor child of plaintiff and defendant Marie Ballentine pending determination of the appeals from portions of the judgment rendered in the above entitled action and for attorneys' fees for the minor on the appeals. By an opinion filed concurrently herewith in 215 P.2d 780, the appeals have been determined.

Defendants contend as grounds for appeal that both the amount plaintiff was ordered to pay for the support of the minor and the counsel fees awarded to the child were so inadequate and unreasonable as to constitute an abuse of discretion.

Plaintiff brought this action for a declaration of the rights and duties of the parties under section 196a of the Civil Code and under a contract entered into between plaintiff and Miss Ballentine. The trial court found the contract to be valid and subsisting and that the child needed \$350 a month for its support in addition to any benefits which it might receive under the contract. Plaintiff was ordered to pay \$250 a month and defendant Marie Ballentine \$100 a month for the child's maintenance and support. Both parties appealed from portions of the judgment and the court ordered plaintiff to pay \$350 a month for the child's support pending a determination of the appeals and \$1,500 for attorneys' fees on the appeals.

Defendants assert that no consideration was given by the court to the fact that

maintenance of the mother is a necessary part of the child's support; that pending appeal plaintiff would make no payments under the contract, leaving Miss Ballentine without means of support; that the court had found the child required \$350 a month for support in addition to other benefits, including benefits which it would receive under the contract. Defendants do not contend that the child is entitled to any greater sum for its support pending appeal than would be available under the final judgment but maintain that since the mother would be without funds pending the appeal, the amount awarded should have been \$750, which would equal the amount that would have been available to the child and the mother were the plaintiff to continue making payments under the contract.

[1] The order provides that payments made pending appeal are to be credited to plaintiff against any accrued amounts on the judgment in the event of its affirmance. The order was for support pending appeal from the judgment and it is now *functus officio*. The judgment has been affirmed, thereby assuring payment by plaintiff of the sums awarded by the judgment from the date of its entry and the question is therefore moot.

[2] There is no merit in appellants' contention that the counsel fees awarded for services for the child on appeal were inadequate and unreasonable. From the manner in which the case was tried and argued in the superior court we take notice that most if not all of the legal points presented on the appeal had been thoroughly researched and briefed for the trial. Considering that fact and the further fact that the issues insofar as the child is concerned were limited, the fees awarded for the appeal were not so unreasonable or inadequate as to constitute an abuse of discretion.

Affirmed.

MOORE, P. J., and McCOMB, J., concur.

INYOKERN SANITATION DIST. v. HADDOCK-ENGINEERS, Limited, et al.

Civ. 4004.

District Court of Appeal, Fourth District,
California.

March 16, 1950.

Hearing Granted May 11, 1950.*

Action by the Inyokern Sanitation District against Haddock-Engineers, Limited, and Travelers Indemnity Company, for forfeiture of bid on bond on first-named defendant's refusal to execute contract for construction of sanitary sewers and modification of existing sewage treatment plant after its bid for the same had been accepted. The Superior Court, Kern County, R. B. Lambert, J., entered judgment for the plaintiff, and the first-named defendant appealed. The District Court of Appeal, Barnard, P. J., held that the defendant had actual notice of circumstances which were amply sufficient to put a prudent person on inquiry as to manner in which sanitation district was proceeding in doing work and in calling for bids and that slightest inquiry would have disclosed facts of which it claimed to have been ignorant and that statutory provisions that if successful bidder fails or refuses to enter into contract certified check which accompanies bid shall be forfeited became a part of the bond.

Judgment affirmed.

1. Municipal corporations ☞332

Under statute providing for manner in which proceedings of improvement district shall be conducted, mode of payment for work to be done is not required to be set forth in form of bid and plans and specifications. Streets and Highways Code, § 5000 et seq.; Health and Safety Code, § 4771 et seq.

2. Health ☞16(1)

Sanitation district's resolution of intention to do work for construction of sanitary sewers, resolution ordering work and notice calling for bids referred to statute regulating procedure, and specified manner of payment for work, and notice of improvement describing work was posted along line of contemplated work, and

* Subsequent opinion 224 P.2d 709.

defendant's bid, which was accepted, stated that he was familiar with conditions, but he refused to execute contract, defendant contractor had constructive notice of manner of payment and actual notice of circumstances sufficient to put a prudent person on inquiry. Streets and Highways Code, §§ 5190, 5242, 5246; Health and Safety Code, § 4771 et seq.

3. Municipal corporations ⇐333

Where bond submitted by contractor with bid was given in connection with proceedings under statute governing activities of improvement district and was furnished pursuant to statute which required that either a certified check or a bond for at least 10 per cent of bid accompany bid and another statute providing that if successful bidder failed or refused to enter into contract certified check should be forfeited, collected and paid into general fund, statutory provisions became part of bond. Streets and Highways Code, §§ 5190, 5242, 5246.

4. Municipal corporations ⇐333

Under statute providing that if successful bidder fails or refuses to enter into contract bond amounting to 10 per cent of bid may be forfeited and amount due collected and paid into general fund, liability on defendant contractor's bond submitted with bid to improvement district after contractor refused to execute contract was not limited so as to require pleading and proof of actual damages and statutory liability could not be limited or abridged by bond. Streets and Highways Code, §§ 5242, 5246; Civ.Code, § 19.

West, Vizzard, Howden & Baker, Bakersfield, for appellant.

Norbert Baumgarten, County Counsel, Roy Gargano, Assistant County Counsel, Bakersfield, for respondent.

BARNARD, Presiding Justice.

The plaintiff began proceedings for the construction of sanitary sewers and the modification of an existing sewage treatment plant in compliance with the provisions of the Improvement Act of 1911,

being Division 7 of the Streets and Highways Code, as said act is made applicable to such districts by section 4771 et seq. of the Health and Safety Code. The resolution of intention to do the work, the resolution ordering the work, and the notice calling for bids all referred to the Improvement Act of 1911, to the assessment district being formed for the purpose, and specified the manner in which improvement bonds would be issued in connection with payment for the work. A notice of improvement describing the work, describing the assessment district and the bonds to be issued, and referring to the Improvement Act of 1911 as it appears in the Streets and Highways Code, was posted along the line of the contemplated work and upon all the streets and highways within the district to be assessed, as required by section 5190 of the Streets and Highways Code. All the requirements for posting and publication were complied with, and the notice calling for bids was both posted and published.

Haddock-Engineers, Ltd. submitted a bid offering to furnish all labor and materials "for the construction of Sanitary Sewers and the modification of existing Sewage Treatment Plant," in strict conformity with the plans and specifications prepared by the engineer of the district for the sum of \$73,201.75. This bid was accompanied by a bond executed by Haddock-Engineers, Ltd. as principal and Travelers Indemnity Company as surety. The obligation of this bond was 10% of the amount of the bid. The condition of this obligation was that in the event the work was awarded to the principal, and the principal entered into a contract in accordance with the terms of the bid and gave bond for faithful performance, or if the principal should, in case of failure so to do, pay to the district the damage it might suffer by reason of such failure not exceeding the penalty of this bond, "then this obligation shall be null and void; otherwise it shall be and remain in full force and effect."

The only other bid received was one for \$145,691.66, which was also accompanied by a bid bond amounting to 10% of that amount. On December 15, 1947, at the

time fixed therefor, the board of directors of the plaintiff district opened the bids and adopted a resolution accepting the bid of Haddock-Engineers, Ltd. and rejecting all other bids. This resolution was published as required by law. Haddock-Engineers, Ltd. refused to sign the contract thus awarded to it, and this action followed.

The complaint, among other things, alleged the facts above set forth and copies of the various instruments were attached thereto. It further quoted sections 5242 and 5246 of the Improvement Act of 1911, as set forth in Division 7 of the Streets and Highways Code, and alleged that the published notice calling for bids stated that each bid must be accompanied by a certified check or bidder's bond in the amount of 10% of the bid, made payable to the plaintiff, and that the said check or bond would be declared forfeited if the successful bidder refused to enter into the contract within the time prescribed by law. Judgment in the sum of \$7,321.76, being the full obligation of the bond, was prayed for.

The surety on the bond was named as a defendant, but was not served and did not appear. Haddock-Engineers, Ltd. in its answer, admitted some of the facts alleged in the complaint, denied upon information and belief others which were matters of public record, and denied that it submitted a bid in response to the plaintiff's call for bids, or filed a bond to secure said bid. It was admitted, however, in a second and affirmative defense, that it submitted a bid and bid bond, exact copies of which were attached to the plaintiff's complaint. The effect of the pleading was to admit that it had submitted this bid and filed this bond to secure the same, but to deny that these acts were done pursuant to the call for bids. This separate defense alleged that on or about December 1, 1947, this defendant "learned through verbal rumor" that the plaintiff proposed to ask for bids for the alteration and enlargement of its sewage disposal system; that it wrote to the plaintiff "requesting a bid form with plans and specifications"; that it received from the plaintiff by mail a bid form; that neither this bid form nor the

plans and specifications which were furnished by the plaintiff contained any reference to the Improvement Act of 1911, or to any portion of the Streets and Highways Code or provided that payment would be made in bonds but on the contrary, specifically and by implication, provided that payment should be made in lawful money; that said defendant had not read and had not had its attention called to any published or posted notice calling for bids; and that it executed and submitted a bid and a bond, exact copies of which were attached to the complaint, believing that payment would be made in lawful money "as indicated and provided in the said bid form, and in the said plans and specifications." It was further alleged that on December 17, 1947, this defendant advised the plaintiff that its bid was based upon cash payments and that it subsequently notified the plaintiff that it would not enter into a contract providing for payment in bonds, wholly or in part, but was willing to enter into the contract provided it was payable in lawful money.

The court sustained a demurrer to this answer without leave to amend and granted the plaintiff's motion for judgment on the pleadings. Judgment was accordingly entered for \$7,321.76 against Haddock-Engineers, Ltd., and that defendant has appealed. It is first contended that it must be assumed, as alleged in the answer, that appellant had no actual knowledge that the Improvement Act of 1911 or payment in bonds were here involved, that under the facts alleged it was not chargeable with constructive notice of these matters and that, in any event, the question as to whether it was chargeable with constructive notice was one of fact which required a trial of the action. It is argued that since neither the bid form nor specifications which were furnished contained any reference to the mode of payment or to the Improvement Act of 1911, there was nothing to put the appellant on inquiry or to call for further investigation on its part, and thus no constructive notice as defined in section 19 of the Civil Code.

[1,2] The form of bid and the plans and specifications did not mention the 1911

Act, and did not refer to the mode of payment, by implication or otherwise. There is no requirement that such matters be set forth in those instruments, and no valid reason why they should be. These steps necessarily call attention to prior steps which are basic and controlling. The bid here submitted also stated that the bidder had examined the location of the proposed work, and was familiar with the local conditions at the places where the work was to be done. Even if the appellant did not see any of the many notices posted, or any of the three which were published, it clearly appears that it knew that it was dealing with a public agency which could act in such a matter only after taking required preliminary steps which necessarily controlled any invitation for bids. *Miller v. McKinnon*, 20 Cal.2d 83, 124 P.2d 34, 140 A.L.R. 570. The facts of which the appellant denies knowledge were contained and repeatedly set forth in public records to which it had access, and were repeatedly published as required by law. It would be an idle thing to require the taking of such steps, and the publishing of such notices, if bidders are free to disregard both the statutes and the publications, and to submit bids upon their own terms without disclosing their secret intentions until after an award has been made in their favor. The appellant had actual notice of circumstances which were amply sufficient to put a prudent person upon inquiry as to the manner in which the respondent was proceeding in doing this work and in calling for bids, and the slightest inquiry would have disclosed the facts of which it claims to have been ignorant. Not only are the admitted facts and circumstances sufficient to constitute constructive notice to the appellant but this result necessarily follows from the facts which appear without dispute. The facts being admitted, the trial court drew the necessary conclusion of law therefrom and correctly ruled upon the matter as one of law.

The appellant further contends that the complaint failed to state a cause of action since it failed to plead facts showing the extent of the actual damages suffered,

and since it relies entirely upon the theory of forfeiture. It is argued that the bond which accompanied the appellant's bid, and upon which the complaint is based, contains no provision for a forfeiture, and also provides that a bidder who fails to enter into the contract shall pay only the damages actually suffered, not exceeding the penalty of the bond.

[3] The contention that the bond contains no forfeiture clause is without merit. The bond was given in connection with proceedings under the Improvement Act of 1911 and was necessarily furnished pursuant to section 5242 of the Streets and Highways Code, which requires that either a certified check or a bond for at least 10% of the bid shall accompany the bid. Section 5246 of that code definitely provides that if the successful bidder fails or refuses to enter into the contract, such a certified check shall be forfeited, collected and paid into the general fund, and any bond forfeited may be prosecuted and the amount due collected and paid into the general fund. These statutory provisions became a part of the bond and clearly provide for the forfeiture here being claimed. *Town of Mill Valley v. Massachusetts Bonding & Ins. Co.*, 68 Cal.App. 372, 229 P. 891.

[4] Nor do we think the liability on this bond was limited so as to require pleading and proof of the actual damages. Because it would always be difficult, and in many cases impossible, to determine the actual damages thus suffered, the statute itself has fixed the exact liability in such a case at 10% of the bid, and the bidder was not at liberty to change it. The condition in this bond is that it shall be null and void only if the principal either enters into the contract awarded him or pays the damages suffered not exceeding the full penalty. The appellant here did neither of these things and, by its own terms, the obligation of the bond remains in full force and effect. Whether it should properly be considered as damages or as a penalty, the amount due and the liability therefor are fixed and determined by sections 5242 and 5246 of the Streets and Highways Code,

and no pleading of the actual damages was required. Insofar as the appellant is concerned, at least, this statutory liability neither could be, nor was, limited or abridged by the bond here in question. While the facts are somewhat different, the principles applied in *Town of Mill Valley v. Massachusetts Bonding & Ins. Co.*, supra, are applicable and controlling here.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



96 Cal.App.2d 553

WELCH v. SEARS, ROEBUCK & CO. et al.
Civ. 17195.

District Court of Appeal, Second District,
Division 3, California.

March 20, 1950.

Hearing Denied May 18, 1950.

Eva E. Welch brought action against Sears, Roebuck & Co., a corporation, and one Campbell for injuries sustained by plaintiff, while a customer in the store of the corporation, when a roll of linoleum fell on plaintiff. The Superior Court of San Luis Obispo County, Ray B. Lyon, J., rendered a judgment for the plaintiff, and the defendants appealed. The District Court of Appeal, Wood, J., held that doctrine of *res ipsa loquitur* was applicable, that jury was adequately instructed on subject of *res ipsa loquitur* and qualifying instructions were not necessary, that verdict was not excessive, and that evidence was legally sufficient to support judgment against Campbell.

Judgment affirmed.

1. Negligence ⇨121(3)

In action by customer against corporation operating store, and clerk to recover for injuries sustained by customer when roll of linoleum fell on customer, doctrine of *res ipsa loquitur* was applicable, where plaintiff did not allege specific acts of negligence, but merely alleged general negligence.

2. Negligence ⇨138(2)

In action by customer against corporation operating store, and clerk to recover for injuries sustained when roll of linoleum fell on customer, it was not necessary that *res ipsa loquitur* instructions be qualified by instructions requiring jury to find that injury was caused by an instrumentality in exclusive control and possession of defendants, that injury would not have occurred, ordinarily, unless defendants had been negligent, that injury occurred without contributory negligence, and that knowledge of cause of injury was more accessible to defendants than to customer.

3. Damages ⇨130(3)

Award of \$15,000 to woman for injuries consisting of three broken ribs, was not excessive, where one of the ribs was broken about three inches from spine and was torn away from the spine and another rib was broken into pieces an inch and one half from spine, injuries aggravated arthritis and heart condition, and medical and hospital bills to date of trial amounted to \$1,475.

4. Negligence ⇨134(1)

In action by customer against corporation operating store and against clerk to recover under *res ipsa loquitur* doctrine for injuries sustained when roll of linoleum fell on customer, evidence that clerk showed a free-standing roll of linoleum to customer by unrolling about two feet of it, that when telephone rang, clerk snapped the two feet of linoleum back into the roll and went to telephone, and that while he was at telephone, roll fell onto customer, was sufficient to support judgment against clerk.

John L. Wheeler, Hanna & Morton, Patrick James Kirby, Los Angeles, for appellants.

Harvey, Johnston, Baker & Palmer, Bakersfield, A. V. Muller, San Luis Obispo, for respondent.

WOOD, Justice.

Action for damages for personal injuries sustained by plaintiff, a customer in

the store of defendant corporation, when a roll of linoleum fell upon her. The jury returned a verdict in favor of plaintiff for \$27,500, and judgment was entered in accordance therewith. In ruling upon defendants' motion for a new trial, the judge made an order, on February 10, 1949, granting the motion upon the grounds of excessiveness of the verdict and insufficiency of the evidence to sustain the verdict, unless the plaintiff, within five days, file a waiver of all portions of the judgment in excess of \$15,000, plus costs; and that if such waiver be filed, then said motion for a new trial shall stand denied; otherwise said motion shall stand granted upon the sole issue of damages. On February 14, 1949, the plaintiff filed such a waiver. Defendants appeal from the judgment.

On June 19, 1948, the plaintiff, accompanied by her daughter-in-law, went into the retail store of defendant corporation at San Luis Obispo for the purpose of buying linoleum. Upon entering the furniture department on the second floor, they met the defendant Campbell, a clerk in the store, who went with them to a place on that floor where linoleum was displayed for sale. Adjoining the rear wall at that place, and near a corner of the room, there was a wooden rack in which several rolls of linoleum were standing on end. In front of that wooden rack and about 18 inches therefrom, there were three rolls of plastic linoleum, standing on end, close together so that they "touched," and in "a line" parallel with the wooden rack. Each roll was about 6 feet high, about 1 foot in diameter, and weighed about 300 pounds. Those rolls had been placed there the day before the accident, and that was the first time that that kind of linoleum had been in the store. The wrapping paper which had been on the rolls had been removed, and there was no "tie" around any of the rolls. The wooden plugs which had been at the ends of the rolls had been removed, and also the wooden plates which had been at the ends of the rolls (attached to the plugs) had been removed. Adjoining the side wall, and near the same corner of the room, and at a right angle to the line

formed by the three "free-standing rolls," there was a steel-frame rug rack which was about 5 feet from the roll nearest that rack. The front of that rack was formed by three horizontal steel bars, spaced about 1½ feet apart. Rugs were hanging over the two upper bars of the rack. The clerk showed them the plastic linoleum, in the roll nearest the rug rack, by unrolling about 2 feet of the standing roll. While he was showing that linoleum the telephone rang, and he snapped the 2 feet of linoleum back into the roll and went to the telephone which was about 30 feet away. Plaintiff and the daughter-in-law then went to the wooden rack and looked at linoleum. Then plaintiff went to a place between the roll of linoleum (that the clerk had shown to them) and the rug rack, which place was about 3 feet from the roll. While she was at that place, facing the roll, the roll fell upon her, striking her chest and knocking her down and against the bars of the rug rack. After the roll had fallen, she was in a reclining position upon the floor with her back against the lower bar of the rug rack, and the top part of the roll was upon her chest. About 1 foot of the top part of the roll extended inside the rack, above the lower bar. The daughter-in-law rolled the linoleum off the plaintiff. The clerk came from the telephone and told the daughter-in-law not to move the plaintiff. Then he went to notify the manager of the store. The daughter-in-law and some one assisted plaintiff in arising and going to a divan in the furniture department. About 10 minutes after the accident the assistant manager arrived. He asked plaintiff some questions about the accident and made arrangements for plaintiff to see a physician. Then the daughter-in-law took her in an automobile to the physician's office.

The floor at the place where the rolls of linoleum were standing was covered with inlaid linoleum which had not been waxed. The slope of the floor at that place, toward the side wall and the rear wall, was about ⅛ of an inch in 3½ feet. The stability of the floor at that place was tested by a building contractor and by a building offi-

cial of San Luis Obispo, who "jumped on the floor," in the area where the accident occurred. According to those tests, there was no noticeable or appreciable vibration of the floor.

An engineer made a test to determine the amount of pressure that would have to be applied to a roll of linoleum, of the kind, dimensions and weight here involved, standing at said place on the floor, to cause the roll to topple over toward the rug rack. According to the test, 16 pounds would have to be applied at the top of the roll; 19 pounds would have to be applied at a place thereon 5 feet from the floor; 25 pounds at a place 4 feet from the floor; and 33 pounds at a place 3 feet from the floor. He made another test to determine how far the roll, used in the prior test, would have to be tipped from a vertical position before it would fall. According to the test, the roll would have "to be nine inches off center at the top in order to just balance back again; but beyond that it would go over."

The manager of the Montgomery-Ward store in San Luis Obispo, who was called as a witness by defendants, testified that it was the general custom of the Montgomery-Ward stores, and other stores in California that sell linoleum, to display 6-foot rolls of linoleum "standing" and "unsecured." On cross-examination, he said that such linoleum in the Montgomery-Ward stores in San Luis Obispo was generally next to or close to the wall. The manager of the furniture department of defendant corporation testified that it was the custom of that store, during the three years he was employed there, to display rolls of linoleum "free and clear" of the racks.

The manager of the McMahon Furniture Store in San Luis Obispo, called as a witness by defendants, testified that it was the custom in that store to display 6-foot rolls of linoleum in "free-standing positions." On cross-examination he said that in his store rolls of plastic linoleum stand "close to the wall—not against the wall; they expand with heat—it softens them up."

A salesman in the Yours & My Furniture Store in San Luis Obispo, called as a witness by defendants, testified that in displaying 6-foot rolls of linoleum, including plastic linoleum, in the store where he was employed and in the Davidson store and the Clay store in San Luis Obispo, the general custom was to tie a string around the rolls and stand them against the wall or in an aisle. On cross-examination, he said that the purpose in tying a string around a roll was to keep the roll from unwinding; that if there was no string around the rolls they would unwind to a certain extent.

The plaintiff testified that she did not touch the roll of linoleum before it fell on her. The daughter-in-law testified that she (herself) did not touch the roll before it fell on plaintiff, and that she did not see plaintiff touch it before it fell. At the time the defendant Campbell (the salesman) was showing the roll of linoleum to plaintiff and the daughter-in-law, no other person was in the linoleum department. The 8-year-old granddaughter of plaintiff was sitting in the furniture department until after the roll of linoleum fell.

[1] The jury was instructed to the effect that the doctrine of *res ipsa loquitur* was applicable herein. Appellants content that said doctrine was not applicable, since the evidence fails to show that defendants had exclusive control of the roll, and since the evidence does not exclude the possibility that the fall of the roll was contributed to by the action of plaintiff, and since it cannot be said that the fall of the roll was more likely than not the result of defendants' negligence. The plaintiff was an invitee in the store. She had no right of control of the linoleum, or any of the merchandise in the store, or any part of the store building. She testified that she did not touch the roll of linoleum at all before it fell. The daughter-in-law testified that she did not see plaintiff touch the roll before it fell. No one testified that plaintiff touched the roll before it fell, and there was no evidence that any one other than defendant Campbell touched the roll between the time plaintiff arrived

in the furniture department and the time the roll fell. No one was in the linoleum department, prior to the fall, other than plaintiff, the daughter-in-law, and defendant Campbell. The roll of linoleum had been placed on the floor the afternoon preceding the accident. It was a kind of linoleum that had never been displayed for sale in the store. It was displayed "free-standing," except that it "touched" the middle roll of the three rolls which were in "a line" on the floor. There was no "tie" around any of the three rolls. There was evidence that a roll of linoleum which was not tied would unwind to a certain extent, and that heat would cause plastic linoleum to expand. The maximum temperature outside the store on the day of the accident was 73 degrees. It is true that the floor was stable, and that its slope was slight. There was no evidence, however, concerning the condition of the base or lower end of the roll from which the wooden plug and plate had been removed. If a considerable force would be required, as shown by the evidence, to topple a roll that was in a vertical position and on good footing, it might be inferred, in the absence of evidence as to the use of such force and in the event a roll fell, that the roll was not safely balanced. Plaintiff did not allege specific acts of negligence, but alleged general negligence on the part of defendants. The doctrine of *res ipsa loquitur* was applicable herein. In the case of *Wills v. Price*, 26 Cal.App.2d 338, 79 P.2d 406, the plaintiff, a customer in defendant's store, was injured when a 6-foot roll of linoleum, which had been standing on end "at the side" of the room, fell upon her and knocked her down. Plaintiff therein alleged specific acts of negligence as the cause of the accident, namely, the defendants had negligently rolled and stood the linoleum on the floor in such manner that, as a result of the vibration caused by walking across said floor or other vibrations of the building, the linoleum fell upon plaintiff. The court therein said, 26 Cal.App.2d page 342, 79 P.2d 406, that since general negligence was not alleged, the plaintiff, in order to recover judgment, was required to prove the specific acts of negligence al-

leged. In that case the plaintiff and her daughter had not noticed particularly any vibration of the floor. The court therein said, 26 Cal.App.2d at page 343, 79 P.2d at page 409: "The court, however, had the right to believe Mrs. Wills' statement that she had not touched the roll. If she had not, then, even though respondents were precluded by their pleading from claiming that the roll was so insecurely placed that it could topple over merely from its own weight, and though they were confined to showing that the immediate cause of its toppling over was the vibration of the floor, still the circumstance that no witnesses noticed such vibration would be inconclusive and there would still be room for a limited application of the *res ipsa loquitur* doctrine [citing case] whereby the trial court might have concluded that there had been a vibration of the floor, though there were no other affirmative evidence that such vibration had taken place than such inferences as the *res ipsa loquitur* doctrine might justify."

Appellants also contend that, even if this had been a proper case for the application of the doctrine of *res ipsa loquitur*, the instructions on that doctrine which were given were erroneous. The court gave the following instructions:

"If, and only in the event, you should find that there was an accidental occurrence as claimed by the plaintiff, namely: A roll of linoleum standing on end toppled and fell against plaintiff; and if you should find that from that accidental event, as a proximate result thereof, plaintiff has suffered injury, you are instructed as follows: an inference arises that the proximate cause of the occurrence in question was some negligent conduct on the part of the defendant. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiff. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant to rebut the inference by showing that it did, in fact, exercise ordinary care and diligence or that the accident

occurred without being proximately caused by any failure of duty on its part.

"In making such a showing, it is not necessary for a defendant to overcome the inference by a preponderance of the evidence. Plaintiff's burden of proving negligence by a preponderance of the evidence is not changed by the rule just mentioned. It follows, therefore, that in order to hold the defendant liable, the inference of negligence must have greater weight, more convincing force in the mind of the jury, than the opposing explanation offered by the defendant.

"If such a preponderance in plaintiff's favor exists, then it must be found that some negligent conduct on the part of defendant was a proximate cause of the injury; but if it does not exist, if the evidence preponderates in defendant's favor, or if in the jury's mind there is an even balance as between the weight of the inference and the weight of the contrary explanation, neither having the more convincing force, then the verdict must be for the defendant."

[2] Appellants assert that said instructions were erroneous in that they constituted a direction, as a matter of law, that the doctrine of *res ipsa loquitur* was applicable and the instructions eliminated any reference to the special circumstances which must be found to exist before the doctrine may be applied. They argue that, if it was proper to give instructions on the subject of *res ipsa loquitur*, the instructions should have included instructions, requested by defendants, to the effect that before the plaintiff should be accorded the benefit of the *res ipsa loquitur* inference against a defendant, the jury must find that (1) the injury must be caused by an instrumentality in the exclusive control and possession of the defendant; (2) the injury would not have occurred, ordinarily, unless the defendant had been negligent; (3) the injury must have occurred without contributory negligence on the part of plaintiff; and (4) knowledge of the cause of the injury must appear more accessible to the defendant than to the plaintiff. In support of their contention that such qualifying

instructions should have been included, appellants cite *Gordon v. Aztec Brewing Co.*, 33 Cal.2d 514, 203 P.2d 522, in which the injury was caused when a bottle of beer exploded in plaintiff's hand. In that case the same instructions hereinabove quoted were given, and the court therein said, 33 Cal.2d at page 519, 203 P.2d at page 525: "Standing alone this instruction was erroneous for it omitted reference to the fact that before the jury may accord the plaintiff the benefit of the *res ipsa loquitur* inference it must believe that the bottle did not suffer damage at the hands of persons other than the defendant." In that case, after giving said instructions hereinabove quoted, the court gave a further instruction to the effect that plaintiff, in order to be entitled to the benefit of said doctrine, must show that every person who moved or touched the bottle after it left the control of defendant did so with due care. The court therein said, 33 Cal.2d at page 520, 203 P.2d at page 525: "Thus the broad instruction on *res ipsa loquitur* was followed by qualifying instructions explaining the circumstances which must be present before the inference of negligence can arise, including a charge that the plaintiff must prove that all who dealt with the bottle beside the defendant did so with due care. It is therefore apparent that taken together the entire charge on the subject fairly presented to the jury the element of careful handling and that the erroneous omission of that element from the general instruction was not prejudicial." They also cite *Zentz v. Coca Cola Bottling Co.*, 92 Cal.App.2d 130, 206 P.2d 653, 656, which involved a bursting bottle. In that case the court gave the same instructions hereinabove quoted and also gave qualifying instructions, but those qualifying instructions did not include the direction that plaintiff must prove that all who dealt with the bottles besides the defendant did so with due care. The court therein held "that the giving of the general instruction without a sufficient explanatory instruction, was prejudicially erroneous." The bursting bottle cases are factually different from the present case. In the bursting bottle cases the bottles had

left the control of the defendants (the bottlers) and had been handled and controlled by others. In the present case there was no evidence that the plaintiff or any one, other than the defendants, touched or controlled the roll of linoleum. One of the instructions herein included the statement, as above shown, that if the jury should find that there was "an accidental occurrence as claimed by the plaintiff, namely: A roll of linoleum standing on end toppled and fell against plaintiff," an inference arises that the proximate cause of the occurrence was negligent conduct by defendants. It was not necessary herein to give the qualifying instructions referred to by appellants. The jury herein was properly and adequately instructed on the subject of *res ipsa loquitur*. As to appellants' assertion that the instruction on that doctrine should have been qualified with a further instruction to the effect that the injury must have occurred without contributory negligence on the part of plaintiff, it appears that the court did give an instruction properly defining contributory negligence and stating that one who is guilty of contributory negligence may not recover from another for the injury suffered.

[3] Appellants contend further that the amount of \$15,000, awarded as damages, was excessive. Plaintiff sustained three broken ribs. She was in a hospital one month. A physician testified that "She had a lot of pain," and "She had a considerable amount of difficulty, much more than the average person." The plaintiff had heart trouble and arthritis prior to the accident. A physician, who was called as a witness by the defendants, stated in a letter, which he wrote during the time he was treating plaintiff at the hospital, as follows: "The outlook in this case entails the possibility of a long period prior to recovery, as Mrs. Welch [plaintiff], who un-

questionably was suffering from heart trouble prior to this accident, has had an added load placed on her heart and this interval of added heart strain will be a real factor in determining how long it will be before she can be discharged from the hospital, and before she will be fully recovered from the effects of the injury." Another physician, who treated plaintiff during a period of approximately 2½ months preceding trial, testified that the twelfth rib was broken about 3 inches from, and was torn away from, the spine; the eleventh rib was "broken in pieces, an inch and a half from the spine"; and that the ninth rib was broken "quite a distance from the spine." He testified further that the twelfth rib condition constitutes a spinal injury; and that the injuries aggravated the arthritis and the heart condition. The medical bills and the hospital bills, to the date of trial, amounted to \$1,475. As above shown, the trial judge, in ruling upon defendants' motion for a new trial, reduced the amount of the award from \$27,500 to \$15,000. The amount of \$15,000 awarded as damages was not excessive.

[4] Appellants also contend that the judgment should not have been against defendant Campbell. He was the agent of the defendant corporation in the linoleum department at the time of the accident. According to testimony on behalf of plaintiff, he showed the "free-standing" roll of linoleum to plaintiff by unrolling about 2 feet of it. When the telephone rang, he snapped the 2 feet of linoleum back into the roll and went to the telephone which was about 30 feet away. The evidence was legally sufficient to support the judgment against him.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

96 Cal.App.2d 460

FUGL v. EDWARDS.**Civ. 17409.**

District Court of Appeal, Second District,
Division 2, California.

March 13, 1950.

Action by Thursa Fugl, as executrix of the estate of Q. A. Knouse, sometimes known as Quincy A. Knouse, deceased, against Robert Edwards to quiet title to certain realty. The Superior Court, Los Angeles County, Alfred L. Bartlett, J., entered judgment quieting title in plaintiff and the defendant appealed. The District Court of Appeal, Wilson, J., held that evidence sustained finding that plaintiff's decedent had title by virtue of adverse possession.

Judgment affirmed.

1. Evidence ☞313

Evidence of declarations of a deceased person are the weakest kind of evidence that may be produced on account of the facility with which it may be fabricated and the impossibility, generally, of contradicting it when false.

2. Adverse possession ☞114(1)

Evidence sustained finding that plaintiff was owner of disputed realty by adverse possession.

3. Mortgages ☞143

Where in 1927 mortgagors executed trust deed to a trustee in which plaintiff's decedent was named as beneficiary, and in 1933 in consideration of sum paid by plaintiff's decedent, mortgagors executed a grant deed in favor of defendant which was delivered to decedent after recording and decedent rented property, collected rent and paid taxes, decedent was in actual occupation under such circumstances as to constitute reasonable notice to defendant.

4. Adverse possession ☞25

Personal occupation of realty is not required since possession by a tenant inures to the benefit of one claiming by adverse possession.

5. Adverse possession ☞60(1)

Where defendant knew that titles to certain realty had been placed of record in his name, that he was not paying taxes or

collecting rents, and acquiesced in use of deeds which he had signed in blank for realty taken in his name, never made demand for possession of realty or for an accounting of rents or for sale prices of realty which had been placed in his name, owner's possession was hostile to defendant and to all other persons.

6. Adverse possession ☞58

"Hostile possession" does not mean that parties must have a dispute concerning title or that there must be combat or open aggression but that hostile claimant's possession must be adverse to record owner unaccompanied by any recognition of latter's rights, either express or inferable.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Hostile Possession".

7. Quieting title ☞15

Where decedent claimed realty as his own under a claim of right, paid taxes, and collected rents, and decedent's possession of realty was continuous and uninterrupted for 14 years prior to his death and thereafter possession passed to his executors, defendant was barred from claiming title. Code Civ.Proc. § 319.

Halverson & Halverson, Los Angeles, for appellant.

E. C. Pyle, Los Angeles, for respondent.

WILSON, Justice.

Defendant has appealed from a judgment quieting plaintiff's title to real property.

The court found that decedent Knouse was at the time of his death and for a long time prior thereto had been the owner in fee and entitled to the possession of the property and that it was a part of his estate; that for more than 14 years, and for as much as five years in the aggregate and continuously prior to his death, he had been in actual occupation and in adverse possession of the property and had held possession of it under a claim of right hostile to the claim of defendant; that the latter had never been the owner of the property or in possession actually or constructively or en-

titled to possession thereof; that defendant's defense to the action is barred by section 319 of the Code of Civil Procedure; that a deed to the property wherein defendant was named as grantee was never delivered to him or to anyone in his behalf.

The facts as shown by the evidence are as follows: In 1927 one Davis and wife executed a trust deed of the property to a trustee in which decedent was named as beneficiary securing a promissory note for the sum of \$3,500; in October, 1933, Davis and wife, in consideration of \$100 paid by decedent, executed a grant deed to the property in favor of defendant Edwards, the deed reciting that the property was subject to a trust deed which defendant assumed and agreed to pay. When the deed was recorded in the office of the county recorder in December, 1933, it bore a notation on the back thereof "When recorded please mail to Q. A. Knouse, 2034 - 8th Avenue, Los Angeles, Calif." - this having been decedent's residence at the time. The deed was presented to Davis by decedent for signature and after it was signed by Davis and wife it was delivered to decedent, who, as a notary public, certified to the acknowledgment thereof by the grantors. Davis and wife vacated the property in November, 1933, shortly after the execution of the deed. The document was found among decedent's papers in his home in a box where he kept all the deeds to his various properties. The blanks in the deed and in the acknowledgment were all filled in the handwriting of the decedent.

Defendant testified that he never saw the deed until after the death of decedent; he never paid the trust deed referred to in the deed; he knew nothing about the trust deed or the amount secured thereby and did not know the name of the beneficiary.

After Davis and wife vacated the property decedent rented it to some unknown person until September, 1935, when he rented it to one Harder. The latter occupied the property and paid rent therefor to decedent during his lifetime and continued to occupy it until the date of the trial of the action, paying rent to the executors. Decedent paid all taxes levied and assessed against the property after the execution of

the Davis deed in 1933. Decedent never told Harder that anyone else had an interest in the property and no one made any demand for rent except decedent.

Decedent owned about 55 or 60 rental properties. A witness testified that he had been employed by decedent for eight or ten years to do carpentering, painting, plumbing and other work to keep the properties in repair, including the property in question in this action.

Defendant testified that beginning about 1933 and continuing until 1941 he signed various documents in blank, some of which were found among the private papers of decedent, consisting of several blank deeds, a general power of attorney, statements of identity, request for full reconveyance, and releases of mortgage. All such documents, defendant testified, were signed at the home of decedent at the latter's request and were left with him. Defendant understood the nature of the documents which he signed.

Prior to decedent's death defendant did not know the location of the property or its value, never collected any rent from it or exercised control over it, did no repair work, and never paid any taxes. A deed naming defendant as grantee covering other property than that here involved, reciting a consideration of \$300, was introduced. Defendant never had seen the deed, never requested the recording of it, and did not pay any consideration therefor. A grant deed executed by defendant conveying the same property was introduced bearing revenue stamps representing a consideration of \$3,200. Defendant did not receive any sum of money for the execution of the deed, never had possession of the property and did not know where it was located. Decedent, as notary public, certified to the acknowledgment of both deeds above mentioned.

It appears from the evidence that decedent was using defendant's name for the purpose of carrying on his real estate transactions on his own behalf and that defendant had no interest in or knowledge of any of decedent's business.

Defendant testified that at various times he had given some of his earnings to de-

cedent for investment but did not remember the amount, whether \$600 or \$900. He never demanded a return of the money or interest upon it. In November, 1934, decedent gave defendant three separate checks aggregating \$100, but defendant was unable to explain why the checks were given to him. In a feeble attempt to make it appear that decedent promised to make a gift of some sort to defendant he testified decedent said "I am not forgetting you son * * * Don't worry, I will take care of you, you will be taken care of." Decedent did not mention any property or indicate he would leave any property to defendant. The latter did not file a claim with the executors for payment of any sums which he asserted he had left with decedent.

[1] Evidence of declarations of a deceased person has been characterized as the weakest kind of evidence that may be produced. *Cox v. Schnerr*, 172 Cal. 371, 379, 156 P. 509. Such evidence is unsatisfactory "on account of the facility with which it may be fabricated and the impossibility, generally, of contradicting it when false." *Davis v. Davis*, 26 Cal. 23, 44, 85 Am.Dec. 157.

[2] The evidence is sufficient to establish all five elements denominated in *West v. Evans*, 29 Cal.2d 414, 417, 175 P.2d 219, and *Ortiz v. Pacific States Properties*, 96 Cal.App.2d 34, 215 P.2d 514 as necessary to establish title by adverse possession:

[3,4] 1. Decedent was in actual occupation of the property through his tenants continuously after November, 1933, under such circumstances as to constitute reasonable notice to defendant. Personal occupation is not required since possession by a tenant inures to the benefit of one claiming by adverse possession. *Kellogg v. Huffman*, 137 Cal.App. 278, 284, 30 P.2d 593.

[5,6] 2. Decedent's possession was hostile to defendant and to all other persons. Defendant knew that titles were being placed of record in his name, that he was not paying taxes or collecting rents. He acquiesced in the use of deeds which he had signed in blank for the purpose of conveying property taken in his name. He never made demand for possession of the

property or for an accounting of the rents or for the sale prices of property which had been placed in his name. Hostile possession does not mean that the parties must have a dispute concerning the title or that there must be combat or open aggression, but that the hostile claimant's possession must be adverse to the record owner unaccompanied by any recognition of the latter's rights, either express or inferable. *Sorensen v. Costa*, 32 Cal.2d 453, 459, 196 P.2d 900; *Ortiz case*, supra.

[7] 3. Decedent claimed the property as his own under a claim of right. He never informed defendant as to what properties stood of record in the latter's name, thus showing an intent to prevent defendant from personally selling or encumbering any of them. By holding blank deeds signed by defendant, which decedent as a notary public could complete, he reserved the right to recall or revoke any title standing in defendant's name or to convey the property to other persons without defendant's knowledge. Decedent's acts manifestly evinced an intent that title should not pass to defendant.

4. Decedent's possession was continuous and uninterrupted for 14 years prior to his death and thereafter possession passed to and remained in his executors until the date of trial. At no time did defendant attempt to exercise domain or control over the property.

5. The evidence is uncontradicted that decedent paid all taxes levied and assessed upon the property after the date of the *Davis* deed in 1933.

Such defense as defendant may have had to the action is barred by section 319 of the Code of Civil Procedure which provides that "No * * * defense to an action, arising out of the title to real property * * * can be effectual, unless it appear that the person * * * making the defense * * * was seized or possessed of the premises in question within five years before the commencement of the act in respect to which such action is prosecuted or defense made."

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

In re BAXTER'S ESTATE.**TOTORIAN et al. v. HYDE et al.****Civ. 3785.**District Court of Appeal, Fourth District,
California.

March 16, 1950.

Rehearing Denied April 10, 1950.

Hearing Denied May 11, 1950.

Proceeding in the matter of the estate of Augusta J. Baxter, deceased. G. L. Aynesworth, executor of the estate of Augusta J. Baxter, deceased, filed a petition for probate of the will of Augusta J. Baxter, deceased. A contest was filed by Souren Totorian and others, surviving relatives of deceased's predeceased husband, against Elizabeth J. Hyde and others, relatives of the deceased, to determine heirship. An order determining heirship was entered by the Superior Court of Fresno County, Dan F. Conway, J., and Souren Totorian and others, relatives of deceased's predeceased husband, appealed. The District Court of Appeal, Griffin, J., held that evidence supported finding that property held by deceased at time of her death was her separate property, and not community property.

Order affirmed.

1. Husband and wife ⇨264

Evidence supporting finding that heirs of husband, who predeceased wife, had failed to meet burden of establishing that assets owned by wife at time of her death, other than cash received from sale of bottling plant property, were community property so as to entitle them to share in the assets with wife's heirs. Probate Code, § 228; Civ.Code, §§ 162, 164, 687.

2. Appeal and error ⇨1011(1)

Sufficiency of evidence is primarily for trial court to determine, and if there is a conflict in the evidence, the finding is not open to review on appeal.

3. Husband and wife ⇨262(2)

Where heirs of husband, who predeceased wife, were asserting right to share with wife's heirs in cash held by wife at time of her death, which money she had realized from sale of bottling plant property after husband's death, husband's heirs had burden of proving that funds used for purchase of lots on which plant was built

were in fact from community funds. Probate Code, § 228; Civ.Code, §§ 162, 164, 687.

4. Husband and wife ⇨254, 262(1)

The fact that husband and wife acquired title to real property in their names as husband and wife was presumptive evidence that funds used for purchase of such property were from community funds, but was not conclusive. Civ.Code, § 164.

5. Husband and wife ⇨274(1)

Fact that deed conveying property from husband to wife recited that consideration was less than \$100, and that no revenue stamps were affixed on deed was not conclusive that deed was an inter vivos gift deed, within provision of Probate Code regarding succession to community property where there is no issue. Probate Code, § 228; Civ.Code, §§ 1039, 1040, 1053, 1614.

6. Husband and wife ⇨274(1)

In determining whether deed executed by husband to wife was an inter vivos gift deed, within statute regarding succession to community property where there is no issue, trial court could rely upon statute providing that a written instrument is presumptive evidence of a consideration. Probate Code, § 228; Civ.Code, §§ 1039, 1040, 1053, 1614.

7. Husband and wife ⇨264

Evidence supported finding that cash held by wife at time of her death which she had realized from sale of bottling plant property after husband's death was wife's separate property, and did not constitute community property, so as to entitle husband's heirs to share in the money with wife's heirs. Probate Code, § 228; Civ. Code, §§ 162, 164, 1039, 1040, 1053, 1614.

8. Husband and wife ⇨262(1)

A presumption exists that expenses of the family are paid from community earnings.

Harry Sarkisian, Fresno, for appellants.
Wm. M. Miles, L. Nelson Hayhurst, Fresno, for respondents.

GRIFFIN, Justice.

The executor of the estate petitioned for the probate of the will of Augusta J. Baxter, deceased. By her will she left certain described real property to one beneficiary (a Mrs. Plant) and the balance went to certain specified charities. She did not live for the statutory period after she made the will and for that reason the bequests to charities failed under section 41 of the Probate Code.

The contest here involved is between the surviving relatives of Mrs. Baxter, namely Elizabeth J. Hyde, Sarah Wilson, et al., respondents, and the surviving relatives of Mr. Baxter, her predeceased husband, namely, Souren Totorian, Margaret Katchadorian, and Margaret Takness, appellants.

The Baxters never had any children. The parents of both spouses are dead. The respondent relatives of Mrs. Baxter claim that her entire estate was her separate property at the time of her death and that the remaining undistributed portion thereof should be distributed to them under sec. 225 of the Probate Code. Appellant relatives of Mr. Baxter claim that the property was community property acquired by the Baxters during their married life; that under section 228 of the Probate Code they are entitled to share in the estate.

The trial court found that all of Mrs. Baxter's intestate estate was her separate property and should be distributed accordingly. The appeal is from this order. The only question presented is whether the evidence, aided by the presumptions and the question of the burden of proof, is sufficient to support the finding.

The Baxters were married in 1908. In 1911 they lived on a small five-acre farm at Redford, Michigan, which farm was valued at about \$2500. Mr. Baxter was employed. Mrs. Baxter took care of the chickens, cows, garden and the home. What became of the farm or how title thereto was held is not shown. It is likewise not shown whether either party did or did not have separate funds or property prior to their marriage. From 1913 to 1917 they lived in Detroit, Michigan. They

bought a flat building for \$12,000. \$7,000 cash was paid down and a note and mortgage in the sum of \$5,000 were jointly executed by them. Both Baxters were named grantees in the deed. In 1917 they sold that property and came to Fresno County, California, and continued to live there until Mr. Baxter's death in 1942, and her death in 1946. There is evidence in the record that in 1918 the Baxters had approximately \$7,000. There is evidence that shortly after their arrival in this state they bought two parcels of farm land and made a profit of \$8,100 on the sale of one parcel and \$13,000 on the sale of the other. Whether they lost or made money on the farming operations is not shown. However, shortly thereafter, Mr. Baxter, on his own account, went into partnership with his brother and they purchased a \$250,000 vineyard. Mr. Baxter paid some money down on it and assigned his interest in a contract of sale of certain properties of the Baxters. It apparently was not a successful operation. Mr. Baxter assigned his interest to his brother and took promissory notes in excess of \$8,000, which notes were later reduced to judgment and in 1922 they were listed in the bankruptcy schedule of liabilities of the brother due to the fact that he went through bankruptcy. There is evidence that during the "prosperity period", Mr. Baxter was "buying new automobiles" and "wearing silk shirts". The Baxters' only bank account was closed out in November, 1921, with a balance of \$56.19. This would indicate that under Baxter's management their original capital, whatever its source, may have been largely lost.

There is evidence in the record that in 1922 or 1923, the Baxters bought two parcels of property. One parcel was their home, which property Mrs. Baxter disposed of in her will. The other parcel consisted of three lots, deeded to them as husband and wife, on which they later (in 1926) built a brick building in which was conducted a soda plant. By deed duly recorded in 1925, Mr. Baxter conveyed to his wife as "her sole separate property" both the home and these lots. The consideration was recited as \$10.00

and "less than \$100." No revenue stamps were affixed. This property and business was operated by the Baxters until 1938, at which time it was leased and later sold to a Mr. Diel for \$18,700, including interest. \$17,772.80 of this sum was paid over to the executor of Mrs. Baxter's estate. After the sale of this property the Baxters lived in retirement. From what source the Baxters paid their cost of living over these years is not shown. In a deed executed in 1936, to Mr. and Mrs. Baxter, they were named as joint tenants of another parcel of property in Fresno, which property passed under her will to the named beneficiary.

In reference to the soda plant, the testimony is that in the latter part of 1921, Mr. and Mrs. Baxter started bottling soda on a small scale in their garage back of their home. Both worked hard in an endeavor to build up the business. There is evidence of some success in this respect. They opened another bank account in 1926 with a deposit of \$482.06. In 1924 Mrs. Baxter's father died and left her four houses located in Canada, and \$7,958.-08 in secured mortgages. In 1925 she opened a personal savings account and in 1926 withdrew \$1528.46 therefrom. This exact amount was paid to the title company to release a mortgage on the three lots. In 1926 she obtained a permit to build a building on the three lots at an estimated cost of \$6,000. The building was completed in January, 1927. Notice of completion was signed by her reciting that "she caused a building to be erected" thereon, and that "the nature of the title of said owner" is "* * * she owns it in fee". Between November, 1926, and February, 1927, while the building was being erected, she withdrew from her separate bank account over \$7,000. The indication is that this sum was paid for the cost of the building out of her separate account. In January, 1927, the Baxters secured a loan in the sum of \$3500, on the lots and building for the purpose of buying machinery and equipment to be installed in the new bottling plant. A subsequent renewal note was paid in January, 1937. The holder of the renewal note testified that payment

thereon was extended to Mrs. Baxter "until she got some money from Canada". Apparently, the bottling business prospered. The record of the bank accounts was received in evidence showing rather substantial deposits and withdrawals. Some were joint accounts. Others were in the name of the partnership organized in 1924 by the Baxters under the name of "Ideal Soda Works". Another was a personal account of Mrs. Baxter in the sum of \$3200, opened in January, 1937.

As to the Canadian property of Mrs. Baxter, the record shows that the estate was valued at about \$31,246.42. Mrs. Baxter received about a one-half interest therein. The "Vesting Order" was dated December, 1928. About that time Mrs. Baxter opened and maintained several bank accounts in Canada. Apparently the real property in Canada was not appraised in Mrs. Baxter's estate. The entire estate of Mrs. Baxter is here appraised at \$48,847.-96. The value of the property distributed under a partial decree of distribution was fixed at \$16,250, leaving a balance in excess of \$32,000 for distribution. This balance, according to the record, consists of the following:

Cash	\$27,832.89
Canadian money	227.83
Pacific Savings & Loan Company Account	572.74
U. S. Savings bonds payable to Mrs. Baxter, alone	2,370.00
U. S. Savings bonds payable to Mr. John K. Baxter or Mrs. Augusta J. Baxter	830.00
Man's ring	225.00
Miscellaneous items	441.50

Appellants concede that the Canadian property is the separate property of Mrs. Baxter and they make no claim thereto, but argue that the only reasonable conclusion that can be drawn from the evidence is that, other than the Canadian property, the whole estate of the deceased, Mrs. Baxter, resulted from the joint efforts of the deceased and her predeceased husband and that the property thus acquired was community property.

It should be here noted that upon Mr. Baxter's death the attorney for the executor under his will, now attorney for appellants, filed a petition for the probate of his will. It was there claimed that there was no property left by that deceased; that no inventory was therein filed, and that the proceedings were permitted to lapse. It further appears that no claim was there made that there then existed any community property subject to distribution.

Respondent's argument is that although the money for the sale of the three lots and the building thereon amounted to \$17,718.28, its actual cost was only \$11,800; that the real property disposed of by the will cost \$10,500, but was appraised at \$15,500, and that therefore the total appreciation in value approximated nearly \$11,000; that all money in the bank accounts, the U. S. Savings bonds and the remaining personal property stood in Mrs. Baxter's name at the time of her death. It is therefore accordingly argued that considering these facts, the amount of Mrs. Baxter's Canadian inheritance and its possible subsequent earnings, which were admittedly her separate property, fully offset or account for the amount of Mrs. Baxter's present estate; and that the court was fully justified in finding that the property now remaining in the hands of the executor was either the separate property of Mrs. Baxter or the fruits and earnings therefrom.

Counsel for appellants starts with the premise that by the instruments under which title was conveyed to the Baxters, as husband and wife, the real properties thus acquired, after their marriage, "presumptively" became community property, citing secs. 162, 164 and 687, Civ.Code; Estate of Duncan, 9 Cal.2d 207, 70 P.2d 174; Maskuns v. Maskuns, 93 Cal.App. 27, 29, 268 P. 1093; Stafford v. Martinoni, 192 Cal. 724, 738, 221 P. 919; and Ballinger on Community Property p. 213, stating that the "community generically embraces all property belonging to the spouses, except such as the statute specifically removes from its operation".

It is respondents reply, in this respect, that if Mr. Baxter's relatives base their

claim on one-half of Mrs. Baxter's remaining estate, they do so under the provisions of sec. 228 of the Probate Code. That section provides: "If the decedent leaves neither spouse nor issue, and the estate, or any portion thereof was community property of the decedent and a previously deceased spouse, * * * or came to the decedent from said spouse by gift, * * * such property goes in equal shares * * * to the brothers and sisters of the decedent and their descendants by right of representation, and the other half goes * * * to the brothers and sisters of said deceased spouse and to their descendants by right of representation."

It is argued that the burden of proof of appellant heirs' right to inherit is dependent upon their establishing that the property claimed by them had formerly been the community property of the decedent and her predeceased spouse and that since appellants did not meet that burden they are not entitled to distribution of any portion of the property, citing Estate of Rattray, 13 Cal.2d 702, 91 P.2d 1042; Estate of Simonton, 183 Cal. 53, 190 P. 442; Estate of Nelson, 104 Cal.App. 613, 286 P. 439. In the Rattray case there was a finding that the property there involved was community property. The appellants claimed certain money was separate property of the decedent. Proof was offered to the probate court by appellants that at the time of the death of decedent's husband in 1930 decedent had on deposit with the bank in her own name, as shown by her bank books, the sum of \$16,618.90. A property search report by a title company was also introduced by appellants which tended to show that decedent, during her married life, had held title in her own name to several parcels of real estate. Aside from the fact of title being held by her as her separate property, no evidence was produced to explain the source of the funds by which the property was acquired by her as her separate property. The court there stated the rule to be that if no evidence of probative value was offered by respondents in proof of the fact that the source of the property was the community property of the spouses, respondents would

necessarily fail to establish their right to inherit by virtue of their relationship to the predeceased spouse of the decedent; that since their right to inherit depended not merely upon the fact of that relationship, but upon the fact of such relationship plus the fact that the property claimed by them as heirs had formerly been the community property of the decedent and her predeceased spouse, the burden of showing such additional fact rested upon them. In that case, as noted, there was no evidence that the wife had any separate property or that there was any source of separate income making up her estate which she had at the time of her death. In the instant action there is evidence of separate property being acquired by Mrs. Baxter during her married life and that it might be reasonably presumed that she had a source of income therefrom. In the instant proceeding, Mrs. Baxter rented the four houses she received through her father's estate, two of which she kept until her death. Two of them she sold in 1944 for the reputed price of \$5,000. The Canadian bank account books, received in evidence, showed a general record of deposits and withdrawals between 1928 and 1943. One showed withdrawals of over \$2800 during that period, and another over \$2400. In August, 1946, one of the Canadian mortgages, in the sum of \$1750, was paid off. Statements in evidence show that the houses in Canada were rented over a period of years. The net proceeds of the rental moneys were either deposited in Mrs. Baxter's bank account in Canada or turned over to her personally. A one-half interest in a small insurance policy, issued on the life of Mrs. Baxter's father, was paid to her.

[1] In disposing of the issue here presented, the assets of Mrs. Baxter's estate may be divided into two categories: (1) Assets which have not been traced to community property and which must therefore be distributed as separate property to the relatives of Mrs. Baxter. In this category fall the assets not included in the item of cash received from the sale of the soda plant property. This property all stood in the name of Mrs. Baxter at the time

of her death and it is, to say the least, most difficult to determine whether these items of property were her own separate property and the fruits thereof or whether they were a part of the community property and its earnings. Assuming that appellants are entitled to the presumption that all property acquired by the husband and wife during marriage was community property, as contended, yet the record shows that the bulk of it stood in her name prior to Mr. Baxter's death, and all of it was in her name at the time of her death. She did have separate property acquired after her marriage and the court might well conclude that much of it was brought to this state by her in aid of her investment. The trial court, apparently, did not believe that appellants had met the burden resting upon them of establishing to its satisfaction that these amounts were community property. Under the facts related the trial court was justified in making this finding. *Estate of Rattray, supra*.

[2] Upon an appeal, in such a case, the appellants are confronted with the added task of establishing the fact that there was no real conflict in the evidence and an entire failure of any substantial evidence to support the conclusion of the trial court. The sufficiency of the evidence is primarily for the trial court to determine, and if there is a conflict in the evidence, the finding is not open to review on appeal. *Estate of Duncan, supra*.

[3] As to the money paid from the sale of the soda works property, a close question is presented. When these three vacant lots were acquired, about 1921 or 1922, it is not shown whether all of the Baxters' money, claimed by appellants to have been community, had been dissipated or not. Mrs. Baxter's father died in 1924, and the "Vesting Order" was made in 1928. Whether or not she received any moneys from Canada between those dates is not shown. It is likewise not shown that she did not have other separate property or income. The record does reflect the fact that \$1100 was paid down on these lots and the balance was paid off in 1923 by the execution of a mortgage by Mr. and Mrs.

Baxter for \$4,000, which was subsequently paid off in 1929. The same rule applies here, as above stated, that the burden of proof was upon the appellants to show that the funds used for the purchase of the three lots were in fact from community funds. *Gilmour v. North Pasadena Land etc. Co.*, 178 Cal. 6, 171 P. 1066. In *Estate of Slack*, 13 Cal.2d 721, 91 P.2d 1052, upon which case appellants so strongly rely, it was conceded and found that the money used to purchase the real estate in question was in fact community property.

[4] It is true that the manner in which Mr. and Mrs. Baxter acquired title to the three lots, i. e., in their names as husband and wife, is presumptive evidence bearing on this question but not conclusive. *Maskuns v. Maskuns*, supra; sec. 164, Civ. Code; *Shaw v. Bernal*, 163 Cal. 262, 124 P. 1012.

[5] It should be here noted that two years after the mortgage for \$4000 was executed on the three lots Mr. Baxter executed a *grant, bargain and sale deed*, and not a *gift deed*, as was done in the case of *Estate of Slack*, supra. This grant deed provided that it was subject to said mortgage. The main question here presented, then, is whether appellants have established that such a deed was an *inter vivos* gift deed, within the meaning of sec. 228 of the Probate Code, or whether the evidence, aided by the presumptions, supports the court's findings and conclusions that such property was the separate property of Mrs. Baxter.

The only evidence indicating that this grant might have been a *gift* appears upon the face of the instrument, that is, that the recited consideration is "less than \$100", and that no revenue stamps were affixed. This evidence is not conclusive. Under sec. 1039 of the Civil Code it is provided that a "transfer is an act of the parties, or of the law, by which the title to property is conveyed from one living person to another." Section 1040 of the Civil Code states that "A voluntary transfer is an executed contract, subject to all rules of law concerning contracts in general; except

that a consideration is not necessary to its validity." Section 1053 thereof provides that "A transfer in writing is called a grant, or conveyance, * * *" and section 1614 recites that "A written instrument is presumptive evidence of a consideration."

In *Driscoll v. Driscoll*, 143 Cal. 528, 77 P. 471, a father deeded real property and his interest in a copartnership to his daughter a long time prior to his death, by grant deed. It was there said, 143 Cal. at page 533, 77 P. at page 473:

"Upon the face of the instrument it purported to be a grant to the defendant *in praesenti* of the property described therein, and, as there was no evidence of any matter connected with the transaction which in any respect qualifies or limits its legal effect, the only function of the court was to give effect to its terms, and to declare that the defendant became thereby vested with the entire interest of her father in the property described in the instrument.

"The finding that the instrument was executed for a good and valuable consideration was also authorized by the evidence. Being in writing, a sufficient consideration was presumed (Civ.Code, § 1614); and, if the plaintiff would seek to avoid it for want of consideration, the burden of showing such fact was upon her. ([Civ. Code] § 1615). If the transaction is to be regarded as a voluntary transfer, no consideration was necessary for its validity. [Civ.Code] § 1040. The plaintiff not only failed to show a want of consideration, but she did not even attempt to make such showing; and it affirmatively appears that upon the suggestion of the notary the defendant gave to her father a dollar as a consideration for the deed. In the absence of any imputation of fraud, the amount of the consideration for a deed is immaterial."

[6,7] It would appear, therefore, that the trial court could rely upon the presumption in holding that there was a consideration for the deed and that the grant was not a *gift inter vivos*. It was shown that shortly after this transfer Mrs. Baxter

drew funds from her personal savings account and the mortgage was released. She obtained a permit to build the building and represented herself as owner of the fee. Over \$7,000 was withdrawn from her separate account to finance the building project. In 1927, a new loan of \$3500 was secured on the lots and building for the purpose of buying the machinery. There is evidence that this renewal note was paid and that she then represented that the money for such payment was coming from Canada. It therefore fairly appears that the original investment could have been paid from Mrs. Baxter's separate estate and from the fruits and earnings thereof, and that the profits, being the difference between the cost and selling price of the property, remained her separate property. Sec. 162, Civ.Code; *Shaw v. Bernal*, supra; *Dyment v. Nelson*, 166 Cal. 38, 134 P. 988; *Huber v. Huber*, 27 Cal.2d 784, 167 P.2d 708. Insofar as the lots, building and machinery are concerned, there is sufficient evidence, aided by the presumptions, to support the finding of the court in respect to this property.

[8] The agreement for the sale of that property to Mr. Diel, for the price stated, also included the business and good will. It is not shown what portion of the price, if any, represented the value of the business or good will. Appellants having failed to show that any portion of the business was community property, this court would be helpless in endeavoring to determine that the parties fixed any additional price upon the business and good will separate from the price of the lots, buildings and machinery. The cost of living may have absorbed any community funds that were earned. It is the presumption that the expenses of the family are paid from community earnings. *Huber v. Huber*, supra.

While the evidence might have supported a contrary conclusion than that reached by the trial court, it cannot be said that its findings are not supported.

Order affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.

35 Cal.2d 26

In re AKELEY'S ESTATE.

LEMMON et al. v. STATE.

L. A. 20939.

Supreme Court of California, in Bank.
March 21, 1950.

Proceeding in the matter of the estate of Clara Rood Akeley, deceased, on a final accounting of the executor, wherein Russell Lemmon, Rosella Lemmon, and others, claimed a right to the residue, and the State of California claimed a share by escheat. The Superior Court for Los Angeles County, Newcomb Condee, J., rendered an adverse order, and the State of California appealed. The Supreme Court, Shenk, J., held that under a will devising a residue in 25 per cent portions to each of three named legatees without disposition of the fourth portion, testatrix intended that the fourth portion would be divided equally between the three named residuary legatees.

Decree affirmed.

Prior opinion 206 P.2d 415.

Traynor and Edmonds, JJ., dissented.

1. Wills ⚭439, 448, 449

A will is to be construed according to intention of testator, and all other rules of construction are subordinate to this rule; and in its application, presumptions are to be indulged which will prevent entire or partial intestacy. Probate Code, § 101.

2. Wills ⚭448, 449

Constructions leading to intestacy either in whole or in part are not generally favored, but will be rejected when language is reasonably effective to dispose of the entire estate; and a liberal interpretation will be employed to that end. Probate Code, § 101.

3. Wills ⚭455

Court must construe language of a will so that it will conform to testatrix' intention as disclosed by will rather than defeat such intention by strict adherence to technical sense of particular words even if they involve mathematical percentages; and especially where will is not drawn by an attorney, words repugnant to clear intention may be regarded as surplusage or

restricted in application. Probate Code, § 101.

4. Wills ⚭463

Where will devised residue in 25 per cent portions to each of three named legatees without specific mention of fourth portion, but will on its face showed that unmarried testatrix knew she had no heirs or relatives and intended to dispose of all of her estate, court could properly disregard mathematical percentages as surplusage and find an intent to dispose of all residue to the named residuary legatees in equal shares rather than permit escheat of fourth portion to the state. Probate Code, §§ 101, 105, 106, 231.

5. Executors and administrators ⚭314(12)

Where construction placed on language of a will by probate court is reasonable and appears to be consistent with testatrix' expressed intention, an appellate court will not substitute another although equally tenable interpretation.

6. Appeal and error ⚭151(2)

Where the state had a possible interest depending upon whether a division of a will was interpreted so that escheat of a certain portion would result, state was a party aggrieved by a decree distributing the estate otherwise and was entitled to appeal.

Fred N. Howser, Attorney General, and Elizabeth Miller, Deputy Attorney General, for appellant.

Sidney N. Bachtell, B. Dean Clanton and Newby, Holder & Newby, Los Angeles, for respondents.

SHENK, Justice.

This appeal from the decree of final distribution presents for consideration the question of the correctness of the probate court's interpretation of the residuary clause in the Will of the decedent.

Clara Rood Akeley died on November 1, 1947. She left an holographic Will dated November 14, 1946, declaring that she was unmarried and had no living relative of any degree of kindred. She made several

specific bequests to individuals, appointed Russell Lemmon executor, and provided for further distribution in the following words:

"Fifth, all the rest, residue and remainder of my estate I give and bequeath as follows

25 per cent to the Childrens Home Society of Calif

25 per cent to the Mary Martha Home for Girls

632 Britannia Street, Los Angeles Calif

25 per cent to Los Angeles Society for the Prevention of Cruelty to animals, 3612 11th Ave Los Angeles, In the event the total of the bequests to the above named Charitable organizations shall exceed the portion of my Estate that I may legally give for charitable purposes, then all such bequests shall be proportionately reduced to the extent, that the total of such bequests shall not exceed the maximum amount that I may legally give to Charity, and in such event, I give devise and bequeath to Russell Lemmon the Executive named, all the residue of my estate, free from Trust, But with the request that he shall distribute the same in such manner, as I shall have indicated to him."

In his petition for distribution the executor alleged an uncertainty as to the proper distribution of the residue of the estate, and raised the question whether in accordance with the manifest intention to dispose of all of the residue it should be distributed one-third to each of the named charitable organizations; or whether the testatrix died intestate as to one-fourth of the residue in which event such portion would escheat to the State of California.

The State of California, through the Attorney General, filed a statement of claim by escheat to one-fourth of the residue of the estate. After a hearing the court found that it was the intention and purpose of the testatrix to dispose of all of the residues of her estate to the three named organizations in equal shares and so ordered distribution of the residue which amounts to \$41,023.19.

The State of California appealed, asserting that there is no ambiguity or uncertain-

ty in the language of the Will but that the specific residuary bequests require a finding that the testatrix failed to dispose of one-fourth of the residue of her estate which is distributable to the State of California as escheated property pursuant to Section 231 of the Probate Code.

[1,2] The controlling rule is stated in Section 101 of the Probate Code which provides that a Will is to be construed according to the intention of the testator. All other rules of construction are subordinate to this cardinal rule and in its application presumptions are to be indulged which will prevent entire or partial intestacy. In re Estate of Blake, 157 Cal. 448, 458-459, 108 P. 287. Presumptions against intestacy are especially applicable in construing residuary clauses, since generally they are employed for the purpose of making complete disposition of the testator's property. Constructions leading to intestacy either in whole or in part are not generally favored but will be rejected when the language is reasonably effective to dispose of the entire estate; and liberal interpretation is employed to that end. O'Connor v. Murphy, 147 Cal. 158, 153, 81 P. 406; In re Estate of Hoytema's Estate, 180 Cal. 430, 432, 181 P. 645; In re Estate of Beldon, 11 Cal.2d 108, 111, 77 P.2d 1052; Estate of Northcutt, 16 Cal.2d 683, 107 P.2d 607; In re Estate of Lawrence, 17 Cal.2d 1, 7, 108 P.2d 893.

[3] Words denoting percentages have a technical meaning and "25 per cent" mathematically equals one-fourth of the whole. The Attorney General assumes that the probate court was bound by the mathematical percentages specified by the testatrix and that the use of any other language could not be deemed to create ambiguity with the specified percentages. However, there is no rule of construction which would prevent the court from applying the language of a Will in accordance with the manifest intention of the testatrix even though to do so would require an interpretation not in accord with the technical meaning of words used. On the contrary it is the duty of the court so to construe the language that it will conform to the testatrix' intention as disclosed by the Will

rather than to defeat such intention by strict adherence to the technical sense of particular words. Especially in cases where the Will is not drawn by an attorney words which are repugnant to the clear intention disclosed by other parts of the instrument may be regarded as surplusage or restricted in application since to do otherwise would be to defeat the intention. *Matter of Estate of Wood*, 36 Cal. 75.

The Attorney General relies on the rule stated in 11 Cal.2d on page 112, 77 P.2d on page 1054 of *In re Estate of Beldon*, supra, namely: That a testator has the right to make a Will which does not dispose of all of his property but which leaves a residue to pass to his heirs under the laws of succession; that such a Will is not the usual one but when the language clearly leads to that result it must be given effect accordingly. The statement is not applicable in the present case because the testatrix left no surviving heirs. The Will on its face shows that the unmarried testatrix was fully aware of the fact that she had no heirs or relatives, and that she intended to dispose of all of her estate. The words of gift of "all the rest, residue and remainder of my estate" to the three named organizations, and in the event the bequest was in excess of that permitted by law then to Russell Lemmon free of trust for distribution by him as she would privately indicate, discloses an intention to dispose of all of the residue to the organizations named unless there were legal restrictions limiting the amount she could leave to charity. It is conceded that there were no applicable limitations and no relatives have appeared to claim any part of the estate.

[4] The language showing a purpose and intention to dispose of the entire estate, and the use of the specified percentages aggregating less than the whole, created an ambiguity which it was necessary to resolve before distribution could be ordered. The language of the will and the surrounding circumstances, namely that the testatrix was unmarried, that she had no relatives of any degree of kindred, that this condition was contemplated by the testatrix, and that she drafted the Will herself, are deemed to have been considered by the

court in arriving at the interpretation which would conform to the testatrix' intention as expressed by her Will. The ambiguity was reasonably resolved in accordance with the court's finding by the language of the Will in the light of the circumstances disclosed, Sec. 105, Probate Code; *In re Estate of Seay*, 180 Cal. 304, 306, 181 P. 58; and the mathematical figures were properly disregarded as surplusage when a different intention appeared by the language of the Will drafted solely by the testatrix. Sec. 106, Probate Code; *In re Estate of Northcutt*, supra, 16 Cal.2d 683, 688, 107 P.2d 607.

[5] As indicated by this court's decision in *Re Estate of Northcutt* (16 Cal.2d at pages 690-691, 107 P.2d at pages 610-611 citing many cases), where the construction placed on the language of the Will by the probate court is reasonable and appears to be consistent with the testatrix' expressed intention the appellate court will not substitute another although equally tenable interpretation.

The foregoing rules of construction and review are determinative of the questions relating to interpretation of the fifth provision in the Will. The rules and decisions relied on by the Attorney General are inapplicable to control a different result considering the particular facts of this case.

[6] The respondents who are the distributees named in the Decree of Distribution contend that the State was not an aggrieved party and was not entitled to take the appeal. The contention is based on the assertion that the State in no event could become a distributee since, so it is claimed, Russell Lemmon was named as the residuary legatee to take any portion not distributable to the named organizations. It was assumed on the hearing before the Probate court that the alternate residuary legatee would take only if the bequest to the organizations was in excess of that permitted by law and, that condition not obtaining, any undistributed portion would escheat to the state. It is here also assumed that the State of California would be a distributee as to one-fourth of the residue had the court made a contrary

finding on the particular issue of interpretation presented by the executor. In any view of the case, however, the state had a possible interest depending on the interpretation of the fifth provision of the Will, and it was a party aggrieved by the decree distributing the property otherwise. It was therefore entitled to appeal.

The decree is affirmed.

GIBSON, C. J., and CARTER, SCHAUER and SPENCE, JJ., concur.

TRAYNOR, Justice (dissenting).

In the fifth clause of her will, the testatrix made three bequests, each representing 25% of her residuary estate. 25% thus remained unbequeathed. It is immaterial whether the omission of a fourth beneficiary was intentional or inadvertent; obviously the court cannot add a beneficiary. Likewise it cannot increase the amount of the bequests; the will specifies 25% and there is no evidence that 33⅓% was intended. The introductory clause, "all the rest, residue and remainder of my estate I give and bequeath as follows", designates the fund from which the bequests were to be paid. The legatees and quantum thereof were specified "as follows"; there were three legatees, and each was to receive one-fourth of the fund. There is no evidence that testatrix intended that they should also receive proportionate shares of the remaining one-fourth of the fund.

In reading such an intention into the will the majority opinion relies on the presumption against intestacy. There is, however, "no room for application of the rule [against intestacy] if the testator's language, taken in the light of surrounding circumstances, will not reasonably admit of more than one construction. A court's inquiry in construing a will is limited to ascertaining what the testator meant by the language which he used. If he used language which results in intestacy, and there can be no doubt about the meaning of the language which was used, the court must hold that intestacy was intended." In re Estate of Beldon, 11 Cal.2d 108, 112, 77 P. 2d 1052, 1053; In re Estate of Hoytema, 129 Cal. 430, 432, 181 P. 645; In re Estate

of Lyons, 36 Cal.App.2d 92, 95, 96 P.2d 1018; In re Estate of Sullivan, 31 Cal. App.2d 527, 529-530, 88 P.2d 225; In re Estate of Maloney, 27 Cal.App.2d 332, 336, 80 P.2d 998.

I cannot agree that this court is bound under applicable rules of appellate review to affirm the trial court's interpretation of the will. The will clearly prescribes the disposition of only 75% of the testatrix's residuary estate. It is not for the trial or appellate court to rewrite her will by enlarging her bequests on the conjecture that the failure to bequeath 25% was unintentional and that had it been pointed out to the testatrix, she would have divided it equally among the three specified beneficiaries rather than have given it to a fourth beneficiary.

The majority opinion relies on In re Estate of Northcutt, 16 Cal.2d 683, 107 P.2d 607, for the proposition that "where the construction placed on the language of the will by the probate court is reasonable and appears to be consistent with the testatrix' expressed intention the appellate court will not substitute another although equally tenable interpretation." It is conceded that the trial court's interpretation of the will was based solely on its terms, without the aid of any extrinsic evidence. The dictum of the Northcutt case is not applicable to the interpretation of a document when there is no extrinsic evidence. "Whatever confusion might have existed in the law on this subject prior to 1942 was set at rest by the decision in Re Estate of Platt, 21 Cal.2d 343, 131 P.2d 825. Since the decision of that case it is settled law that the interpretation of a document, including a will or a decree, is a question of law and that it is the duty of an appellate court in such cases to interpret the document independent of the construction given to it by the trier of the fact, and to make a final determination in accordance with the applicable principles of law." In re Estate of Norris, 78 Cal.App.2d 152, 159, 177 P.2d 299, 303; In re Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825; Western Coal & Mining Co v. Jones, 27 Cal.2d 819, 826-827, 167 P.2d 719, 164 A.L.R. 685; Union Oil Co. of California v. Union Sugar Co.,

31 Cal.2d 300, 306, 318, 188 P.2d 470; In re Estate of Pearson, 90 Cal.App.2d 436, 438, 203 P.2d 52.

The only evidence of testatrix's intention is her will. It offers no support for the construction placed upon it by the trial court and by the majority opinion herein. I would therefore reverse the decree of distribution and direct the escheat to the State of California of 25% of the residuary estate.

EDMONDS, J., concurs.



35 Cal.2d 10

SCHEFF et al. v. ROBERTS et al.

No. L.A. 21289.

Supreme Court of California, in Bank.

March 17, 1950.

Action by Jack Scheff and another against Raymond W. Roberts (sued as Raymond W. Williams) and others for injuries and property damages sustained in collision with truck owned by defendant, Charles L. Fink, and operated by named defendant. The Superior Court, Los Angeles County, Ray P. Brockman, J., gave judgment for plaintiffs and defendants, Charles L. Fink and Charles L. Fink, doing business as Norge Refrigerator Repair Shop, appealed. The Supreme Court, Spence, J., held that the evidence sustained trial court's finding that truck was being operated with implied permission of defendant owner.

Judgment affirmed.

For prior opinion see 209 P.2d 820.

1. Automobiles ⇨244(22)

Under statute making owner liable for negligent operation of motor vehicle by another with owner's permission, such permission must be affirmatively proved and cannot be left to speculation or conjecture, being as important as the fact of ownership. Vehicle Code, § 402(a).

2. Appeal and error ⇨1010(1)

Whether motor vehicle was being operated with permission of owner so as to render owner liable for negligent operation thereof is a question to be determined by trial court upon the facts and circumstances in evidence and the inferences reasonably to be drawn therefrom and trial court's decision will not be disturbed on appeal if the record furnishes substantial support therefore. Vehicle Code, § 402(a).

3. Automobiles ⇨244(27)

Evidence sustained trial court's finding that truck was being operated with implied permission of owner after regular working hours by employee of corporation controlled and managed by owner so as to render owner of truck liable under statute for negligent operation thereof, though owner and driver testified driver did not have express permission to use truck and owner had no knowledge of driver's intended use thereof. Vehicle Code, § 402(a).

4. Evidence ⇨589

In evaluating testimony of owner and driver of truck that driver did not have express permission to use truck at time of collision with plaintiff's automobile, trial court was entitled to consider the interest in result of case of owner liable under statute for its negligent operation with his permission and of driver as an employee of corporation controlled by owner. Vehicle Code, § 402(a); Code Civ.Proc. § 1847.

5. Automobiles ⇨192(1)

Under statute making owner liable for negligent operation of motor vehicle by another with owner's permission, owner's prior knowledge of intended use of vehicle is not a necessary element of implied permission. Vehicle Code, § 402(a).

6. Automobiles ⇨244(27)

That employee of corporation procured key of truck from desk drawer while owner of truck who managed corporation was busy with customers in another part of building was consistent with inference that employee had implied permission to use truck so as to render owner liable for negli-

gent operation thereof. Vehicle Code, § 402(a).

7. Appeal and error — 996

Decision of trial court as trier of facts is binding on appeal, where recited facts authorize either of two opposite inferences, one of which trial court adopted.

Charles A. Thomasset, Los Angeles, for appellants.

Borah & Borah, Los Angeles, for respondents.

SPENCE, Justice.

Defendants Charles L. Fink and Charles L. Fink doing business as Norge Refrigerator Repair Shop appeal from a judgment for plaintiffs in an action for damages sustained as the result of an automobile collision. The cause was tried by the court sitting without a jury, and the appeal is presented on a settled statement.

On January 23, 1947, a Studebaker pickup truck owned by defendant Charles L. Fink and operated by defendant Raymond W. Roberts collided with plaintiff's automobile. It is undisputed that Roberts was negligent and that his negligence was the proximate cause of the accident. The court found that at the time of the accident California Refrigerator Repair Shop, a corporation, was the *alter ego* of Charles L. Fink; that Roberts was employed by said corporation and Charles L. Fink; that Roberts was operating the truck after his regular hours of employment and with the consent and permission of said Fink. Appellants challenge the sufficiency of the evidence to sustain the above findings as to these particulars: (1) the *alter ego* identification of Fink; (2) the employment relationship of Roberts with Fink; and (3) the operation of the truck with the "consent and permission" of Fink. It is stipulated in the record that the judgment against appellants was "predicated solely upon the findings that defendant Raymond W. Roberts was operating the Studebaker truck with the consent and permission of defendant Charles L. Fink and Charles L.

Fink doing business as Norge Refrigerator Repair Shop."

[1,2] Section 402(a) of the Vehicle Code imposes liability upon the "owner of a motor vehicle" when the driver, whose negligent operation caused the injury, operated such vehicle "with the permission, express or implied, of such owner." Under such statute, permission cannot be left to speculation or conjecture nor be assumed, but must be affirmatively proved *Barcus v. Campbell*, 90 Cal.App.2d 768, 204 P.2d 65, and the fact of permission is just as important to sustain the imposition of liability as is the fact of ownership, *Krum v. Malloy*, 22 Cal.2d 132, 134, 137 P.2d 18. However, the question of whether there was such permission is one to be determined by the trial court upon the facts and circumstances in evidence and the inferences reasonably to be drawn therefrom, *Casey v. Fortune*, 78 Cal.App.2d 922, 923, 179 P.2d 99, and its decision will not be disturbed upon appeal where the record furnishes substantial support therefor. *Harms v. Reed*, 73 Cal.App.2d 853, 860, 167 P.2d 747. Such is the case here with respect to the trial court's finding on the issue of permissive operation of the truck, and it therefore becomes unnecessary to consider the sufficiency of the evidence to sustain other findings to which appellants object as above noted.

The pertinent facts appear as follows: Roberts was an employee of the California Refrigerator Repair Shop, a corporation, engaged in the business of repairing refrigerators and other appliances. Fink was its president and general manager; he owned about ninety per cent of the stock; and he was in control of and ran the business, drawing a salary therefor. Roberts testified that he was first "hired by" Fink "about three years before going into the service"; that after he "got out of the service," he was again "employed by" Fink and that he had been so working "about eight months" prior to the accident. He stated that in the course of his employment he drove a truck—"one of the regular trucks" belonging to the corporation and used to "pick up any machines that had to be

fixed." In identification of the Norge Refrigerator Repair Shop, Fink testified that it was merely a name he adopted as a convenient telephone listing for advertising purposes; that calls from customers wanting such repair service were handled by the corporation, as "Norge" had no employees; that the equipment used in the work belonged either to the corporation or to himself personally; that the corporation did not pay him anything if his equipment was used and that he did not pay the corporation for the service of its employees; and that the money received for the repair services went to the corporation.

The truck involved in the accident was a Studebaker owned by Fink personally but registered under the name of "Norge." It had been used by the California Refrigerator Repair Shop prior to 1943. It was not being used in the business at the time of the accident, and in fact, had been "up for sale" for some months. Roberts testified that on the day of the accident he "quit work" about 6:30 p. m. and took the truck, which was parked "on [a] side street next to the shop," as it was late and he was anxious to get home to take his "wife for treatments." Fink was at the shop at the time but he did not see Roberts leave. Roberts did not tell Fink that he was taking the truck. He did not ask Fink if he could use the truck and Fink did not know anything about his taking it. When he took the truck, it was not visible from the place where Fink was in the shop. Roberts obtained the key from a desk drawer in a room apart from where Fink was—"up front" in the shop "taking care of the customers." Roberts knew where the key was kept, and Fink did not see him take it. He testified that he did not ask Fink for the key because Fink "was busy at the time"; that he "just helped [himself]" and intended to tell Fink "the [next] morning." He further testified that a few times previously, with Fink's permission, he had taken "other trucks" home after working hours, "regular trucks" (belonging to the corporation); that Fink "had rather [he] wouldn't take them, but under the circumstances"—"taking [his] wife for treatments"—had "loaned them to [him]"; that

a "week" or "two weeks" before the accident Fink had similarly permitted him to take the Studebaker truck and did not object "under the circumstances." Fink testified that when Roberts had asked on other occasions for a truck "to take his wife for treatments," he had let Roberts "have a Dodge" (belonging to the corporation) but "never [the] Studebaker" because it was the only one "in the place" that "wasn't insured"; it was "up for sale—not supposed to be used" and he himself "hardly" ever drove it unless "to show it to a prospective customer who wanted to buy a truck." Roberts was not discharged after the accident.

[3] As thus reviewed, the record discloses evidence of sufficient substantiality to support the finding that Roberts was operating the Studebaker truck with the consent and permission of its owner, Fink. So significant are these factors: property of the corporation and property of Fink were used together generally as available in the shop; Roberts had been permitted to drive the corporation's trucks on several occasions and the Studebaker at least once, after working hours in "certain circumstances"—for "taking [his] wife for treatment," the same situation that prompted his taking the Studebaker on the day of the accident; the key to the Studebaker was left in an office desk where it was readily accessible; the several years' working association that existed between Fink and Roberts in the business, closely akin to an employer-employee relationship in view of Fink's "hiring" of Roberts for the corporation, wherein Fink held the bulk of the stock and was in complete control; and Roberts was not discharged from his employment after having allegedly taken Fink's property for his own use but was retained as before. From these facts and the inferences reasonably deducible therefrom, the trial court was justified in its determination that Roberts had implied permission to use the truck at the time in question. *Flemmer v. Monckton*, 73 Cal. App.2d 271, 274-276, 166 P.2d 380; *Brown v. Aldrich*, 77 Cal.App.2d 693, 694-696, 176 P.2d 89; *Casey v. Fortune*, supra, 78 Cal.App.2d 922, 925, 179 P.2d 99; *Reed v.*

Cortez, 88 Cal.App.2d 416, 420-422, 198 P.2d 911.

[4] Appellants argue that because both Roberts and Fink testified that Roberts did not have express permission to use the Studebaker truck on the occasion of the accident, permission cannot be inferred. But such testimony may not influence the result on an appeal of this character where the conduct of the parties and the circumstances existing at the time sustain an inference of implied permission as the basis of the imposition of liability under the statute. *Burford v. Huesby*, 35 Cal.App.2d 643, 647, 96 P.2d 380. Moreover, in evaluating the testimony of Fink and Roberts, the trial court was entitled to consider their "interest in the result of the case"—Fink as owner of the truck liable for its permissive use and Roberts as an employee of the corporation controlled by Fink. *Flemmer v. Monckton*, supra, 73 Cal.App.2d 271, 275, 166 P.2d 380; see Code Civ.Proc., sec. 1847; *People v. One 1937 Buick Coupe*, 89 Cal.App.2d 556, 561, 201 P.2d 402.

[5] Nor does it avail appellants to argue that the record establishes that Fink had no knowledge of Roberts' intended use of the truck, and that in the absence of such factor, implied permission may not be found. *Bradford v. Sargent*, 135 Cal.App. 324, 330, 27 P.2d 93; *Howland v. Doyle*, 6 Cal.App.2d 311, 315, 44 P.2d 453. In *Burgess v. Cahill*, 26 Cal.2d 320, 158 P.2d 393, 159 A.L.R. 1304, this proposition was considered and it was held that prior knowledge is not a necessary element of implied permission. The language to the contrary in the cases cited by appellants was there disapproved, and it was recognized 26 Cal. 2d at page 324, 158 P.2d at page 395 that "knowledge or information of the intended use of [a] car had reference to the element of 'express' as opposed to 'implied'

consent." See *Burford v. Huesby*, supra, 35 Cal.App.2d 643, 644, 96 P.2d 380.

[6, 7] Appellants also cite Roberts' procurement of the key from the desk after he looked to see "where Mr. Fink was" and found that "he was busy and out of sight" as conduct showing Roberts' purpose to avoid Fink at that time. While such action might suggest a plan of furtive movement and concealment on the part of Roberts, it likewise is consistent with the inference that Roberts looked for Fink in order to mention the fact that he was going to take the truck but upon seeing that Fink was "busy," decided that it was not necessary in view of the same circumstances prevailing as had existed on previous occasions when Fink had loaned him other trucks as well as the Studebaker for "taking [his] wife for treatments." The latter interpretation would indicate a course of open and unconcealed behavior on the part of Roberts coincident with his taking the truck "without hesitation and without apparent consciousness of disobeying instructions or violating the law", *Flemmer v. Monckton*, supra, 73 Cal.App.2d 271, 276, 166 P.2d 383, and in the honest belief that Fink had no objection to his using it. It is not open to appellants to complain that the trial court from the recited facts authorizing "either one of two opposite inferences," adopted the one favorable to respondents and rejected the contrary—resulting in a "decision * * * binding upon the appellate court." *Boland v. Gosser*, 5 Cal.App.2d 700, 701, 43 P.2d 559, 560; see, also, *Ilarms v. Reed*, supra, 73 Cal.App.2d 853, 860, 167 P.2d 747.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAINOR and SCHAUER, JJ., concur.

PRIDONOFF v. BALOKOVICH et al.

Civ. 17397.

District Court of Appeal, Second District,
Division 2, California.

March 20, 1950.

Rehearing Denied April 6, 1950.

Hearing Denied May 18, 1950.*

Eric L. Pridonoff sued Zlatko Balokovich and another for libel. A judgment denying recovery pursuant to order sustaining demurrer to third amended complaint without leave to amend was entered by the Superior Court, Los Angeles County, William B. McKesson, J., and the plaintiff appealed. The District Court of Appeal, Moore, P. J., held that the amended complaint was sufficient to state cause of action.

Judgment reversed with instructions.

McComb, J., dissented.

1. Libel and slander ⇨1

"Libel" is a false and unprivileged publication by writing which exposes any person to hatred, contempt, ridicule or obloquy or which causes him to be shunned or avoided or which has a tendency to injure him in his occupation, and includes almost any language which upon its face has a natural tendency to injure a person's reputation, either generally, or with respect to his occupation. Civ.Code, § 45.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Libel".

2. Libel and slander ⇨19

In determining whether a publication is libelous it is measured not by its effect when subjected to critical analysis of a trained legal mind but by its probable effect upon mind of average reader. Civ.Code, § 45.

3. Libel and slander ⇨19

Publisher is liable for what he has insinuated as well as for his explicit statement, and his language will be regarded not only with reference to actual words employed but according to sense and meaning under all circumstances of the publication. Civ.Code, § 45.

215 P.2d—59

* Subsequent opinion 223 P.2d 854.

4. Libel and slander ⇨19

In evaluating alleged libelous publication, court will place itself in situation of reader to whom it is addressed and then determine sense or meaning of document according to its natural and popular construction. Civ.Code, § 45.

5. Libel and slander ⇨16

The requirements of definition of "libel" have been met if false publication "exposes" a person to ridicule, hatred, contempt or obloquy, and it is not essential that the false publication declare a crime to have been committed. Civ.Code, § 45.

6. Libel and slander ⇨6(2)

Falsely charging a person with violation of confidence reposed in him or with treachery to his associates is "libelous per se". Civ.Code, § 45.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Libelous per Se".

7. Libel and slander ⇨10(3)

A false publication that plaintiff was recalled by American government from his position as a member of the American Embassy in Belgrade, Yugoslavia, in effect charged plaintiff with violating trust reposed in him, and was actionable per se. Civ.Code, § 45.

8. Libel and slander ⇨85

Complaint which alleged that defendants published false article which stated that plaintiff had been apprehended in Belgrade, Yugoslavia, in spying upon Yugoslav government while a member of American Embassy, and had been ordered back to United States, and that thereafter plaintiff wrote articles tending to foment a revolt against Yugoslav government, was sufficient to state cause of action for libel. Civ.Code, § 45.

Paul Barksdale d'Orr and B. E. Ahlport,
Los Angeles, for appellant.

Edward Mosk, Hollywood, for respondents.

MOORE, Presiding Justice.

Appeal from judgment denying recovery for libel pursuant to order sustaining de-

murrer to the third amended complaint without leave to amend.

The writing¹ allegedly published by respondents accused appellant of having been apprehended in Belgrade in spying upon the Yugoslav government while he was a member of the American Embassy; the Yugoslav government requested his recall and he was ordered back to the United States; he thereupon wrote articles violently attacking the Yugoslav government, intimating that

if the Yugoslavs would revolt against their government America would help them; the articles were mimeographed both in English and Serbo-Croatian and distributed through the American reading room in Belgrade where respondents read them.

The complaint² admits that plaintiff was "one of the American Embassy at Belgrade" but declares that in all other respects the publication was false and was published by respondents in *Narodni Glasnik*, a daily

1. In paragraph IV of complaint.

2. "I. That plaintiff is, and was at all of the times herein mentioned, a citizen of the County of Los Angeles, State of California, carrying on the occupation of consulting engineer, and of a writer and lecturer on economic subjects, in said County and State and other parts of the American Union, and that he enjoyed a good reputation in such occupation.

"II. That prior to the events herein-after alleged, plaintiff had been an economic attache in the United States Embassy, at Belgrade, Yugoslavia, and had served the government of the United States, in the functions assigned to him as such employee, at that capital, and that such functions, employment and service were of an economic and commercial nature entirely, and wholly unrelated to, and did not embrace, in any sense or manner, espionage or spying activities, but that all of plaintiff's functions, employment and service were non-political, and that all of said facts and the nature of plaintiff's functions, employment and service [were] known to defendants.

"III. That defendant Joyce Borden Balokovich (sometimes spelled Balokovic) is a native-born citizen of the United States, and is married to defendant Zlatko Balokovich (sometimes spelled Balokovic), who is a native of the country now known as Yugoslavia, but plaintiff is advised and believes and therefore alleges that he is a naturalized citizen of the United States.

"IV. That on or about the 6th day of March, 1947, the defendants together composed, wrote and caused to be printed and published, of and concerning the plaintiff, under their joint names and respective photographs, in a daily newspaper known as *Narodni Glasnik*, and distributed to, and which was read by, large numbers of people in the County of Los Angeles, and in other parts of the State of California, and in numerous

other cities and counties throughout the United States, the following matter:

"Eric Pridonoff, while one of the American Embassy in Belgrade, was caught carrying on flagrant espionage activities. The Yugoslav government requested his recall and we recalled him. When Pridonoff got back to the United States, he wrote a series of articles for the Hearst press violently attacking the Yugoslav government and intimating clearly that if the Yugoslav people would revolt against their government, we would help them. These articles were mimeographed both in English and Serbo-Croatian, and distributed through the American Reading Room in Belgrade. We read them ourselves while we were there."

"V. That said publication, except the statement that plaintiff was 'one of the American Embassy at Belgrade,' was false, and that defendants, through evil motive and malice, and ill-will toward the plaintiff, wilfully, wickedly, wrongfully, maliciously, and with intent and design to injure, disgrace and defame this plaintiff, and to bring him into public discredit as a man, and in his occupation as a consulting engineer and a writer and lecturer on economic subjects, and to cause the public to hold plaintiff in contempt and ridicule, published in said newspaper, of and concerning the plaintiff, and of and concerning him in his said occupation, the said false, libelous, malicious and defamatory article.

"VI. That said publication did expose plaintiff to, and bring upon him, hatred, contempt, ridicule and obloquy, and caused him to be shunned and avoided, and to be injured in his occupation aforesaid, and in his good name and reputation; all to his general damage in the sum of \$100,000.

"VII. That said publication was made by defendants with actual malice, motivated by the fact that, as plaintiff alleges, both of the defendants were and are disloyal to the democratic principles

newspaper, through evil motive, malice and ill-will toward plaintiff, and "with intent and design to injure, disgrace and defame him and to bring him into public discredit as a man and in his occupation as a consulting engineer and a writer and lecturer on economic subjects, and to cause the public to hold plaintiff in contempt and ridicule." The pleading alleges that the publication accomplished its designs, "caused him to be shunned and avoided and to be injured in his occupation and in his * * * reputation" to his general damage in the sum of

\$100,000. In a second count the complaint alleges innuendo and special damages in the sum of \$5,000.

[1-4] "Libel is a false and unprivileged publication by writing, * * * which exposes any person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Civ.Code, sec. 45. Any language is libelous if upon its face it has a natural tendency to injure a person's reputation, either in a general way or with respect to his occupation.

and political system of the government of the United States, and both of them adhere to the totalitarian principles and system of Communism, which at said time prevailed, and still prevail, in Yugoslavia, and which the defendants desire to see prevail in the United States, and that plaintiff disliked and distrusted the principles and system of Communism, and was and is devoted to the principles and system of government of the United States, all of which was known to the defendants, and that they were animated by hatred for the plaintiff because thereof, and because of such ill-will maliciously made said publication, and sought to bring upon, and brought upon, plaintiff hatred, contempt, obloquy and injury, as aforesaid.

"For a second Cause of action Plaintiff alleges:

"He adopts the matters and things alleged in paragraphs I, II, III, IV, V, VI and VII, of the First Cause of Action, with the same force and effect as if here repeated.

"VIII. That said publication was intended by defendants to import, and the language thereof was understood by the persons reading said publication to mean, that while plaintiff was an employee and attaché of and in an Embassy of the United States, under the Foreign Service of the State Department of the United States, accredited to a foreign country, to wit, Yugoslavia, which was at peace with the United States, and employed and sent to the capital of Yugoslavia upon a diplomatic mission, and for economic and commercial purposes, and in the interest of amicable relations between said foreign government and the government of the United States, he violated the trust of his employment, and acted as a spy, and engaged in espionage activities, in said foreign country, against said foreign government, and was by reason thereof

an unfaithful servant of the government of the United States, and that because of such improper conduct he was recalled from his station by the government of the United States, and that after his return to the United States he had pursued said previous activities and attempted to encourage or foment rebellion in a foreign country, at peace with the United States, to the government of which he had been accredited, and had indicated that if the Yugoslav people revolted against the government of Yugoslavia, the United States, notwithstanding that its Government was on terms of peace and amity with Yugoslavia, would aid the revolutionists.

"IX. Plaintiff is informed and believes and therefore alleges that as a direct and proximate result of said false and malicious publication, and its consequent injury to his reputation as a man, and as a consulting engineer, he suffered special damages in this, that he lost employment, between July 1, 1947, and February 1, 1948, as an engineer with Parsons Aerojet Company, of Los Angeles, California, and compensation of \$5,000.00; that he has suffered and will continue to suffer special damages, in respect to his occupation as an engineer, from loss of business not yet ascertained, but which plaintiff will ask leave of court to show by amendment and proof.

"Wherefore, plaintiff prays judgment against the defendants and each of them on its First Cause of Action, in the sum of \$100,000.00 as compensatory damages, and by reason of defendants' actual malice in said libelous publication the further sum of \$100,000.00 as exemplary damages; and/or on the Second Cause of Action, for \$100,000.00 as compensatory, \$5,000.00 as special, and \$100,000.00 as exemplary damages; and for costs and all other relief provided in such cases."

Bates v. Campbell, 213 Cal. 438, 441, 2 P.2d 383; *Stevens v. Snow*, 191 Cal. 58, 62, 214 P. 968. In determining whether a publication is libelous it is to be measured not by its effect when subjected to the critical analysis of a trained legal mind but by its probable effect upon the mind of the average reader. The publisher is liable for what he has insinuated as well as for his explicit statements. His language will be regarded not only with reference to the actual words employed, but according to the sense and meaning under all the circumstances of the publication. And such significance will be attached to the language as it may fairly be adjudged to have conveyed. In evaluating the publication the court will place itself in the situation of the reader to whom it is addressed and then determine the sense or meaning of the document according to its natural and popular construction. *Bates v. Campbell*, supra, 213 Cal. 441, 2 P.2d 383.

[5,6] To be libelous it is not essential that a false publication declare a crime to have been committed. *Stevens v. Snow*, 191 Cal. 58, 62, 214 P. 968. For illustration, falsely charging a person with a violation of confidence reposed in him or with treachery to his associates is libelous per se. *Dethlefsen v. Stull*, 86 Cal.App.2d 499, 501, 195 P.2d 56. The requirements of the definition have been met if the publication "exposes" a person to ridicule, "hatred, contempt, or obloquy." If it is false and if it paints the plaintiff in such colors as to make him despised and hated by others; or if it presents him as an object of contempt, i. e., greatly reduced in mental and moral stature or as one whose conduct has been grossly at variance from the standards adhered to by the reader or whose behavior was inimical to the family, tribe or clan of the reader; or if it is calculated to make the plaintiff ridiculous to those who had known him favorably or with whom he had been associated on a friendly basis; or if it presents plaintiff as one who deserves censure or reproach, or exposes him to obloquy; if it accomplishes any one of these ends it is a libel. *Tonini v. Cevasco*, 114 Cal. 266, 272, 46 P. 103.

In view of the foregoing principles and doctrines we turn to a consideration of appellant and of the article alleged to have been published of and concerning him. He is an educated man with some attainments superior to those of his average fellow citizen. He is evidently of Yugoslavic antecedents and naturally operates among the people of that ancestry. While life in America infuses into the consciousness of every immigrant and his progeny that his rights are as great in extent, and protected as fully, as those of other strains, still the culture of those of the same origin and of a common sentiment and language induces them to associate together.

Prior to the alleged publication appellant had been an attaché in the embassy of the United States at Belgrade and obviously was so employed by reason of his skill and learning in the field of economics. His "functions, employment and service were of an economic and commercial nature." Such position was nonpolitical and in no respect had to do with espionage on behalf of his own government nor did it oblige him to spy upon the activities of the Yugoslavs on any account. But after appellant had honorably served a season beyond the seas, returned to his own home and resumed his normal life among his people, the malice and ill-will of respondents burst into song. That their intention was to bring appellant into public discredit and to injure him in his occupation is patent in the words chosen to rebuke him before the readers of *Narodni Glasnik*. "Caught carrying on flagrant espionage activities" has no innocent connotations. For an American in any station to be "caught" by the authorities of Yugoslavia implies his having committed some reprehensible act. But here is an American holding an important official position whose primary function had been to engender sentiments of peace and friendship among the inhabitants of the ancient capital. By this admittedly false article³ he is reduced from a position of honor to one of cheap notoriety at home and of disgrace abroad. Although he had engaged in peaceful and friendly intercourse among the citizens of

Belgrade, respondents would have his fellow countrymen believe that he was possessed of inferior judgment; that he would abandon his office in the American Embassy and forthwith associate with the topmost agents of the government as a spy. Not a modest spy, but so proud of his adventure that his conduct was openly scandalous. According to the authors of the publication, what was the result of his espionage activities? He would not be tolerated. The Yugoslav government looked upon him with disdain. He was frowned upon as a visiting viper to a nation that had been kind and hospitable to him and they demanded his recall. But did they let it rest with the request of the eastern government? By no means. They put upon him the seal of disapprobation by the government of the United States. He was recalled. To make appellant especially loathsome to the Yugoslavic peoples of America they make it appear that he had become so hostile to the little Adriatic republic that he commenced a campaign of propaganda by writing a series of articles, to which he gave wide circulation, attacking the government of that country and assuring its people that their revolt would be succored by the American Government. And to convince their readers of the persistent hostility of appellant, they declare that his articles were printed in the Serbo-Croatian tongue and distributed and read by the people of Belgrade. The declaration in a printed article of vast circulation that the government of the United States has withdrawn its protective arm from the mantle of a diplomatic agent can have no significance other than that the latter is so dishonest or so stupid as not to be trusted with an important mission on behalf of the Washington government.

[7, 8] Respondents contend that the article has an innocent connotation and is therefore not actionable. If the court construes it in the same sense as was done by the average person of Yugoslavian ancestry, very little of innocence will be found, but evil only. Imagine the feelings of a person of Serbian, Croat or Yugoslav antecedents who although an American by adoption or birth, cherishes the welfare of the land of

his forebears. On reading that one of kindred ties and sympathies while in the diplomatic service has made use of his high office to spy openly and notoriously upon the governmental activities of Yugoslavia, his indignation swells into resentment. He reads that the unfaithful servant is recalled by the United States at the request of Yugoslavia. He then becomes prejudiced against the former diplomat. He reads that the misguided former official attacked the government of Yugoslavia by writing denunciatory propaganda and by giving it wide circulation in America and in Belgrade. His feelings then become hate toward the accused. But give the article a reasonably intelligent interpretation by the average reader of Mayflower ancestry and he is at once convinced that the United States has a most successful method of selecting moronic and officious intermeddlers to promote feelings of good will in foreign lands. Who could condone the act of a diplomatist who would engage in social activities with the people of Yugoslavia, as any member of the embassy there may be expected to do, in promoting friendship for America, and go thence to participate in acts of espionage? Such reader would conclude from the story that such adventurer had been "caught," that he was either in flight as a fugitive or was apprehended while in the very act of spying upon the doings of his host. And the fact that he was recalled by the American government was in effect a judgment that the government of the United States had considered that appellant had overstepped the bounds of propriety and had violated the trust reposed in him. In short, he was either foolish or unfaithful. This was actionable per se. *Dethlefsen v. Stull*, supra, 86 Cal.App.2d 501, 195 P.2d 56. It made him appear shallow and superficial and deservedly the object of contempt and ridicule. If his espionage was improper and disqualified him to represent his country and if upon his return he undertook to foment a revolution in Yugoslavia thereby involving the people and the government of the United States, he was a character to be abhorred. Any of the foregoing inferences would be reasonable deductions from the

published article. No reasonably intelligent person can read the publication without concluding therefrom that Pridonoff was not honorable toward the Yugoslav government and had been "guilty of such reprehensible misconduct as should deter people from trusting him in his occupation." See *Tonini v. Cevasco*, 114 Cal. 266, 272, 46 P. 103, 105.

In conducting a career as lecturer and consulting engineer it is of paramount importance that a person retain a reputation of the highest honor, integrity and good judgment. These virtues in appellant were liberally aspersed by the pen and publication of respondents. By the document some people will be dissuaded from patronizing appellant or from attending his lectures.

To be employed in what is euphemistically called the intelligence service, but in common parlance the spy system, may be deemed an honor because of the assumption that only those possessing more than an average degree of intelligence and sagacity are qualified for such labors. The error in such assumption will readily appear. One who is engaged in the diplomatic service is openly known as the representative of his government and is in constant contact with the officials of the government to which he is accredited, while he who operates in the intelligence service—acting as a spy—does not work openly. His activities and his methods are secret. To be branded as having been so engaged would destroy forever plaintiff's chances of service as a diplomat. A charge that while accredited and serving as an attaché of our embassy in a foreign country he had engaged in spying would be sufficient cause for any other country to refuse to receive him. Such an accusation, if false, is actionable libel.

Respondents attempt to abridge the libelous character of the publication by restricting it to the reference to appellant's fomenting a revolt against the Yugoslav government. The offensiveness of the article is but slightly augmented by the charge of appellant's advocating a revolution against the government of Tito. But if that feature stood alone it would indicate to all

Yugoslavs appellant's aggressive effort to embroil Yugoslavia in a revolution to overthrow its government, and to that extent it would be a libel upon appellant. Such behavior on the part of any American citizen is an impeachment of his sound judgment and his good morals. In fact, it is a crime against the federal statutes to stir up a revolution against a friendly power. The article of respondents was therefore, in that respect, a libel.

But respondents invoke the decision of *Mellen v. Times-Mirror Company*, 167 Cal. 587, 140 P. 277, 278, Ann.Cas.1915C, 766, as a refutation of appellant's thesis. The Times published that Mellen had on ship-board in a Pacific port a cargo of munitions headed for the then current Mexican insurgents. In his action Mellen maintained that the publication had charged him with the crime of violating the federal neutrality laws. The court rejected his contention with the pronouncement that the crime of violating neutrality laws "does not necessarily involve such elements as would impute to a person deemed guilty thereof anything infamous, ridiculous or disgraceful * * * It is thoroughly settled that it is not an offense against the neutrality laws of the United States to transport arms, ammunition, and munitions of war from this country to any foreign country * * * Section 5286 [18 U.S.C.A. § 960] * * * does not prohibit the mere engaging in transportation of arms or ammunition as a commercial venture, nor peaceable aid rendered to either belligerent, so long as this aid arises indirectly only through commercial dealings." Not only was Mellen innocent of crime but he was a private citizen, engaged in transacting private affairs. He had done nothing that was calculated to bring him into disgrace or censure or contempt or ridicule or to be shunned but on the contrary it was fair publicity calculated to increase his sales to Mexican insurgents.

While no crime was charged against appellant by the publication yet by a reasonable interpretation of the article he was libeled. He was characterized by words whose sinister significance cannot be doubt-

DEVENS v. GOLDBERG.

No. 14218.

District Court of Appeal, First District,
Division 1, California.

March 20, 1950.

Hearing Denied May 18, 1950.

ed. He was presented as a person without sense of the proprieties, without respect for the common amenities, recalled from a diplomatic post by his government and persistent in his attacks upon a government friendly to the United States. So presented and so characterized he was necessarily injured in his reputation generally and in his occupation in particular.

In support of their contention that if a publication has a connotation of innuendo it is not libelous they cite *Peabody v. Barham*, 52 Cal.App.2d 581, 126 P.2d 668, 669. Concerning the plaintiff in that action the alleged publication had announced that "Eddie Peabody's divorcing wife * * * is also his aunt." In holding that the article is susceptible of an innocent interpretation, the court had the advantage of (1) its judicial knowledge that a man rarely marries the widow of his consanguineal uncle and never his consanguineal aunt; (2) also of the presumptions that in any transaction (a) the law has been obeyed; (b) private transactions have been regular; (c) a person is innocent of crime. Code Civ. Proc., sec. 1963. In the case at bar there is no presumption that Pridonoff was pursuing his diplomatic duty to the government of the United States in flagrantly spying upon the Yugoslav government, or that there was honor in the fact that Yugoslavia requested his recall or in his recall by the United States. There was no such established significance in giving wide circulation to published articles attacking the Yugoslavian government that the publication of that fact would lend charm to the author thereof or cause him to be kindly regarded by the readers of a Serbo-Slavian periodical. What could be the emotional reaction of those of Yugoslav antecedents other than disgust and contempt to read of an esteemed American contemporary that he had encouraged the natives of Yugoslavia to revolt against its government?

Judgment reversed with instructions to overrule the demurrer.

WILSON, J., concurs.

McCOMB, J., dissents.

Action by Katherine Devens against Joseph Goldberg for personal injuries. The Supreme Court, 33 Cal.2d 173, 199 P.2d 943, reversed an order of the trial court granting defendant's motion for judgment notwithstanding a verdict for plaintiff, and thereafter the Superior Court of County of San Mateo, Edmund Scott, J., granted defendant's motion for a new trial, and plaintiff appealed. The District Court of Appeal, Bray, J., held that the Supreme Court's reversal of the order granting defendant's motion for a judgment notwithstanding the verdict did not preclude the trial court from granting a new trial for insufficiency of the evidence.

Affirmed.

1. Appeal and error ⇨1202

The Supreme Court's reversal of an order granting defendant's motion for judgment notwithstanding verdict, with direction to enter judgment for plaintiff on the verdict, did not preclude trial court from granting a new trial for insufficiency of evidence on ground that Supreme Court's decision was law of the case.

2. Appeal and error ⇨927(3, 7), 934(1)

Where appeal is from a judgment notwithstanding verdict or from a judgment following a directed verdict or nonsuit, District Court of Appeal must consider evidence in light most favorable to losing party in trial court and cannot express opinion as to weight or truth of evidence.

3. Judgment ⇨199(3.3)

Trial ⇨178

Although trial court may weigh evidence and determine credibility of witness on motion for new trial, it may not do so on motion for a directed verdict or for judgment notwithstanding verdict.

4. New trial ⇨6

The granting or refusing of new trial rests very largely within trial court's discretion which is extremely wide.

5. Appeal and error ⇨979(2)

A trial court's ruling granting or refusing a new trial will not be disturbed on appeal, especially where new trial was granted for insufficiency of evidence, in absence of clear affirmative showing of gross or unmistakable abuse of discretion.

6. Appeal and error ⇨977(3)

A reviewing court will set aside an order granting new trial only in rare instances and on very strong grounds.

7. New trial ⇨72

On motion for new trial for insufficiency of evidence to sustain verdict, trial court must scrutinize and weigh evidence, and new trial should be granted if court believes that facts on which jury's decision is based are insufficient to justify it, or if weight of evidence is against it, even though court may draw inferences opposed to those of jury.

8. Appeal and error ⇨1202

The trial court's action in granting defendant's motion for new trial after Supreme Court's reversal of order granting motion for judgment notwithstanding verdict for plaintiff was not violative of constitutional provision that reviewing court may make findings of fact contrary to those of trial court or of Code provision relating to fact findings by appellate courts in non jury cases. Const. art. 6, § 4¾; Code Civ.Proc. § 956a.

Melvin M. Belli, Henry G. Sanford, Van H. Pinney, San Francisco, for plaintiff and appellant.

George C. Faulkner, Novato, A. Dal Thomson, San Francisco, for defendant and respondent.

BRAY, Justice.

In an action for damages for personal injuries sustained when a porch railing gave way and plaintiff fell to the ground, plaintiff received a jury verdict of \$10,000. The trial court granted defendant's motion for judgment notwithstanding the verdict. On

appeal, this court reversed the order.¹ On hearing, the Supreme Court likewise reversed the order, and directed the trial court to enter judgment for plaintiff in accordance with the verdict. *Devens v. Goldberg*, 33 Cal.2d 173, 199 P.2d 943. This the court did. Thereafter the trial court granted defendant's motion for a new trial on the "ground of insufficiency of the evidence to justify the verdict and upon the further ground that the weight is against the weight of the evidence." Plaintiff appealed.

Question Presented.

Does the reversal by the Supreme Court of the order granting the motion for judgment notwithstanding the verdict bar the trial court from granting a new trial for insufficiency of the evidence?

[1, 2] In *Devens v. Goldberg*, *supra*, the Supreme Court held that the "jury's implied finding that defendant was negligent is supported by the record * * *." 33 Cal.2d 180, 199 P.2d page 948. Plaintiff argues that such a ruling, plus the instruction to the trial court to enter a judgment for plaintiff in accordance with the jury's verdict, became the law of the case and deprived the trial court of the right to grant a new trial. This very contention has been clearly and properly answered adversely to plaintiff's contention in *Collins v. Nelson*, 41 Cal.App.2d 107, 106 P.2d 39. There on appeal the court affirmed an order granting plaintiff a new trial which had been made after the District Court of Appeal in *Collins v. Nelson*, 16 Cal.App.2d 535, 61 P.2d 479, had set aside the trial court's order granting a judgment for defendants notwithstanding the verdict and ordered the trial court, as here, to enter judgment in favor of plaintiff on the jury's verdict. The court said, 41 Cal.App.2d 114, 115, 106 P.2d page 43: "Appellant's contention that because the court held in the first appeal that certain of the evidence was sufficient to sustain a verdict for plaintiff, such holding became the law of the case and deprived the trial judge of power to grant a new trial on the ground of insufficiency of the evidence, is without merit. * * *

"The decision on the first appeal dealt only with the propriety of the trial court's order granting defendants judgment notwithstanding the verdict, and was in no-wise applicable to a situation presented on the hearing of a motion for a new trial. * * * As this court has so often pointed out, when the appeal is from a judgment notwithstanding the verdict, or a judgment following a directed verdict or nonsuit, we are controlled by the rule requiring the appellate tribunal to consider the evidence in the light most favorable to the losing party in the court below, and we do not and cannot express an opinion as to the weight of the evidence or its truth or falsity. Therefore, what we had to say with reference to the evidence on the first appeal herein from the judgment entered notwithstanding the verdict could not be and is not controlling upon the lower court in its consideration of a subsequently made motion for a new trial."

[3] The difference between the rule under which a trial court acts in considering a motion for judgment notwithstanding the verdict and the rule under which it acts in considering a motion for a new trial is well set forth in *Re Estate of Flood*, 217 Cal. 763, 21 P.2d 579, where the court says (it refers to a directed verdict to which the same rule applies as to a judgment notwithstanding the verdict) 217 Cal. page 769, 21 P.2d page 581: "'* * * the function of the trial court on a motion for a directed verdict is analogous to and practically the same as that of a reviewing court in determining, on appeal, whether there is evidence in the record of sufficient substance to support a verdict. *Although the trial court may weigh the evidence and judge of the credibility of the witnesses on a motion for a new trial, it may not do so on a motion for a directed verdict.*' (Italics ours.)"

"Two important propositions should be noted in the above quotation. First, the trial court, on a motion by a defendant for a directed verdict, cannot weigh all the evidence introduced by both sides; all evidence in conflict with the plaintiff's evidence must be disregarded. Second, the trial court, in determining such motion,

cannot judge the credibility of witnesses, but must give to the plaintiff's evidence all of the value to which it would be legally entitled if the witnesses were believed."

[4-7] "The granting of or refusal to grant a new trial rests very largely within the discretion of the trial court—a discretion which is extremely wide; and its ruling will not be disturbed, especially where, as here, a new trial has been granted on the insufficiency of the evidence, unless there is a clear and affirmative showing of a gross, manifest, or unmistakable abuse of the discretion it is called upon to exercise. 20 Cal.Jur. pp. 27-31. In other words, it is only in rare instances and on very strong grounds that the reviewing court will set aside an order granting a new trial. *Morgan v. Los Angeles Pac. Co.*, 13 Cal.App. 12, 108 P. 735. Furthermore, as frequently pointed out in the decisions, in considering such a motion it is not only the trial court's province but its duty to scrutinize and to weigh the evidence, and if in its opinion the facts upon which the decision of the jury is based are insufficient to justify that decision, or if it believes that the weight of the evidence is against the decision, a new trial should be granted, even though the inferences it may draw are opposed to those drawn by the jury." *Ogando v. Carquinez G. School Dist.*, 24 Cal.App.2d 567, 569, 75 P.2d 641, 642.

Thus, in the case at bar, after entering judgment as ordered on the jury's verdict, the court had the right on the motion for new trial to weigh the evidence and to judge of the credibility of the witnesses.

[8] Plaintiff further contends that the action of the trial court in granting the new trial is in contravention of article VI, section 4¾ of the California Constitution, and of section 956a of the Code of Civil Procedure. Just how these sections are supposed to apply here is not clear from plaintiff's opening brief, particularly as they both apply only "[i]n all cases where trial by jury is not a matter of right or where trial by jury has been waived * * *." Plaintiff refers to *Brown v. Schroeder*, 88 Cal.App. 192, 203, 263 P.

325, and *Cunningham v. Reynolds*, 135 Cal. App. 91, 94, 26 P.2d 896, which, referring to the section of the Constitution, hold that the reviewing court may make findings on appeal contrary to those of the trial court and that wherever possible causes should be disposed of finally on a single appeal. Neither of these cases were jury cases, nor do they discuss anything pertinent here. The Supreme Court in the first appeal in our case, even though in referring to the evidence used such language as "It did not appear, however, that he [Goldberg] had ever inspected * * *" etc., was not even attempting to make findings as such. It was merely holding that there was substantial evidence to support the jury's verdict.

Plaintiff has cited a number of other cases, none of which are in point. In *Lial v. Superior Court*, 133 Cal.App. 31, 23 P.2d 795, the trial court held that the contract for the purchase of cattle upon which the plaintiffs relied in an action in assumpsit was void for lack of mutual understanding of the terms. However, the court provided that the cattle should be returned to defendants only on condition that they pay plaintiff the sheriff's costs as keeper of the cattle. Upon appeal from that judgment the reviewing court held that the trial court was unauthorized to make the conditional order, and directed the trial court to enter judgment that plaintiff take nothing. The trial court did so, and thereafter granted a motion for a new trial. An application for a writ of prohibition to restrain the retrial of the action was made to the higher court alleging, (133 Cal.App. 33, 23 P.2d page 795) "that unless it is restrained the lower court will proceed to permit the filing of amended pleadings so as to raise new issues and retry the cause in disregard of the directions of this court. In granting a new trial after rendering the judgment directed by this court, the trial judge said:

"There is only one ground upon which this court can consistently at this time order a new trial, and that is with the direct end in view of having the pleadings amended so as to admit of the introduction of evidence' concerning the equities of the case."

The court held, 133 Cal.App. page 33, 23 P.2d page 795: "After the issues of a case have been established and a judgment has been passed upon on appeal, it is ordinarily too late to amend the pleadings so as to change the nature of the cause. * * * There is nothing in this case for the court to re-try. * * *

"It is a well-established principle which has been frequently announced by the courts that, when an appellate court has passed upon the merits of a cause on appeal and has directed the trial court to render a particular judgment or decree, there is no authority to permit amendments to the pleadings, change the issues which were determined, or try the cause de novo."

There is a great difference between that case and ours. There, on appeal the court passed upon the merits of the cause. In our case it passed only upon the question of the propriety of the trial court granting a judgment notwithstanding the verdict.

Snoffer v. City of Los Angeles, 14 Cal. App.2d 650, 58 P.2d 961, was likewise a case where the reviewing court had passed on the merits of the case. In *Rice v. Schmid*, 25 Cal.2d 259, 153 P.2d 313, the trial court refused to enter the judgment ordered by the reviewing court but proceeded to retry an issue already reviewed. In *Buttram v. Finley*, 73 Cal.App.2d 536, 166 P.2d 654, the trial court failed to "conform to the specific directions of the Appellate Court * * *" 73 Cal.App.2d page 540, 166 P.2d page 656.

In *Phillips v. Patterson*, 34 Cal.App.2d 481, 93 P.2d 807 and *McCulloch v. Superior Court*, 91 Cal.App.2d 641, 205 P.2d 689, the reviewing court found that there was no contrary evidence, but that the evidence *compelled* as a matter of law a certain verdict and therefore, in the absence of newly discovered evidence, the trial court had no power to grant a new trial. There was no such situation here.

The order granting a new trial is affirmed.

PETERS, P. J., and SCHOTTKY, J.,
pro tem, concur.

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**JOHN BEARD MEMORIAL FOUNDATION
v. KREBS et al.**
Civ. 14150.

District Court of Appeal, First District,
Division 2, California.

March 23, 1950.

Action by John Beard Memorial Foundation against Ernest T. Krebs, Jr., and Dr. E. T. Krebs, to enjoin defendants from using the name John Beard Memorial Foundation in connection with defendants' laboratory work. Defendants filed cross-complaint alleging prior adoption and use of name and asked that plaintiff be prohibited from using it. The Superior Court for the City and County of San Francisco, William F. Traverso, J., held that the parties were the joint and several owners of the name and entitled to joint and several use thereof, and plaintiff appealed. The District Court of Appeal, Dooling, J., held that evidence sustained trial court's finding that plaintiff failed to establish its prior right to the exclusive use of the fictitious name.

Judgment affirmed.

1. Associations ⚡4

A voluntary, nonbusiness association may by user acquire the right to a fictitious name.

2. Corporations ⚡49(2)

In action by nonprofit corporation to enjoin defendants from using a fictitious name in connection with their laboratory work, burden was on plaintiff to establish its prior right to exclusive use of such name.

3. Corporations ⚡49(2)

In action to enjoin defendants from using a fictitious name in connection with their laboratory work, evidence sustained trial court's finding that plaintiff failed to establish its prior right to exclusive use of such name.

DOOLING, Justice.

Plaintiff sued to enjoin defendants from using the name John Beard Memorial Foundation in connection with defendants' laboratory work devoted to cancer research. Defendants answered and cross-complained alleging prior adoption and use of the name and asked that plaintiff be prohibited from using it. The court first granted judgment for plaintiff but on motion for new trial the findings were amended to read that the parties were the joint and several owners of the name and entitled to the joint and several use thereof and judgment followed accordingly. Defendants did not appeal on their cross-complaint, but plaintiff Foundation appeals from the amended judgment.

The appellant Foundation, a non-profit corporation, was incorporated in 1944 under the name "University Research Foundation" and from late in 1944 or early in 1945 until the end of 1946 Dr. Gurchot, representing the Foundation, worked without charge to himself in the laboratory belonging to defendant Dr. E. T. Krebs, and in collaboration with the two defendants. During 1944 the name of John Beard had been discussed between Dr. Gurchot and the defendants because their experiments had been inspired by a book by the scientist John Beard. The name "John Beard Memorial Foundation" was in use during 1946, particularly in articles published by Dr. Gurchot and E. T. Krebs, Jr., with the collaboration and approval of Dr. E. T. Krebs. The laboratory earned no income and there was no attempt to organize in any formal manner nor was there any specific agreement or filing of certificate of doing business under a fictitious name. Rather there was but a loose working arrangement which suited the convenience and purposes of the parties at the time.

As a result of personal differences early in 1947, Dr. Gurchot terminated the collaboration and his use of the laboratory and on January 20, 1947 the corporate name of University Research Foundation was changed to John Beard Memorial Foundation without knowledge or consent of the defendants. Dr. Gurchot severed all connections with defendants by June,

George B. White, San Francisco, for appellant.

John G. Reisner, San Francisco, for respondents.

1947. Thereafter both plaintiff and defendants continued the use of the name John Beard Memorial Foundation in connection with the work which was thenceforth carried on by each independently of the other.

It is unquestioned that while Dr. Gurchot and the two defendants were working together in Dr. Krebs' laboratory they commenced to use the fictitious name John Beard Memorial Foundation in connection with the laboratory and the scientific work there carried on together and the primary question presented is whether the corporation which Dr. Gurchot represented in that association could gain exclusive right to the use of that name against the association by secretly adopting the name without the knowledge or consent of a majority of the associates.

[1] A voluntary, non-business association may by user acquire the right to a fictitious name. *Law v. Crist*, 41 Cal. App.2d 862, 107 P.2d 953; *Purcell v. Summers*, 4 Cir., 145 F.2d 979; *Kline v. Knights of the Golden Eagle*, 113 N.J.Eq. 513, 167 A. 758; *Faisan v. Adair*, 144 Ga. 797, 87 S.E. 1080; *Talbot v. Independent Order of Owls*, 8 Cir., 220 F. 660; 7 C. J.S., Associations, § 37. Appellant asserts however that there was no evidence to support a finding of such public user of the name by the associates as to establish a right thereto. Dr. Gurchot and the younger Krebs published in a scientific journal a letter signed by them jointly as representing the John Beard Memorial Foundation. This publication sufficiently excited the interest of a former pupil of John Beard that he wrote from Scotland to

inquire about the Foundation. Dr. Gurchot, while associated with the defendants, published an article under his signature using the name John Beard Memorial Foundation and the address of Dr. Krebs' laboratory. Dr. Gurchot's article appeared in a January, 1947 issue of *Science* and since the change of name of the corporation was not adopted until January 20, 1947 it is a fair inference that the use by him of the name John Beard Memorial Foundation in that article must have referred to the association and not to the corporation, bearing in mind the lapse of time to be expected between submission of the article and publication. Stationery was ordered bearing the name John Beard Memorial Foundation and giving the address of Dr. Krebs' laboratory and this was used in correspondence concerning the affairs of the laboratory and the experiments there carried on; and, while the articles were not produced, the younger Krebs testified on cross-examination that before Dr. Gurchot withdrew from the association the younger Krebs had sent articles and letters to scientific publications using the name John Beard Memorial Foundation.

[2, 3] Bearing in mind that the burden was on appellant to establish its prior right to the exclusive use of the fictitious name we are satisfied that there was substantial evidence to support the trial court's conclusion that this burden had not been met.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

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SECOND SERIES

CLEMONS v. CITY OF LOS ANGELES et al.

L. A. 20873.

Supreme Court of California, in Bank.
March 21, 1950.

Rehearing Granted April 17, 1950.*

Action by Charles L. Clemons against the City of Los Angeles, a municipal corporation, wherein certain other defendants intervened, for declaratory and injunctive relief to test the validity of an ordinance of the city limiting the subdivision of property to certain minimum lot requirements. The Superior Court for Los Angeles County, W. Turney Fox, J., rendered a judgment for defendants, and the plaintiff appealed. The Supreme Court, Spence, J., held that the ordinance providing that no lots in a certain area held in separate ownership and used for dwelling purposes should be reduced below a minimum width of 50 feet and an area of 5,000 square feet was valid generally and as applied to plaintiff's property.

Judgment affirmed.

Carter and Schauer, JJ., dissented.

Prior opinion, see 208 P.2d 420.

1. Appeal and error ⇨110

An order denying a motion for new trial is not appealable. Code Civ.Proc. § 963.

2. Municipal corporations ⇨601(7)

A restrictive zoning regulation pursuant to a municipality's comprehensive and systematic plan of community development when reasonable in object and not arbitrary in operation will be sustained as within the legitimate exercise of the police power. U.S.C.A.Const. Amend. 14, § 1.

3. Municipal corporations ⇨63(1), 122(2)

A zoning regulation enacted pursuant to a municipality's comprehensive and systematic plan of community development

216 P.2d—1

* Subsequent opinion 222 P.2d 439.

is to be considered with every intendment in favor of its validity; and a court will not, except in clear case of oppressive and arbitrary limitation, interfere with legislative discretion which has been exercised in adoption of the regulation; and it is presumed that the measure as a whole is justified under the police power and adapted to promote public health, safety, morals and general welfare. Gen.Laws, Act 5211b; U.S.C.A.Const Amend. 14, § 1.

4. Appeal and error ⇨931(1)

Where from a consideration of the evidence the trial court has found that certain physical facts and conditions exist in relation to a particular property restriction which would justify regulation by a city through exercise of its police power, all intendments must be indulged to sustain such findings and the resulting judgment. U.S.C.A.Const. Amend. 14, § 1.

5. Appeal and error ⇨717

A memorandum of an opinion filed by trial judge and then included in the record will be considered by the Supreme Court insofar as it bears on an interpretation of the findings. Rules on Appeal, rule 5(a).

6. Municipal corporations ⇨601(7)

City ordinance providing that no lot in certain area held under separate ownership at effective date and used for dwelling purposes should be reduced below minimum width of 50 feet and area of 5,000 square feet was a valid exercise of the police power. Gen.Laws, Act 5211b; Const.Cal. art. 11, § 6; U.S.C.A.Const. Amend. 14, § 1.

7. Constitutional law ⇨89(1), 278(1)

Municipal corporations ⇨601(11)

As applied so as to prohibit an owner of a bungalow court from subdividing and

conveying each building to a separate owner, a city zoning ordinance providing that no lot held under separate ownership should be reduced below stated minimum size did not interfere with constitutional guarantees affecting property rights or right of contract. Gen.Laws, Act 5211b; Const.Cal. art. 1, §§ 1, 13, 14; U.S.C.A.Const. Amend. 14, § 1.

8. Municipal corporations ⇨601(4)

Police power, as evidenced in zoning ordinances, has a much wider scope than mere suppression of offensive uses of property, and acts constructively and affirmatively for promotion of the public welfare. U.S.C.A.Const. Amend. 14, § 1.

9. Constitutional law ⇨277(1)

A property owner's right to unlimited and uncontrolled disposition of his property may properly be subordinated to the public good under the police power. U.S.C.A.Const. Amend. 14, § 1.

10. Constitutional law ⇨190

A city zoning ordinance providing that no lot in a certain area, held under separate ownership on effective date and used for dwelling purposes should be reduced below a stated minimum in area was not objectionable upon retroactive grounds as destroying vested property rights. Const.Cal. art. 1, §§ 1, 14; U.S.C.A.Const. Amend. 14, § 1.

11. Municipal corporations ⇨601(12)

Where city zoning ordinance in furtherance of general plan of community development provided that no lot in certain area held under separate ownership on effective date and used for dwelling purposes should be reduced below minimum width of 50 feet and area of 5,000 square feet, fact that bungalow court owner who had built before adoption of the ordinance was deprived of realizing a greater profit from disposition of various bungalows and single units to different individuals through subdivision did not make ordinance arbitrary in application nor preclude regulation of his individual rights in promotion of the general welfare. Gen.Laws, Act 5211b; Const.Cal. art. 11, § 6; U.S.C.A.Const. Amend. 14, § 1.

12. Municipal corporations ⇨601(7)

A city ordinance providing that no lot in a certain area held under separate ownership on effective date and used for dwelling purposes should be reduced below minimum width of 50 feet and area of 5,000 square feet, and penalizing violators by fine and imprisonment did not effect a restriction upon free alienation of land, a matter of state court concern. Gen.Laws, Act 5211b; Const. art. 11, § 6.

13. Constitutional law ⇨277(1)

While police regulation of use or enjoyment of property rights can only be justified by presence of a public interest, within such limits the individual's personal liberty in that regard is subject to reasonable restraint. U.S.C.A.Const. Amend. 14, § 1.

14. Contracts ⇨103

Where the State Subdivision Map Act declared that any sale contrary to its provisions was voidable at sole option of purchaser, but act as it then read applied only to unimproved property, the court had before it the violation of a local ordinance stating minimum lot size below which realty could not be subdivided, and transaction in issue involved improved property, court could properly determine that transaction was void under general rule relating to contracts involving acts prohibited by law. Business and Professions Code, § 11500 et seq.; Gen.Laws, Act 5211b; Const. art. 11, § 6.

E. H. Delorey and Harold L. Newman, Los Angeles, for appellant.

O'Melveny & Myers, Louis W. Myers, W. B. Carman, Jr., Sidney H. Wall, and William W. Alsup, Los Angeles, amici curiæ on behalf of appellant.

Ray L. Chesebro, City Attorney, Bourke Jones and Roger Arnebergh, Assistant City Attorneys, Lester L. Lev and Alan G. Campbell, Deputy City Attorneys, Los Angeles, for respondents.

SPENCE, Justice.

This action for declaratory and injunctive relief was brought to test the validity

of an ordinance of the city of Los Angeles limiting the subdivision of property to certain minimum lot requirements. The trial court held that the ordinance was "constitutional, valid and enforceable," and that the transactions concluded by plaintiff in violation thereof were "null and void." The propriety of such adjudication cannot be successfully assailed in the light of settled legal principles.

It appears from the agreed statement of facts that within two years prior to the commencement of this action on December 12, 1946, plaintiff purchased the property in question, a bungalow court of nine units which had been built some twenty years previously and had been used continuously for residential purposes. Located in zone C-2 on Beverly Boulevard, the property was subject to section 12.21-C of the Los Angeles Municipal Code (Ordinance No. 77,000 adopted September 28, 1936, as amended by Ordinance No. 90,500, adopted March 7, 1946) providing that no lot "held under separate ownership" at the law's effective date and "used * * * for dwelling purposes" shall be "reduced in any manner below the minimum lot area, size or dimensions" prescribed—"a minimum average width of fifty (50) feet and a minimum area of five thousand (5000) square feet."

Following his purchase, plaintiff subdivided the property into nine separate parcels, each averaging 925 square feet (25' x 37') and having a bungalow thereon. Through sale or 99-year lease arrangements plaintiff conveyed eight of these parcels to various individuals—transactions contrary to the minimum lot area and width requirements of the ordinance as a zoning regulation. Each parcel was conveyed with an easement to Beverly Boulevard over the walkways within the bungalow court. Two of the parcels had no frontage on any street or alley. The entire property was serviced by only one incinerator and two sewer connections.

[1] Threatened with arrest and prosecution for violation of the ordinance, plaintiff instituted this action for declaratory and injunctive relief from the enforcement of such municipal regulation against him as a

property owner, charging that it transcended the legitimate scope of the exercise of the police power and constituted "an unwarranted and arbitrary interference with [his] constitutional rights." The lessees under one of the 99-year lease arrangements on a single bungalow unit intervened in this action. The trial court upheld the validity of the ordinance both in its general aspects and in its application to plaintiff's property, and declared that transactions made contrary thereto—whether sales or 99-year leases—were "null, void and of no force or effect." Plaintiff has appealed from the adverse judgment accordingly entered and also from the court's order denying his motion for a new trial. Since said order is not appealable, Code Civ.Proc. sec. 963; *Pipoly v. Benson*, 20 Cal.2d 366, 368, 125 P.2d 482, 147 A.L.R. 515, plaintiff's purported appeal therefrom must be dismissed and only the appeal from the judgment remains for consideration.

[2, 3] The constitutionality of the principle of zoning is no longer an open question, and a restrictive regulation in this field pursuant to a municipality's comprehensive and systematic plan of community development, when reasonable in object and not arbitrary in operation, will be sustained as within the legitimate exercise of the police power. *Miller v. Board of Public Works*, 195 Cal. 477, 488-490, 234 P. 381, 38 A.L.R. 1479; *Zahn v. Board of Public Works*, 195 Cal. 497, 503, 234 P. 388, affirmed 274 U.S. 325, 328, 47 S.Ct. 594, 71 L.Ed. 1074; *Wilkins v. City of San Bernardino*, 29 Cal.2d 332, 337, 175 P.2d 542. Such an enactment is considered with every intendment in favor of its validity, and a court will not, except in a clear case of oppressive and arbitrary limitation, interfere with the legislative discretion which has been exercised in the adoption of the regulation. *Jardine v. City of Pasadena*, 199 Cal. 64, 72, 248 P. 225, 48 A.L.R. 509. It is presumed that the measure as a whole is justified under the police power and adapted to promote the public health, safety, morals, and general welfare. *Lockard v. City of Los Angeles*, 33 Cal.2d 453, 460, 202 P.2d 38, 7 A.L.R.2d 990. The courts may differ with the zoning authorities as to the

"necessity or propriety of an enactment," but so long as it remains a "question upon which reasonable minds might differ," there will be no judicial interference with the municipality's determination of policy. *Miller v. Board of Public Works*, supra, 195 Cal. page 490, 234 P. 381, 386; see, also, *Acker v. Baldwin*, 18 Cal.2d 341, 344, 115 P.2d 455. The mere fact that some hardship may be experienced is not material, for "[e]very exercise of the police power is apt to affect adversely the property interest of somebody." *Zahn v. Board of Public Works*, supra, 195 Cal. page 512, 234 P. page 394. Consonant with these established principles, the zoning ordinance here involved is not vulnerable to plaintiff's attack.

Zoning is an essential part of a city's overall master plan for community development, Planning Act of 1929, Stats. 1929, p. 1805, as amended, 2 Deering's Gen. Laws, Act 5211b, and a city is vested with control of "the design and improvement of subdivisions," subject to judicial review as to reasonableness. Subdivision Map Act, Stats. 1937, p. 1864, as amended, now Business and Professions Code, secs. 11500 et seq.; sec. 11525. The word "design" is defined in the latter Act to include, among other things, provision for "minimum lot area and width", Business and Professions Code, sec. 11510, by "local ordinance." Ibid, secs. 11506, 11526. Consistent with this state recognition of municipal functions and in line with its autonomous character, Cal. Const., art. XI, sec. 6; *West Coast Advertising Co. v. City and County of San Francisco*, 14 Cal.2d 516, 519-521, 95 P.2d 138, the city of Los Angeles adopted the zoning ordinance prohibiting the reduction of residential lots below the specified minimum of 5,000 square feet in area and 50-foot frontage. The city's charter expressly contemplates the adoption of regulations pursuant to the authority granted by the Subdivision Map Act, Charter, sec. 95(g), and on this point the trial court found that the ordinance " * * * constitutes an essential part of the master plan for the comprehensive development of the City of Los Angeles in that it is designed to prevent the cutting up of lots into unduly small areas and into parcels of economically un-

usable widths; that the ordinance * * * supplements the California Subdivision Map Act in that it prevents lots sold pursuant to said Act from being further subdivided, and in so doing, the ordinance prevents or diminishes the possibility of circumvention of [said] Act." In support of its view that the "ordinance is an important factor in the orderly development of the city," the trial court found that the "attempted cutting up" of such property as plaintiff's bungalow court would "tend to create and accelerate the creation of slum conditions" and "overcrowd[ing]," thus "militating against orderly, quiet and peaceful living"; that "health and sanitary regulations and laws would be more difficult to enforce" if the bungalow units "were sold to various separate owners"; and that therefore "said ordinance has a reasonable relation to the public health, safety and general welfare, and was enacted for the public good."

[4, 5] Where from a consideration of the evidence the trial court has found certain physical facts and conditions to exist in relation to the particular property restriction involved as would justify regulation by the city through the exercise of its police power, all intendments must be indulged to sustain such findings and the resulting judgment. *Ayres v. City Council of City of Los Angeles*, 34 Cal.2d 31, 207 P.2d 1. So significant are these factors in accord with the objectives found by the trial court to be within the design of the ordinance. The benefits of the Subdivision Map Act would be of little practical value in aid of desirable community planning if following the subdivider's compliance for the terms of the initial sale, the purchasers of the lots could erect multiple dwellings thereon according to authorized specifications and then "cut up" the units for separate sale. In this regard the ordinance clearly appears to supplement the state Act and to operate in avoidance of its circumvention as the trial court found. Likewise appropriate for consideration here is the memorandum opinion filed by the trial judge and included in the record, Rules on Appeal, rule 5(a), 22 Cal.2d 1, 4, as bearing on the interpretation of the findings.

Trans-Oceanic Oil Corp. v. City of Santa Barbara, 85 Cal.App.2d 776, 790, 194 P.2d 148. The comment is there made that according to the view of experts in the field of community development, the subdivision of "bungalow courts into separate parcels" tends "to create slum conditions" because it would be unlikely that a uniform state of repair would be maintained by the various owners and a "hodge-podge appearance" would result, with a consequent depreciation in value of the entire property; "overcrowding" develops because where it is "a common practice for landlords to limit the number of people who may occupy a bungalow in a court," such restriction would not apply under separate ownership of the various units, and the probable increase and concentration of people within the limited area would "add to the noise and other irritations that militate against orderly, quiet and peaceful living"; "health and sanitary regulations" become "more difficult to provide for and enforce," and particularly where such "close living" in separately owned bungalow units contemplates "each person * * * constantly making use of easements over the others' property, and where there is no one to make or enforce any rules touching items of common necessity to all, such as, for example, use of incinerators or other disposal of trash, and keeping clean the common walkways," the situation could create disturbing tensions. As is further there said, the "City Council may well have had all these matters in mind in passing the ordinance here under attack and may have concluded that it was necessary in furtherance of the general welfare of the city and its orderly development."

A zoning law which prescribed a minimum area of one acre for residential lots was recently upheld in *Simon v. Town of Needham*, 311 Mass. 560, 42 N.E.2d 516, 141 A.L.R. 688, as a reasonable and valid restriction in view of the location of the district, the physical characteristics, and other circumstances present. Among the factors considered pertinent in relation to the municipality's power to so regulate the size of house lots in a district which appeared "admirably suited for one family

residences" were the following, 42 N.E.2d page 518: avoidance of "congestion in the streets"; prevention of "overcrowding of land"; facilitation in furnishing "transportation, water, light, sewer and other public necessities"; provision of recreational space for "children to play"; encouragement of the "cultivation of flowers, shrubs and vegetables." While the court recognized that there might be a "difference of opinion" as to the real advantages that would accrue from the larger lots and whether they were such as to lead one to the conclusion that the adoption of the one-acre area would result in a "real and genuine enhancement of the public interests," still a belief that such a result would be realized under the particular circumstances was "not unreasonable" and precluded "the measure" from being held "invalid." 42 N.E.2d page 518. Similar factual considerations prevailed and a like rationale was followed in the case of *Greenway Homes v. Borough of River Edge*, 137 N.J.L. 453, 60 A.2d 811, with regard to a zoning regulation prescribing a minimum frontage of 75 feet in residential districts.

[6] While the validity of the respective zoning laws in these two cited cases arose in connection with the power of the municipality to disapprove map plans for proposed subdivisions and to deny permits for the erection of dwellings thereon unless the minimum lot requirements were observed such difference in the stage of development of the land at the time of litigation as compared with the present case does not militate against the principle of decision sustaining the propriety of such type of regulation. So here the factors listed by the trial court as constituting a basis for the adoption of the ordinance in question appear to bear a reasonable relation to the public interests—the general welfare of the community—and properly bring the regulation within the purview of the police power. *Thille v. Board of Public Works*, 82 Cal.App. 187, 190–193, 255 P. 294.

[7] Plaintiff argues that the zoning ordinance prohibiting his conveyance of the bungalow units in separate parcels to individuals as he chooses encroaches upon

constitutional guarantees attaching to the ownership of property and securing him in his right to contract concerning the use, enjoyment, and disposition of his property. U.S.Const., Fourteenth Amend., sec. 1; Cal.Const., art. I, secs. 1, 13, and 14. But the fact that the ordinance so restricts plaintiff in his right to dispose of his property is not determinative of its invalidity, for in innumerable situations the sale of various types of property has been subject to regulation by public authority: such as drugs, *Gregory v. Hecke*, 73 Cal.App. 268, 238 P. 787, various food products, *Justesen's Food Stores, Inc., v. City of Tulare*, 43 Cal.App.2d 616, 111 P.2d 424, secondhand and pawned merchandise, *In re Holmes*, 187 Cal. 640; the quantity of farm produce that may be marketed, *Agricultural Prorate Comm. of California v. Superior Court*, 5 Cal.2d 550, 55 P.2d 495; and articles at auction, *Hart v. City of Beverly Hills*, 11 Cal.2d 343, 79 P.2d 1080. The right of free bargaining does not preclude legislation directed toward the curbing of predatory merchandising practices which tend to injure or destroy fair and open competition. *Wholesale Tobacco Dealers Bureau of Southern California v. National Candy & Tobacco Co.*, 11 Cal.2d 634, 82 P.2d 3, 118 A.L.R. 486. A property owner may not divide his tract of land into lots to sell before developing or improving them without complying with the Subdivision Map Act. *Cowell v. Clark*, 37 Cal.App.2d 255, 99 P.2d 594. These various instances illustrate the expanding concept of the exercise of the police power consistent with "the gradual regulation of the individual in his liberty of action and ownership of property for the public good." *Max Factor & Co. v. Kunsman*, 5 Cal.2d 446, 458, 55 P.2d 177, 182; see, also, *Miller v. Board of Public Works*, supra, 195 Cal. 477, 484, 234 P. 381, 38 A.L.R. 1479. Likewise here the zoning ordinance as above considered in relation to the city's accomplishment of a comprehensive and systematic plan of community development shows the challenged regulation to have been reasonably adopted in furtherance of the "general welfare," and plaintiff's individual liberty in the disposition of his property may be curtailed to

that extent in the public interest. Moreover, it should be noted that plaintiff still has the right to sell the property as he bought it—the bungalow court as a single entity—and he has only been deprived of his right to "cut it up" into individual units for conveyance to separate individuals, to what reasonably appears would be to the public detriment and at variance with the dictates of the city's overall plan of community design.

[8] Plaintiff further argues that the zoning ordinance is unreasonable and arbitrary in its application to his property because his subdivision and separate conveyance of the bungalow units to various individuals would effect only a change in ownership, and not a change in their use for dwelling purposes. In this connection reliance is placed on these factors: that the bungalow units were constructed on plaintiff's property some twenty years before the adoption of the ordinance in question; that the city laws do not purport to require the removal of these improvements nor cessation of the present use thereof; that the property would remain exactly as it has been in the past, without a change in its improvements, its use or its existing yard areas, and the sole difference would be the circumstance of single ownership of the bungalow units through the respective conveyances; and that the city manifestly does not consider such bungalow courts a nuisance, for the very ordinance here considered permits the present construction of just such improvements on 5,000-square-foot lots held under single ownership in the C-2 zone (where plaintiff's property is situated), with a requirement of only 800 square feet of lot area per dwelling unit—while each of the parcels into which plaintiff has subdivided his property contains approximately 925 square feet. But the mere fact that the property in its existing condition is not deemed a nuisance per se nor objectionable as a "near-nuisance" in constituting a menace to health, safety or morals in the strict sense of the phrase does not strengthen plaintiff's position. *Jones v. City of Los Angeles*, 211 Cal. 304, 310, 295 P. 14. The "police power, as evidenced in zoning ordinances, has a much wider

scope than the mere suppression of the offensive uses of property * * * it acts, not only negatively, but constructively and affirmatively, for the promotion of the public welfare." *Miller v. Board of Public Works*, supra, 195 Cal. 477, 487-488, 234 P. 381, 384, 38 A.L.R. 1479.

[9-11] The ordinance here challenged is grounded in considerations of the "general welfare" pursuant to the city's comprehensive and systematic plan of community development, and consistent with the "tendency to a more liberal construction of the police power, as applied in zoning and other regulatory laws", *Thille v. Board of Public Works*, supra, 82 Cal.App. 187, 189, 255 P. 294, 295, plaintiff's right to the unlimited and uncontrolled disposition of his property may properly be subordinated to the public good. *Miller v. Board of Public Works*, supra; *Zahn v. Board of Public Works*, supra, 195 Cal. 497, 234 P. 388. The various factors above reviewed as found by the trial court to be possible motivating forces in the city's adoption of the ordinance show it to have a reasonable relation to the interests of the community as a whole in establishing a recommended residential pattern through regulation of minimum lot areas under single ownership. Moreover, it is fairly arguable that numerous other advantages might well suggest themselves when one attempts to visualize the appearance of a sizable area of a city subdivided into lots akin in dimension to those of plaintiff, upon each of which there stood an individually owned and maintained dwelling—in support of the legislative discretion exercised in the enactment of this regulation. See *Simon v. Town of Needham*, supra, 311 Mass. 560, 42 N.E.2d 516, 518, 141 A.L.R. 688. The zoning ordinance is not objectionable upon retroactive grounds in destroying plaintiff's vested property rights, *Jones v. City of Los Angeles*, supra, 211 Cal. 304, 310-311, 295 P. 14, but it only looks to the future in guiding a pattern of home development in the enhancement of the public interest. *Acker v. Baldwin*, supra, 18 Cal.2d 341, 346, 115 P.2d 455. While it may be that plaintiff could realize a greater profit in the aggregate from the disposition of the various bungalows in

single units to different individuals, such consideration does not make the zoning ordinance arbitrary in its application to his property, *Wilkins v. City of San Bernardino*, supra, 29 Cal.2d 332, 338, 175 P.2d 542; *Lockard v. City of Los Angeles*, supra, 33 Cal.2d 453, 466-467, 202 P.2d 38, 7 A.L.R.2d 990, nor preclude the regulation of his individual rights in the promotion of the general welfare. *Miller v. Board of Public Works*, supra, 195 Cal. 477, 487-488, 234 P. 381, 38 A.L.R. 1479.

[12, 13] There remains for discussion one point further in relation to the support of the ordinance and its application to property interests—a matter vigorously argued on behalf of plaintiff by amicus curiae, the California Land Title Association. It takes the position that the zoning ordinance is invalid because it effects a "restriction upon the free alienation of land, wholly divorced from the manner of its use"; that "laws and regulations governing transfers of real property are matters of statewide concern", *Robinson v. Kerrigan*, 151 Cal. 40, 46, 90 P. 129, 121 Am.St.Rep. 90, 12 Ann.Cas. 829; and that the defendant city is "wholly without power to legislate upon that subject." Such line of argument misconstrues the function of the zoning ordinance as a regulatory measure within the city's exercise of its police power, distinct from a law governing private property rights as between the citizens themselves. *Rehmann v. City of Des Moines*, 200 Iowa 286, 204 N.W. 267, 269, 40 A.L.R. 922; *Sanders v. Southern Electric Ry. Co.*, 147 Mo. 411, 48 S.W. 855, 859. The ordinance does not specify any status attaching to a conveyance contrary to its terms—whether void, voidable or valid—but merely prohibits a reduction in lot area below a minimum size and for the violation of such restriction, prescribes punishment by fine and imprisonment. Such regulation simply undertakes to control the property owner in respect to his relation to the city, and though an act contrary thereto may involve a transfer of title to realty, such circumstance cannot affect the city's power to impose a restriction upon the exercise of such private right

in behalf of the general welfare. While police regulation of the use or enjoyment of property rights can only be justified by the presence of a public interest, within such limits the individual's personal liberty in that regard is subject to reasonable restraint. 11 Am.Jur. sec. 267, p. 1006; Hart v. City of Beverly Hills, *supra*, 11 Cal.2d 343, 345, 79 P.2d 1080; Trans-Oceanic Oil Corp. v. City of Santa Barbara, *supra*, 85 Cal.App.2d 776, 783, 194 P.2d 148.

[14] Nor is the effect of the ordinance as construed by the trial court open to objection in relation to the pertinent state statute above cited, the Subdivision Map Act. As aforesaid, the ordinance purports to be a municipal regulation supplementary to the state Act, see *Pipoly v. Benson*, *supra*, 20 Cal.2d 366, 370, 125 P.2d 482, 147 A.L.R. 515, consistent with the Act's reference to "local ordinances" as appropriate enactments for a city's effective establishment of its pattern of community development. Business and Professions Code, secs. 11506, 11526; *Ayres v. City Council of City of Los Angeles*, *supra*, 34 Cal.2d 31, 207 P.2d 1. Plaintiff's several conveyances of the bungalow units, made prior to the 1947 amendment of the Subdivision Map Act, Stats.1947, p. 822, Business and Professions Code, sec. 11535, constituted a violation of the terms of the ordinance but not of the Subdivision Map Act as it then read, the latter applying in its reference only to *unimproved* property. *Cowell v. Clark*, *supra*, 37 Cal.App.2d 255, 258, 99 P.2d 594; *People v. Embassy Realty Associates, Inc.*, 73 Cal.App.2d 901, 904-905, 167 P.2d 797. Accordingly, the trial court adjudicated such transactions to be null and void in the light of the settled rule relating to contracts involving acts prohibited by law. *Smith v. Bach*, 183 Cal. 259, 262-264, 191 P. 14; *Duntley v. Kagarise*, 10 Cal.App.2d 394, 397, 52 P.2d 560. Amicus curiae argues that such determination renders the ordinance inconsistent with the Subdivision Map Act, which declares that any "sale or contract to sell * * * contrary to [its] provisions * * * is voidable at the sole option of the buyer", Business and Professions Code, sec. 11540, and accordingly the local regulation may not be sustained as

so conflicting. *Pipoly v. Benson*, *supra*, 20 Cal.2d 366, 369-370, 125 P.2d 482, 147 A.L.R. 515. There is no merit to this contention. The state Act manifestly had not "fully occupied" the field, *Pipoly v. Benson*, *supra*, 20 Cal.2d page 370, 125 P.2d page 484, and the trial court correctly adjudicated the problem as presented. *Smith v. Bach*, *supra*, 183 Cal. 259, 262-263, 191 P. 14. The effect of the alleged inconsistency posed by amicus curiae in relation to the 1947 amendment of the Subdivision Map Act, referable to "improved" property, is not a matter for decision here.

The purported appeal from the order denying a new trial is dismissed. The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, and TRAYNOR, JJ., concur.

CARTER, Justice.

I dissent.

Plaintiff, in 1945, bought a piece of property on which some nine bungalows had been built some twenty years previously. He then subdivided the property into nine parcels which averaged 925 square feet in size. Eight of these parcels were sold to individual purchasers in violation of a municipal ordinance which prohibited reduction of residential lots below 5,000 square feet of area with a fifty-foot frontage. The property purchased by the plaintiff is in a C-2 zone, and the ordinance permits the present construction of the same type of units as those owned by the plaintiff on a lot area of 800 square feet per dwelling unit. But these units must be held in single ownership.

The property here involved is situated in a C-2 Zone for which the ordinance provides in part as follows:

"C-4. Lot Area. Buildings hereafter erected and used wholly or partly for dwelling purposes shall comply with the lot area requirements of the R4 Zone—Sec. 12.11-C,4."

"Section 12.11-R4.

"C-4. Lot Area. Every lot shall have a minimum average width of fifty (50) feet and a minimum area of five thousand

(5000) square feet. *The minimum lot area per dwelling unit shall be eight hundred (800) square feet.* [Emphasis added.]

In *Devaney v. Board of Zoning Appeals*, 132 Conn. 537, 45 A.2d 828, 829, the Supreme Court of Connecticut aptly stated that "Zoning consists of 'a general plan to control and direct the use and development of property in a municipality, or a large part of it, by dividing it into districts according to the present and potential use of the properties.'" It has also been said that a zoning statute or ordinance is one regulating by districts the building development and uses of property and imposing restrictions on the use of the land itself. The term "zoning" within the meaning of a constitutional provision permitting laws authorizing zoning ordinances means a separation of the municipality into districts and the regulation of buildings and structures in such districts in accordance with their construction and the nature and extent of their use and the dedication of such districts to the particular uses designed to subserve the general welfare and pertains not only to use but to structural and architectural design of the building. *Yokley, Zoning Law and Practice*. In *Goodrich v. Selligman*, 298 Ky. 863, 183 S.W.2d 625, it was said that the theory of zoning is to foster improvements by confining certain classes of buildings and uses to certain localities without imposing undue hardship on property owners.

It would seem that the ordinance here involved is not the usual type of zoning ordinance, nor does it fall within the definitions given above insofar as it applies to the *ownership* of lots of a certain size. By it a restriction is placed on the ownership, *not the use*, of parcels of land below a certain specified area.

I concede that the objectives of zoning are within the police power—that the public health, safety, morals and general welfare must be safeguarded. *But* there must be a rational connection between the means used and the end result to be attained. The majority opinion sets forth the reasons why this ordinance providing for single ownership of the units, rather than individual

ownership, is a rational basis for the ordinance enacted under the police power of the municipality. These reasons would have validity if, and only if, the ordinance prohibited more than a single dwelling or two on each 5000 square foot parcel of land (which was heretofore used by the occupants of the nine bungalows). These reasons are: (1) Avoidance of congestion in the streets. The absurdity of this is apparent—because a man owns his own home, does he tend to make for greater congestion in the streets? (2) Prevention of overcrowding the land—because a man owns his land, does he tend to have more children, more guests, more relatives? (3) Facilitation in furnishing transportation, water, light, sewer and other public necessities—I may be obtuse, but it appears that this reason is less than valid. In bungalow courts, unfurnished apartments, and the like, each tenant usually pays for his own water, light, and public utilities—these facilities are furnished to him as an individual tenant, and have nothing whatsoever to do with his ownership of the property. The transportation argument seems so ridiculous as to require no answer. (4) Provision of recreational space for children to play—how can individual ownership of the various units have the slightest bearing on such space? (5) Encouragement of the cultivation of flowers, shrubs, vegetables—it has been my experience that individual ownership tends toward the encouragement of interest in the land, rather than tending to diminish it, and the same argument applies so far as the upkeep of property is concerned. Tenants are only too willing to let the landlord take care of any repairs, and if the landlord fails to do so, the tenant is not willing to expend his funds on someone else's property. (6) As another reason we are told that a "probable increase in occupancy" would add to the noise and other irritations which militate against orderly, quiet and peaceful living. As I have pointed out previously, this is a valid argument if we are to prohibit absolutely such bungalow courts, but, in the very nature of things, can have no validity when we take into consideration the fact that these units will be occupied in the same manner

whether or not they are individually owned. (7) Health and Sanitary regulations—this argument is equally delusive. There is one incinerator and two sewer connections servicing the nine units and it would seem that individual ownership would not make these services less adequate. There are common walkways which will need to be cleaned, we are told, and there are easements over other property which will need to be regulated. And on these very speculative and improbable future neighborhood squabbles, we are asked to say that the ordinance has a reasonable basis in that it will tend to promote the public health, welfare, safety and general well-being! A corollary of finding this ordinance a sound and rational exercise of the police power of the municipality is to restrain the free alienation of property.

The majority say that "The courts may differ with the zoning authorities as to the 'necessity or propriety of an enactment,' but so long as it remains a 'question upon which reasonable minds might differ,' there will be no judicial interference with the municipality's determination of policy." I am of the opinion now, as I have been in the past, that this court, when viewing a record on appeal, must sustain the findings of the trial court when there is substantial evidence in support thereof. The evidence in the instant case in support of the reasonableness of the ordinance appears to me to be sadly lacking. I fail to see that there is a question on which "*reasonable* minds might differ"! It seems to me that this is a clear case of arbitrary interference with the rights of an individual, and that the public gain from that interference is non-existent.

The majority tell us that "* * * it is fairly arguable that numerous other advantages might well suggest themselves when one attempts to visualize the appearance of a sizable area of a city subdivided into lots akin in dimension to those of plaintiff, upon each of which there stood an individually owned and maintained dwelling * * *." The fact remains that plaintiff's property is in a zone in which these bungalow units (under single ownership) are permitted by this ordinance. Just how an

observer would be able to say whether or not they were individually owned and what difference that would make in one's visualization of the area in question, I am at a loss to understand. There is no reasonable relation between a reduction of the area of an improved lot, *without* change in its improvements, its use or its existing yard areas and the protection of the public health, safety, morals or welfare. The exercise of the police power, though an essential attribute of sovereignty for the public welfare and arbitrary in its nature, cannot extend beyond the necessities of the case and be made a cloak to destroy constitutional rights as to the inviolateness of private property. *House v. Los Angeles County Flood Control Dist.*, 25 Cal.2d 384, 153 P.2d 950.

I consider it a duty of this Court—a duty imposed on it by the will of the people of the State—to protect the individual against state or municipal action which deprives an individual of a right guaranteed to him not only by the Constitution of the United States, but by the Constitution of the State of California, when that action is not validly necessary for the benefit of the public at large. I have long argued against statism and for the protection of individual rights when it is not necessary that those rights should be abridged for the benefit of the public. I consider that the people of this State and of the United States voluntarily relinquished certain of their rights that they collectively might benefit, but that they did not intend that all individual rights should be so relinquished. Our Constitutions embody that intent, and they stand as shields protecting the individual against arbitrary state action. It is the duty of this Court to hold those shields. I do not feel that the declaration in the majority opinion that this ordinance is a reasonable and valid exercise of the police power has any support in reason.

In affirming the judgment, the majority fall into the error of assuming, just because municipal legislation on zoning is involved, that every such restriction is valid and that it is beyond the power of this Court to inquire into the reasonableness thereof. Ordinances *are* held invalid and unconstitu-

tional, Page v. City of Portland, 178 Or. 632, 165 P.2d 280; Lee v. City of Chicago, 390 Ill. 306, 61 N.E.2d 367; Koch v. City of Toledo, 6 Cir., 37 F.2d 336; American Wood Products Co. v. City of Minneapolis, 8 Cir., 35 F.2d 657; Van Auker v. Kimmey, 141 Misc. 105, 252 N.Y.S. 329; Lombardo v. City of Dallas, Tex.Civ.App., 47 S.W.2d 495; Johnson v. Village of Villa Park, 370 Ill. 272, 18 N.E.2d 887; Village of Terrace Park v. Errett, 6 Cir., 12 F.2d 240; Women's Kansas City St. Andrew's Soc. v. Kansas City, Mo., 6 Cir., 58 F.2d 593; Glencoe Lime & Cement Co. v. City of St. Louis, 341 Mo. 689, 108 S.W.2d 143, because unreasonable and discriminatory. "The courts usually will hold a zoning ordinance invalid when it clearly appears that the restrictions are arbitrary and unreasonable and have no substantial relation to health, safety, morals or the general welfare." State ex rel. Dixie Inn v. City of Miami, 156 Fla. 784, 24 So.2d 705, 706, 163 A.L.R. 577. Zoning restrictions must bear a *substantial relation* to the promotion of public health, safety, morals or general welfare. Ex parte Angelus, 65 Cal.App.2d 441, 150 P.2d 908; Grant v. Board of Adjustment, 133 N.J.L. 518, 45 A.2d 184; Merrill v. City of Wheaton, 379 Ill. 504, 41 N.E.2d 508; Zadworny v. City of Chicago, 380 Ill. 470, 44 N.E.2d 426; City of Louisville v. Koenig, 290 Ky. 562, 162 S.W.2d 19, 140 A.L.R. 1369.

The legislation here considered is arbitrary and discriminatory. It is arbitrary and unreasonable in that it has no substantial justification based on "imperious considerations of public health, morals, and safety, * * *" Miller v. Seaman, 137 Pa.Super. 24, 8 A.2d 415, 417. It is discriminatory in that it prohibits *ownership* of small parcels of land in a district where *rental* of lesser parcels of land is permitted. As the court said in the case cited by the majority, Simon v. Town of Needham, 311 Mass. 560, 42 N.E.2d 516, 519, 141 A.L.R. 688: "A zoning by-law cannot be adopted for the purpose of setting up a barrier against the influx of thrifty and respectable citizens who desire to live there and who are able and willing to erect homes upon lots upon which fair and reasonable re-

strictions have been imposed nor for the purpose of protecting the large estates that are already located in the district." This ordinance discriminates against those wishing to live in the district in homes *owned* by them and favors those who wish only to rent property there. It definitely sets up a barrier and discriminates *against* thrifty persons of small means while favoring those who can afford to buy property and build small homes thereon for rental and income purposes.

A zoning ordinance may be generally valid, but its enforcement with respect to particular property will be restrained by the courts if it is unreasonable, arbitrary and discriminatory in its application thereto. Reynolds v. Barrett, 12 Cal.2d 244, 250, 251, 83 P.2d 29; Skalko v. City of Sunnyvale, 14 Cal.2d 213, 214, 216, 93 P.2d 93; Bernstein v. Bush, 29 Cal.2d 773, 777, 177 P.2d 913; Hagenburger v. City of Los Angeles, 51 Cal.App.2d 161, 163, 164, 124 P.2d 345.

We are supposed to have a constitutional form of government where certain fundamental individual rights are guaranteed and protected. Section 1 of Article I of our Constitution provides that "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness." While I concede that the right to acquire and possess property is subject to the police power of the state in the advancement and protection of public health, safety, morals and general welfare, I think it is time for this Court to declare that the police power of the state is so limited and that the right to own and possess property may not be impaired by the mere whim or caprice of any planning commission, city council, or board of supervisors which may have some pet notion about what use should be made by an individual of property owned by him. In other words, I do not believe that these public agencies should be permitted to interfere with the ownership or possession of property unless it can reasonably be said that such interference is necessary in the

interests of public health, safety, morals or welfare. In my opinion, the determination of this issue is for the Courts who must interpret and apply the constitutional safeguards for the protection of the property owner.

I positively do not agree with the philosophy announced in the recent decisions of this Court, *Wilkins v. City of San Bernardino*, 29 Cal.2d 332, 175 P.2d 542; *Lockhard v. City of Los Angeles*, 33 Cal.2d 453, 202 P.2d 38, 7 A.L.R.2d 990, and *Ayres v. City of Los Angeles*, 34 Cal.2d 31, 207 P.2d 1, in which it has completely abdicated its judicial function in favor of the arbitrary and unreasonable action of city councils, as shown by the record in those cases, who recognize no constitutional limitation of their power to control the use of private property.

It may be that we are going to have to stand up and be counted in order to determine whether constitutional rights in the ownership and possession of property still exist. Such rights certainly will no longer exist when the decision in this case takes its place beside the *Wilkins*, *Lockhard* and *Ayres* cases herein cited. Under these decisions the right of ownership and possession of real property is subject to the whim and caprice of any planning commission, city council or board of supervisors and the restrictions which any one of them may place upon an individual's right to own, possess or use real property which will be upheld by a majority of this Court is any one's guess—the sky may be the limit—certainly not the Constitution which has become a dead letter—a forgotten document.

When the Constitution is disregarded we reach the perimeter of the police state. True, city councilmen are elected, but what chance has a property owner who may

be in the minority to protect himself against arbitrary and unreasonable action by a city council who may see fit to zone his property for a use for which it is wholly unsuited? This Court has said it will not interfere with such action. Of what value to him is the inalienable right guaranteed by the Constitution to acquire, possess and protect property when a city council or board of supervisors tells him he can only use his property for a purpose dictated by whim or caprice and the courts refuse to grant him relief? The instant case is a shining example of such arbitrary action. The bungalow units were legally constructed and have been legally occupied, but they cannot be legally sold in separate units. Does this really make sense? Is there a scintilla of reason or logic behind such a rule? If there is, it is not apparent to me, and I doubt that it would be to any unprejudiced mind.

I am of the opinion that the ordinance is invalid and unconstitutional in its application to these facts in that the evidence discloses that it bears no reasonable relation to the legitimate objectives to be attained by an exercise of the police power, and that it is wholly arbitrary and discriminatory. I would reverse the judgment.

SCHAUER, Justice (dissenting).

I agree with the conclusion of Mr. Justice Carter that the ordinance here involved, in its application to the facts of this case, is arbitrary and discriminatory. On the face of the majority opinion it appears, I think, that the ordinance as applied bears no reasonable relation to legitimate objectives of constitutional police power but, rather, effects an unwarranted curtailment of the rights of private ownership. By heretofore well established standards the judgment should be reversed.

35 Cal.2d 36

BAFFA v. JOHNSON et al.**L. A. 21266.**

Supreme Court of California, in Bank.

March 24, 1950.

William Baffa sued Johnnie A. Johnson and another to recover down payment made under written contract for purchase of cocktail lounge and business. The Superior Court, Los Angeles County, Otto J. Emme, J., entered judgment for defendants, and the plaintiff appealed. The Supreme Court, Traynor, J., held that plaintiff could not recover any of his down payment in absence of proof that defendant's damages as result of plaintiff's breach of the contract were less than the down payment.

Judgment affirmed.

Prior opinion, 209 P.2d 678.

1. Vendor and purchaser ⇨335

A defaulting vendee may recover part payments after further performance under contract to purchase real property has terminated, if he proves facts justifying relief under statute respecting relief from forfeitures. Civ.Code, §§ 3275, 3307, 3369.

2. Vendor and purchaser ⇨335

One who entered into written contract to purchase cocktail lounge and business could not recover back part of his down payment upon his breach of the contract, where he failed to prove that down payment exceeded vendors' damages. Civ. Code, §§ 3275, 3307, 3369.

Laurence J. Rittenband, Los Angeles, Sidney H. Rivkin, Hollywood, Frederick Brunner and Raymond A. Nelson, Los Angeles, for appellant.

Sturzenacker & Isenberg and Carl B. Sturzenacker, Hollywood, for respondents.

TRAYNOR, Justice.

Plaintiff brought this action to recover a down payment of \$5,000 made under a written contract in which he agreed to buy defendants' cocktail lounge and business for \$93,000. The contract provided for the payment of \$40,000 in cash with the balance payable at \$1,000 per month and secured by a deed of trust. In addition to the down payment, \$15,000 was to be deposited on the opening of escrow within forty-five days. The contract provided that if the vendee failed to deposit the additional cash payments in escrow, the vendors would retain the \$5,000 as liquidated damages. The trial court found on substantial evidence that defendants performed all that was required of them under the contract and that plaintiff refused to open an escrow and abandoned the contract. Judgment was entered for defendants and plaintiff has appealed.

[1] Plaintiff contends that the damages to which defendants are entitled for his failure to perform the contract should be, not the amount paid down in part performance, but an amount determined under Civil Code section 3307.¹ It has frequently been stated that the vendor may retain payments as an alternative remedy to an action for damages for breach of a contract to purchase real property. *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 10, 55 P. 713, 43 L.R.A. 199, 69 Am.St.Rep. 17; see cases cited in *Barkis v. Scott*, 34 Cal.2d 116, 208 P.2d 367. It is now settled, however, that the defaulting vendee may recover part payments after further performance under the contract has terminated, if he proves facts justifying relief under Civil Code section 3275.² *Barkis v. Scott*, 34 Cal.2d 116, 208 P.2d 367, 370. As pointed out in the *Barkis* case, "The

1. "The detriment caused by the breach of an agreement to purchase an estate in real property, is deemed to be the excess, if any, of the amount which would have been due to the seller, under the contract, over the value of the property to him."

2. "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty."

facts in the Glock and similar cases suggest that the reason no attempt was made to rely upon section 3275 was that the defaulting vendee could not qualify for relief under that section and that therefore his only hope of recovering any of the money he had paid or keeping the contract alive was in proving that it was the vendor who was in default. In many cases the amount forfeited was a small fraction of the total price and there was no indication that it exceeded in amount the damage caused the vendor by the vendee's breach. [Citations.] On the other hand, when relief has been sought and denied under section 3275 the courts have frequently pointed out that the damages sustained by the vendor were no less in amount than the vendee had already paid [citations], or that the nature of the condition that was breached was such that it was impossible to compute the actual damages involved. [Citations.] In other cases the vendee has been unable to continue with performance of the contract, and although such inability prevents his default from being wilful [citations], it also defeats his right to have the contract kept in force, since he is unable to make full compensation for the default. [Citations.]” 34 Cal.2d 121-122, 208 P.2d 367.

Notwithstanding the evidence in this case that plaintiff's breach was wilful, he contends that since this fact would be immaterial if defendants were suing him for damages, it should also be immaterial in determining whether he is entitled to the return of any part of his down payment. The rule to which he objects is stated in the Restatement of Contracts: “One who is sued for damages is required to pay no more than just compensation, making due allowance for benefits received by the injured party, even though his breach is wilful and deliberate; but one who sues for restitution of value that he has given in part performance can recover none of it if his breach is wilful and deliberate. * * *” Rest., Contracts, § 357, comment c. It also finds expression in sections 3275 and 3369 of the Civil Code. Section 3275 makes it a condition of relief from forfeiture that the breach be neither grossly negligent, wilful, nor fraudulent. Section

3369 provides that “Neither specific nor preventive relief can be granted to enforce a penalty or forfeiture *in any case * * **” (Italics added.) Under these sections a defaulting vendee seeking restitution of part of his payments will be denied relief if his breach is wilful. On the other hand, if he is able to prove that the vendor has received more than the benefit of his bargain, the court is precluded by section 3369 from quieting the vendor's title unless he refunds the excess. *Barkis v. Scott*, 34 Cal.2d 116, 208 P.2d 367, and cases cited.

[2] It is contended, however, that the nature of the breach is material only when the vendee is seeking under section 3275 to keep the contract in force; that when the vendee is seeking to recover the excess of his part payments over the damage he has caused the vendor, the provisions of the Civil Code governing the measure of damages for breach of contract provide an alternative basis for relief independently of section 3275. Whatever the merits of this contention, plaintiff has failed to prove that the down payment exceeds defendants' damages. He introduced no evidence to prove that when he repudiated the contract, the property was worth more than \$88,000 to defendants, namely, the \$93,000 purchase price less the \$5,000 down payment. Plaintiff contends, however, that defendants' own evidence proves that they lost no more than \$1,500 as a result of his breach. Seven months after plaintiff repudiated the contract, defendants sold the business less the real property for \$48,000, and the purchaser received an option to buy the real property for \$50,000. Meanwhile defendants had invested an additional \$6,500 in the business. Plaintiff contends that this transaction is equivalent to a resale at \$91,500 when an adjustment is made for the additional investment and that defendants should therefore refund \$3,500. Even if the price of the real property provided in the option were a fair measure of its value to defendants at the time of the resale, there is no evidence concerning the value of the property at the time plaintiff repudiated the contract. One of the defendants testified that values were falling when the contract was made. After plain-

tiff's breach any benefit from a rising market would rightfully accrue to defendants as owners of the property, not to plaintiff. If its value had dropped to \$88,000 at the time plaintiff repudiated the contract, and defendants resold it at that price, there would clearly be no unjust enrichment. Nor would there be any if they retained the property and the value rose.

Plaintiff cannot recover any of his down payment since he has failed to prove that defendants' damages were less than the amount he had paid.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.



96 Cal.App.2d 471

ELLIS et al. v. KLAFF et al.
Civ. 17302.

District Court of Appeal, Second District,
Division 3, California.

March 15, 1950.

Art Ellis and Hester L. Ellis brought action against Seymore Klaff and Don Rose, doing business under the fictitious name and style of Buena Motors, and W. B. Adams to recover under first cause of action for violation of covenant to construct a building or buildings on leased premises, and on second cause of action for unpaid rent. The Superior Court of Ventura County, Charles F. Blackstock, J., rendered an order granting plaintiffs' motion for new trial on all issues as to all defendants, and Seymore Klaff and Don Rose appealed. The District Court of Appeal, Shinn, P. J., held that construction clause in lease was too vague to give rise to a contractual duty, that it was void under statute of frauds, that extrinsic evidence was not admissible, and that order granting a new trial as to the second cause of action was void as to Don Rose.

Order reversed in part and affirmed in part.

1. Appeal and error ☞173(6)

District Court of Appeal would consider applicability of the statute of frauds on appeal from order granting a new trial, though question may not have been asserted in the trial court, since if order granting new trial should be affirmed, case would be restored to the same situation as any other contested case prior to trial, and trial court, in its discretion, could permit pleadings to be amended, and could relieve the parties from the effect of stipulations, admissions, or waivers occurring at the previous trial. Civ.Code, § 1624.

2. Evidence ☞448, 460(2), 461(1) Frauds, Statute of ☞158(3)

Both the statute of frauds and the parol evidence rule permit reception of extrinsic evidence to identify the subject matter of a contract from the written description, explain the meaning of ambiguous, abstruse, or technical expressions, and assist in interpreting the expressed intentions of the parties in the light of circumstances existing at time of execution. Civ.Code, § 1624; Code Civ.Proc. § 1856.

3. Evidence ☞384, 442(1)

The "parol evidence rule" is a principal of substantive law, premised on the hypothesis that when the parties have voluntarily expressed their agreement in written form, the writing represents a complete integration of their understanding, and it is not calculated to, nor does it in practice, exert any compulsion on the parties to put their entire understanding in writing. Code Civ.Proc. § 1856.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Parol Evidence Rule".

4. Evidence ☞442(1)

The parol evidence rule does not render inadmissible proof of contemporaneous oral agreements collateral to, and not inconsistent with, a written contract, where the written contract is either incomplete or silent on the subject, and the circumstances justify an inference that it was not intend-

ed to constitute a final inclusive statement of the transaction. Civ.Code, § 1856.

5. Frauds, Statute of ☞121

The statute of frauds is designed to prevent fraud and perjury by requiring certain contacts to be evidenced exclusively in writing. Civ.Code, § 1624.

6. Frauds, Statute of ☞121

The statute of frauds demands that every material form of an agreement within its provisions be reduced to written form, whether the parties desire to do so or not. Civ.Code, § 1624.

7. Frauds, Statute of ☞106(1)

A writing, to be sufficient under the statute of frauds, must be one which states with reasonable certainty each party to the contract, the land, goods or other subject matter to which the contract relates, and the terms and conditions of all the promises constituting the contract and by and whom the promises are made. Civ.Code, § 1624.

8. Frauds, Statute of ☞113(1)

Unless a writing, considered alone, expresses the essential terms with sufficient certainty to constitute an enforceable contract, it fails to meet the demands of the statute of frauds. Civ.Code, § 1624.

9. Frauds, Statute of ☞158(3)

Where the statute of frauds is invoked, recovery may not be predicated on parol proof of material terms omitted from written memorandum, even though oral understanding is entirely consistent with, and in no way tends to vary or contradict, the written instrument. Civ.Code, § 1624.

10. Contracts ☞9(1)

Though the terms of a contract need not be stated in the minutest detail, it is requisite to enforceability that it must evidence a meeting of the minds on the essential features of the agreement, and that the scope of the duty and limits of acceptable performance be at least sufficiently defined to provide a rational basis for assessment of damages.

11. Frauds, Statute of ☞113(3), 158(3)

Provision in lease that lessee agreed to improve premises by construction of a

building or buildings as soon as building conditions reasonably should permit, and that it was agreed that such obligation of lessee was one of the elements of the consideration to be given by lessee to lessors for execution of lease, and that any building or structure constructed should comply strictly with building code of city, was too vague and uncertain to give rise to a contractual duty and was unenforceable under the statute of frauds, and extrinsic evidence was not admissible to show type of building intended by parties. Civ.Code, § 1624(4).

12. Frauds, Statute of ☞128

Where construction clause in lease requiring lessee to construct buildings, was unenforceable under statute of frauds, any subsequent agreement which the parties may have reached with respect to obligation to construct, was also required to be reduced to writing. Civ.Code, §§ 1624(4), 1698.

13. New trial ☞8

Where plaintiffs sought judgment against one of the defendants only on first cause of action, order granting new trial as to second cause of action against all defendants, was void as to that defendant against whom recovery was sought only on first cause of action.

14. New trial ☞1/2

New trial procedure is jurisdictional.

15. Appeal and error ☞1172(3)

Where, as between plaintiffs and one of defendants, plaintiffs were aggrieved by judgment of nonsuit in favor of that one defendant, and their motion for new trial was proper, but on appeal, that defendant did not seek a reversal of order granting a new trial as to second cause of action, order would be affirmed in that particular, though plaintiffs were not entitled to prevail against that defendant on the second cause of action.

Nordman & Berenson and Gustafson & Rosenmund, Oxnard, for appellants Don Rose and Seymore Klaff.

William A. Reppy, Neil D. Heily, Oxnard, for respondents.

SHINN, Presiding Justice.

This action was brought against defendant Adams, as lessee, and defendants Rose and Klaff, as assignees, for rent and for damages for the alleged breach of a covenant in a written lease. The first cause of action of the complaint alleged the violation of a covenant for construction by the lessee of "a building or buildings" on the leased premises. The second cause of action was for unpaid rent in the amount of \$375. A nonsuit was entered in favor of Klaff on both counts; judgment went for plaintiffs Ellis against Adams and Rose on the cause of action for unpaid rent, and for defendants on the cause of action for breach of covenant to construct. Subsequently on motion of plaintiffs the court granted a new trial on all the issues as to all of the defendants "on the grounds that the evidence is insufficient to justify the decision of the Court and that it is against the law." Defendants Rose and Klaff have appealed from this order; defendant Adams has not appealed.

In their opening brief appellants state that they are raising no question as to the propriety of the order as against defendant Adams nor as to its propriety insofar as it relates to the cause of action for unpaid rent. It is said "[t]he only matter about which complaint is made is that the order for new trial should have been limited, as permitted by Code of Civil Procedure, section 657, so as to exclude any new trial on the first cause of action against appellants."

In the summer of 1946 Adams was appointed sales agent for Kaiser-Fraser Automobiles for Ventura, California. Needing a location for conducting sales he executed the lease involved in the present action for a term of five years with an option to renew for an equal period, at a monthly rental of \$125. The lease contained the following provisions:

"The lessee agrees to improve said premises by the construction of a building or buildings as soon as building conditions rea-

sonably shall permit. It is understood that this obligation of the lessee is one of the elements of the consideration to be given by the lessee to the lessors for the execution of this lease. In connection with the construction and maintenance of any such improvements the lessee agrees to hold the lessors harmless from any liability whatsoever due to injury and/or damage to persons or property. Any building or structure constructed by the lessee shall comply strictly with the Building Code of the City of Buenaventura.

"Lessee agrees to carry adequate fire and earthquake insurance on structures erected by him on said property. Lessee also agrees to pay any increase in the City and County taxes on said property due to improvements placed or erected on said property by the lessee.

"It is understood that all buildings placed on or erected on the leased premises shall become a part of the real property and shall remain and shall inure to the benefit of the lessors at the termination of this lease."

Parol evidence was admitted, some of it over the objection of appellants, in an attempt to prove an agreement on the part of Adams to construct either a brick or concrete-block building with glass front and service garage, suitable for an automobile salesroom and repair shop, and costing approximately \$12,000. Shortly after the execution of the lease in July, 1946, Adams caused an architect to prepare plans and specifications for such a building and he filed an application with the Civilian Priorities Administration for a construction permit. The permit was finally granted in January, 1947, at which time building conditions were such as to permit construction to proceed. Meanwhile Adams had placed on the leased premises a construction shed approximately 8' x 10' containing a telephone, desk, and other office equipment from which he conducted his business. In December, 1946 Adams sold all of his assets, including the Kaiser-Fraser franchise, to defendant Rose and assigned the lease to him. The written assignment, which was signed by Rose, stated

in part: "I, Donald L. Rose, do hereby accept the foregoing assignment and do hereby agree to be bound by the terms, conditions and obligations in said lease contained and agree to save and hold W. B. Adams harmless from any further liability or obligations under the terms of said original lease." Rose, who conducted the automobile agency as Buena Motors Inc., or his sublessee, paid rent under the lease through September, 1947. He moved the shed off the lot, and never physically occupied the property or used it in his business. Prior to the execution of the assignment he had leased other premises in Ventura upon which he conducted the Kaiser-Fraser agency; and he testified that he paid the rent on the leased premises for the sole purpose of retaining it for possible future use as a used car lot.

Defendant Klaff became associated with Rose for the first time in either January or February, 1947, as a stockholder in Buena Motors. He became Vice-President or Secretary of the corporation. There was no evidence that Klaff became at any time a party to the assignment, or that he entered into an agreement with plaintiffs or Adams to assume the obligations of the lease other than testimony by Mr. Ellis that Klaff had stated to him that "somewhere in their dealings for the Kaiser-Fraser agency they assumed a lease"; that Klaff asked Ellis to give his consent to a sublease in May, 1947; and also requested that the lease be cancelled in September, 1947. The present action was brought after the refusal of defendants in November, 1947, to comply with plaintiffs' written demand that they construct a building and pay the rent due.

[1] Since the lease agreement was for a term of more than one year, its essential provisions were required by the Statute of Frauds, Civ.Code, sec. 1624(4) to be in writing. Appellants contend that the construction clause of the lease, as written, is unenforceable due to uncertainty, and that the statute forbids its deficiencies to be supplied by parol evidence. It does not appear from the record that the applicability of the Statute of Frauds was urged in the trial court. Although appellants' gen-

eral denial may have been sufficient to raise the point, *Howard v. Adams*, 16 Cal.2d 253, 257, 105 P.2d 971, 130 A.L.R. 1003, it was evidently not pursued with any show of diligence. The objections to introduction of evidence were not made on this ground, nor was the statute argued on appellants' motion for nonsuit. Appellants claim that the question was raised in connection with an unsuccessful motion to strike portions of the pleadings referring to parol understandings; and respondents admit that they presented points and authorities as to admissibility of extrinsic evidence in their trial brief. Neither of these documents, nor any transcript of oral argument pertaining thereto, was incorporated in the record, however. Conceding that the bar of the Statute of Frauds is being asserted for the first time upon the appeal, we nevertheless are constrained under the particular circumstances to exercise our discretion to consider the matter. See *Solorza v. Park Water Co.*, 86 Cal.App.2d 653, 195 P.2d 523. If the order granting a new trial is affirmed, the case will be restored to the same situation as any other contested case prior to trial. *Kent v. Williams*, 146 Cal. 3, 7, 79 P. 527; *Miller & Lux v. Enterprise Canal etc. Co.*, 169 Cal. 415, 419, 147 P. 567; *Gruben v. Leebrick & Fisher*, 32 Cal.App.Supp.2d 762, 766, 84 P.2d 1078. The trial court, in its discretion, may permit the pleadings to be amended, *National City Finance Co. v. Lewis*, 216 Cal. 254, 14 P.2d 298; *Stinnett v. Superior Court*, 36 Cal.App. 275, 171 P. 1076, and may relieve the parties from the effect of stipulations, admissions, or waivers occurring at the previous trial. *Daneri v. Gazzola*, 2 Cal.App. 351, 355-358, 83 P. 455; 39 Am. Jur., secs. 217-218, pp. 208-209; 46 C.J., secs. 581-583, pp. 462-463. The issues being set at large, it cannot be assumed that the parties would rely upon the same theory or be restricted to the same evidence as before. *Morton v. Superior Court*, 105 Cal.App. 143, 286 P. 1072. Since appellants are vigorously contending before us that the Statute of Frauds is a conclusive defense to plaintiffs' first cause of action, it may be assumed that they would so contend upon a retrial. Also, if respondents are

correct in their position, it is appropriate that the issue be determined upon this appeal in order, if possible, to reach a final determination of the controversy without the need for a retrial and possible additional appeal, with attendant expense and delay.

[2] The evidentiary consequences of the Statute of Frauds, Civ.Code, sec. 1624, are in many respects similar to those of the parol evidence rule, Code Civ.Proc. sec. 1856. Both require exclusion of extrinsic evidence which would vary, contradict, or add to the terms of the written agreement under consideration, *Craig v. Zelian*, 137 Cal. 105, 69 P. 853, statute of frauds; *Germain Fruit Co. v. J. K. Armsby Co.*, 153 Cal. 585, 96 P. 319, parol evidence rule, but both permit reception of such evidence to identify the subject matter of the contract from the written description, explain the meaning of ambiguous, abstruse, or technical expressions, and assist in interpreting the expressed intentions of the parties in the light of circumstances existing at the time of execution. 10 Cal.Jur., "Evidence", sec. 186, pp. 916-919; 12 Cal.Jur., "Statute of Frauds", sec. 65, p. 902; *Gibson v. De La Salle Institute*, 66 Cal.App.2d 609, 152 P.2d 774; *Balfour v. Fresno Canal & Irrigation Co.*, 109 Cal. 221, 225, 41 P. 876; *Von Rohr v. Neely*, 76 Cal.App.2d 713, 173 P.2d 828. It must be recognized, however, that there is a basic distinction between the two rules, which, in certain circumstances, becomes of controlling significance.

[3, 4] The parol evidence rule is a principle of substantive law, premised upon the hypothesis that when the parties have voluntarily expressed their agreement in written form, the writing represents a complete integration of their understanding. *Wigmore on Evidence*, vol. 9, sec. 2425, p. 76. It is not calculated to, nor does it in practice, exert any compulsion upon the parties to put their entire understanding in writing. *Lande v. Southern California Freight Lines*, 85 Cal.App.2d 416, 420, 193 P.2d 144. It does not, therefore, render inadmissible proof of contemporaneous oral agreements collateral to, and not inconsis-

ent with, a written contract where the latter is either incomplete or silent on the subject, and the circumstances justify an inference that it was not intended to constitute a final inclusive statement of the transaction. *Crawford v. France*, 219 Cal. 439, 443-445, 27 P.2d 645; *Weil v. California Bank*, 219 Cal. 538, 27 P.2d 904; *Van Slyke v. Broadway Ins. Co.*, 115 Cal. 644, 647, 47 P. 689, 928.

[5-9] The Statute of Frauds, on the other hand, is designed to prevent fraud and perjury by requiring certain contracts to be evidenced exclusively in writing. In order to effectuate that purpose, it demands that every material term of an agreement within its provisions be reduced to written form, whether the parties desire to do so or not. To be sufficient, the required writing must be one "which states *with reasonable certainty*, (a) each party to the contract * * * and (b) the land, goods or other subject-matter to which the contract relates, and (c) *the terms and conditions of all the promises* constituting the contract and by whom and to whom the promises are made." *Restatement, Contracts*, sec. 207. Emphasis added. Unless the writing, considered alone, expresses the essential terms with sufficient certainty to constitute an enforceable contract, it fails to meet the demands of the statute. *Breckinridge v. Crocker*, 78 Cal. 529, 535, 21 P. 179; *Sherwood v. Lowell*, 34 Cal.App. 365, 375, 167 P. 554; *Wineburgh v. Gay*, 27 Cal.App. 603, 150 P. 1003; *Zellner v. Wassman*, 184 Cal. 80, 85-86, 193 P. 84; *Fritz v. Mills*, 170 Cal. 449, 458, 150 P. 375; *Hines v. Copeland*, 23 Cal.App. 36, 136 P. 728; 37 C.J.S., *Frauds, Statute of* § 195, page 681. See also, *In re Guardianship of Carlon's Estate*, 43 Cal.App.2d 204, 209, 110 P.2d 488. Accordingly, where the Statute of Frauds, rather than the parol evidence rule is invoked, it follows that recovery may not be predicated upon parol proof of material terms omitted from the written memorandum, even though the oral understanding is entirely consistent with, and in no way tends to vary or contradict, the written instrument. *Friedman v. Bergin*, 22 Cal.2d 535, 140 P.2d 1; *Seymour*

v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154; Wristen v. Bowles, 82 Cal. 84, 22 P. 1136; Edgar Bros. Co. v. Schmeiser Mfg. Co., 33 Cal.App. 667, 166 P. 366; Baume v. Morse, 13 Cal.App. 456, 110 P. 350; Fields v. Harris, Tex.Civ.App., 294 S.W. 612; Linebarger v. Devine, 47 Nev. 67, 214 P. 532, 217 P. 1101; Williston on Contracts, vol. 2, pp. 1619, 1645; 49 Am.Jur., sec. 322, p. 636. In the words of the Supreme Court, "The whole object of the statute would be frustrated if any substantive portion of the agreement could be established by parol evidence." Craig v. Zelian, supra, 137 Cal. 105, 106, 69 P. 853, 854.

The distinction noted has apparently been overlooked upon occasion (see Blahnik v. Small Farms Improvement Co., 181 Cal. 379, 184 P. 661; Stockburger v. Dolan, 14 Cal.2d 313, 317, 94 P.2d 33, 128 A.L.R. 83), but, as the Supreme Court indicates in 22 Cal.2d 535, 539, 140 P.2d 1 supra, such cases are not in point where they fail to discuss the statute of frauds. Although in Rohan v. Proctor, 61 Cal.App. 447, 453, 214 P. 986, the court employed language apparently opposed to the views here expressed, it is clear upon analysis that the portions of the opinion referred to were merely dictum, and hence not authoritative. The same is true of Enlow v. Irwin, 80 Cal.App. 98, 251 P. 658. See also, Austin v. Bullion, 77 Cal.App. 257, 246 P. 151, in which the Rohan case is cited. The distinction between the two rules has frequently proven to be a troublesome one, but is both sound in principle and supported by the great weight of authority. In addition to authorities previously cited, see Sheldmyer v. Bias, 112 Ind.App. 522, 45 N.E.2d 347; Patterson v. Beard, 227 Iowa 401, 288 N.W. 414, 125 A.L.R. 393; Stanley v. A. Levy & J. Zentner Co., 60 Nev. 432, 112 P.2d 1047, 158 A.L.R. 76; Farrell v. Simons, 180 Okl. 600, 71 P.2d 688; Catterlin v. Bush, 39 Or. 496, 59 P. 706, 65 P. 1064; In re Rosenthal's Estate, 247 Wis. 555, 20 N.W.2d 643; Hamilton v. Morrison, 5 Cir., 146 F.2d 533; Blue Valley Creamery Co. v. Consolidated Products Co., 8 Cir., 81 F.2d 182; Simmons v. Birge Co., D.C.

Cal., 52 F.Supp. 629; Rosenberg v. Deitrick, D.C.Mass., 37 F.Supp. 700.

[10, 11] The lease expressly provided that the lessee's obligation to build was one of the elements of consideration. It was clearly an essential term of the agreement, and, as such, was required by the Statute of Frauds to be expressed in the writing with sufficient certainty to evidence an enforceable contract. The construction clause in the lease, as written, however, is too vague and uncertain to give rise to a contractual duty. Aside from the requirement that the "building or buildings" comply with the city building code, an the implication that it (or they) be sufficiently substantial to be a valuable asset after expiration of the term, the lease is manifestly incomplete in failing to specify whether the lessee was to construct one or more buildings and is wholly silent as to the size, type, materials, location, cost, appearance, or any other details of construction. The language of the construction clause thus shows that, at the time of the execution of the lease, the parties expected to supplement it by a future agreement with respect to the improvement of the property. Although the terms of a contract need not be stated in the minutest detail, it is requisite to enforceability that it must evidence a meeting of the minds upon the essential features of the agreement, and that the scope of the duty and limits of acceptable performance be at least sufficiently defined to provide a rational basis for the assessment of damages. 12 Am.Jur., sec. 64, p. 554. Tested by these settled rules, the construction clause in the present lease upon its face is manifestly unenforceable. Alderson v. Republican-Courier Co., 69 Mont. 271, 221 P. 544, "upstairs portion of * * * building * * * is to be completed" by lessee; Cincinnati Underwriters Agency Co. v. Thomas J. Emery Memorial, 6 Cir., 88 F. 2d 506, 508, lessee to build a "new building * * * of fireproof construction", with portion on leased premises to cost not less than \$100,000; Cannaday v. Martin, Tex.Civ.App., 98 S.W.2d 1009, "brick building" with a party wall; Hart v. Georgia R. Co., 101 Ga. 188, 28 S.E. 637, "first-

class hotel"; *Palombi v. Volpe*, 222 App. Div. 119, 226 N.Y.S. 135, lessee to make an "opening * * * through the hall"; *Greater Houston Suburban Corp. v. Dupuy & Mullen*, Tex.Civ.App., 176 S.W. 668, to pave streets with shell; *Factor v. Peabody Tailoring System*, 177 Wis. 238, 187 N.W. 984, promise to deliver a "tailor-made suit or overcoat"; *Jordan v. Buick Motor Co.*, 7 Cir., 75 F.2d 447, promise to give "exclusive dealership"; *Williston on Contracts*, Vol. 1, sec. 42, p. 119; 17 C.J.S., *Contracts*, § 36, page 364; *Rest., Contracts*, sec. 32.

[12] Any subsequent agreement which the parties may have reached with respect to the obligation to construct, was also required to be reduced to writing. *Civ.Code*, sec. 1698; *Boyd v. Big Three Ranch Co.*, 22 Cal.App. 108, 133 P. 623; anno. 118 A.L.R. 1511, 80 A.L.R. 539. The record does not disclose the existence of any such subsequent memorandum, nor is it contended that one was ever executed.

Under these principles the extrinsic evidence relied upon by plaintiffs to cure the deficiencies of the construction clause was inadmissible, since its purpose and effect were to add material terms to the lease as written, and thereby prove by parol that a contract existed which could be proven solely by a writing as required by the Statute of Frauds.

Plaintiffs seek to justify receipt of the parol evidence upon the ground that it was merely explanatory of an ambiguity in the writing. Cases are cited in which the receipt of parol evidence was approved for this purpose. It is unnecessary to analyze these cases, since they do not discuss the admission of extrinsic evidence with relation to the Statute of Frauds and are otherwise inapplicable. The provision in the lease for construction of "a building or buildings," clearly indicates that the number of structures required, whether one or more, was to be left to future arrangement. There is, of course, ambiguity and uncertainty in the writing in this respect but it arises from the absence of any expressed agreement as to the very essence of the obligation to improve the property. The parol evidence was introduced to prove

not only that a single building was to be erected, which was not expressed in the writing, but also, as we have pointed out, that the lessee was obligated to construct either a brick or concrete block building of a certain type which would cost approximately \$12,000. This was an attempt, not to resolve an ambiguity, but to supply essentials of a complete agreement which were lacking in the writing. It is clear that the receipt of parol evidence for the purpose of adding substantial terms to an otherwise unenforceable writing would be contrary to the requirements of the Statute of Frauds and destructive of its purpose. The case is governed by *Friedman v. Bergin*, supra, 22 Cal.2d 535, 140 P.2d 1, wherein it was held that under the Statute of Frauds parol evidence could not supply the unwritten details of an arrangement between the parties as to the method of operation of certain race-track concessions, where the written contract merely named the concessions for which plaintiff had contracted.

The order should be reversed insofar as it grants plaintiffs a new trial as to Rose and Klaff on the first cause of action.

[13, 14] As to the second cause of action the situation is the following: Plaintiffs had judgment against Rose and Adams for the full amount of rent demanded in the complaint, and judgment of nonsuit was rendered in favor of Klaff. Neither Adams, Rose nor Klaff made a motion for a new trial and Adams, as we say, has not appealed. As between plaintiffs and Rose the order granting a new trial as to the second cause of action is void. New trial procedure is jurisdictional. *Del Barrio v. Sherman*, 16 Cal.App.2d 407, 412-413, 60 P.2d 559; *Cooper v. Superior Court*, 12 Cal.App.2d 336, 55 P.2d 299. Only a party aggrieved by the judgment may make a motion for new trial under section 667, Code of Civil Procedure, and plaintiffs were not aggrieved by the judgment which awarded them all they sought to recover from Rose by way of rent. Since plaintiffs' motion was unauthorized and Rose did not move for a new trial, the court had no power to order one. The judgment on the second

cause of action must therefore stand as between plaintiffs and Rose.

[15] As between plaintiffs and Klaff, plaintiffs were aggrieved by the judgment of nonsuit in favor of Klaff, and their motion for a new trial was proper. Oddly enough, Klaff does not seek a reversal of the order granting a new trial as to the second cause of action, and plaintiffs argue that the order should be affirmed in this particular. Under these circumstances this portion of the order will not be disturbed. The affirmance, however, is not to be regarded as a holding that the evidence in the record would be sufficient to support a judgment against Klaff for rent.

The order is final as to Adams, and since he is not before the court, no opinion is expressed as to any question of his liability upon either the first or second cause of action.

The order granting a new trial as to the first cause of action is reversed as to defendants Rose and Klaff; it is also reversed insofar as it purports to grant a new trial as between plaintiffs and Rose on the second cause of action; and it is affirmed as between plaintiffs and Klaff as to the second cause of action. Appellants are awarded costs on appeal.

WOOD and VALLÉE, JJ., concur.



96 Cal.App.2d 617

MOISE v. OWENS.

Civ. 17413.

District Court of Appeal, Second District,
Division 2, California.

March 24, 1950.

Reinald L. Moise, a minor, by his guardian ad litem, Edward Lamoureux, sued Fred T. Owens, an individual, doing business as Paramount Concrete Products, for injuries

resulting when plaintiff employee was struck by truck driven by defendant employer. The Superior Court, Los Angeles County, Ingall W. Bull, J., rendered a judgment for plaintiff and defendant appealed. The District Court of Appeal, Moore, P. J., held that Industrial Commission had exclusive jurisdiction to determine liability and award.

Judgment reversed with instructions.

1. Workmen's compensation ☞2084

When a workman suffers an injury to which he was exposed in the course of his employment, and injury arises out of his employment, Industrial Accident Commission has exclusive jurisdiction to determine liability and award and the theory on which compensation in such cases is awarded is that causal connection between employment and injury consist in facts that employment requires presence of employee when employee suffered injury and that injury was caused by some human or mechanical instrumentality incidental to employment. Labor Code, §§ 3201 et seq., 3600, 3601.

2. Workmen's compensation ☞2084

The Workmen's Compensation Act must be liberally construed in favor of the jurisdiction of Industrial Accident Commission to determine liability and award, as against jurisdiction of court in civil action by employee against employer. Labor Code, §§ 3201 et seq., 3600, 3601.

3. Workmen's compensation ☞2084

Where employee was injured when employee was struck by truck driven by employer, while employee was stooping to pick up sack of cement which employee's duties required him to carry away from pile in front of truck, Industrial Commission had exclusive jurisdiction to determine liability and award, and employee could not maintain civil action against employer for negligence. Labor Code, §§ 3201 et seq., 3600, 3601.

Crider, Runkle & Tilson, Los Angeles, for appellant. By Donald E. Ruppé, and E. Spurgeon Rothrock, Los Angeles.

George A. Pickering, Los Angeles, for respondent.

MOORE, Presiding Justice.

The sole question for decision is whether the Industrial Accident Commission has exclusive jurisdiction of an action on account of injuries arising out of the negligence of the employer while the employee was engaged in the course of his employment.

Appellant in pursuit of his business as a cement contractor had respondent and other workmen engaged on the premises of a patron in carrying sacks of cement from a pile in front of appellant's truck which was parked with its front bumper about four feet from the driveway curb to a pile 10 feet away. Before attempting to drive the truck out appellant informed respondent and his collaborators of his intention and entered the driver's seat from its left side. While respondent was standing in front of the truck and in plain view of appellant, the two engaged in conversation. As respondent stooped to pick up the last sack of cement, appellant started the truck. It jumped forward and crushed respondent's legs between the wheel and the curb causing severe injuries.

Thereafter respondent filed his application with the Industrial Accident Commission for adjustment of his claim based upon the injuries so received. After receiving compensation for 11 weeks, he advised the commission that he was about to file a negligence action in the superior court based upon the same facts. Pursuant to such advice the commission suspended its proceedings in the matter. In compliance with section 3856 of the Labor Code respondent stipulated with appellant's insurance carrier that he would recognize its lien upon any judgment he might obtain for the full amount expended on him by such carrier. In his answer to the action appellant included as an affirmative defense a plea that exclusive jurisdiction of the matter rested with the Industrial Accident Commission. After a trial of the issues judgment for \$2960 was entered in favor of respondent.

[1] The law is clearly established that when a workman suffers an injury to which he was exposed in the course of his

employment, and it arises out of the employment, the Industrial Accident Commission has exclusive jurisdiction to determine the liability and award. Labor Code, sec. 3601; *Freire v. Matson Navigation Co.*, 19 Cal.2d 8, 118 P.2d 809; *Baugh v. Rogers*, 24 Cal.2d 200, 148 P.2d 633, 152 A.L.R. 1043; *Nelson v. Associated Indemnity Corporation*, 19 Cal.App.2d 564, 66 P.2d 184. The theory upon which compensation in such cases is awarded is that the causal connection between the employment and the injury consists in the facts (1) that the employment required the presence of the employee at the spot where he suffered his injury and (2) that it was caused by some human or mechanical instrumentality incidental to the employment. Labor Code, sec. 3600; *Frigidaire Corporation v. Industrial Accident Commission*, 103 Cal.App. 27, 283 P. 974; *Globe Indemnity Co. v. Industrial Accident Commission*, 36 Cal.App. 280, 171 P. 1088; *Kimbol v. Industrial Accident Commission*, 173 Cal. 351, 354, 160 P. 150, L.R.A.1917B, 595, Ann.Cas.1917E, 312; *Pacific Indemnity Co. v. Industrial Accident Commission*, 86 Cal.App.2d 726, 730, 195 P.2d 919; 18 Cal. Law Review, page 562; *General Accident, Fire & Life Assurance Corporation v. Industrial Accident Commission*, 186 Cal. 653, 657, 200 P. 419.

A number of decisions demonstrate that the instant cause is compensable and is justiciable only before the commission and not before the court. In *Freire v. Matson Navigation Company*, supra, the employee in stepping from a taxicab onto the bulkhead adjoining the pier to which defendant's ship was moored was struck by defendant's automobile operated by one of its employees. The effect of that decision is that where the hazard is directly connected with the employment and the injury arises out of and in the course of plaintiff's employment, the Workmen's Compensation Act, Labor Code, § 3201 et seq., is to be liberally construed in favor of jurisdiction in the commission with the purpose of extending the benefits of the act for the protection of persons injured in the course of their employment. The rule is not altered because a plaintiff be-

lieves that he can establish negligence on the part of his employer and brings a civil suit for damages. If the injury falls within the scope of the act, a proceeding thereunder constitutes his exclusive remedy. In *Associated Indemnity Corporation v. Industrial Accident Commission*, 18 Cal. 2d 40, 112 P.2d 615, the employer, a terminal company, was using a dock of a railroad company. The terminal company's superintendent was awarded compensation for an injury sustained while riding with permission on an engine from the depot to the dock on a mission for his employer. The commission's award was affirmed. In *Truck Insurance Exchange v. Industrial Accident Commission*, 27 Cal.2d 813, 167 P.2d 705, the employee, a ranch hand, was killed on the highway on which he was compelled to travel to another ranch of his employer. His widow's benefit was affirmed under the doctrine that when an employee's injury arises out of his employment and is proximately caused thereby, the commission has exclusive jurisdiction to arbitrate the claim. In *Filitti v. Lerode Homes Corporation*, 244 N.Y. 291, 155 N.E. 579, the employee was struck by a piece of cornice which fell from an adjoining building. The danger of its falling attached to the spot where the claimant was at work. It was peculiar to the situation and was a risk which arose from working alongside the building. See *California Casualty Indemnity Exchange v. Industrial Accident Commission*, 21 Cal.2d 461, 132 P.2d 815; *Tingey v. Industrial Accident Commission*, 22 Cal.2d 636, 140 P.2d 410.

The authorities cited by respondent *Associated Indemnity Corporation v. Industrial Accident Commission*, 43 Cal.App.2d 292, 110 P.2d 676; *California Casualty Indemnity Exchange v. Industrial Accident Commission*, 190 Cal. 433, 213 P. 257; *Lumbermen's Mutual Casualty Co. v. In-*

dustrial Accident Commission, 134 Cal. App. 131, 25 P.2d 22; *Robbins v. Yellow Cab Co.*, 85 Cal.App.2d 811, 193 P.2d 956, are distinguished by their facts. The primary cause of the injury in each of them was remote from the scene of the employment and did not arise out of the employment. In *Associated Indemnity Corporation v. Industrial Accident Commission* the employee while at work on a ranch was struck by a bullet fired from a rifle by a boy who was shooting at a bird. In *California Casualty Indemnity Exchange v. Industrial Accident Commission* the claimant was widow of an ice delivery man who was struck down by an automobile after lunching at a cafe and while returning to his truck from a visit to a cigar store. *Lumberman's Mutual Casualty Company v. Industrial Accident Commission* involved the injury to an orange picker who while waiting for the picking boxes to arrive crossed to the south side of the road where he engaged in conversation with other pickers standing on the highway. While so engaged, another orange picker drove up and struck him with his automobile. There was no causal connection between the employment and the injury.

[2,3] Inasmuch as the Workmen's Compensation Act must be liberally construed in favor of jurisdiction in the commission, in view of the authorities supporting the rule, it would be egregious error to permit the instant action wherein all conditions for compensation concur to be prosecuted in the superior court.

The judgment is reversed with instructions to enter judgment in favor of defendant without prejudice to respondent's proceeding before the Industrial Accident Commission.

McCOMB and WILSON, JJ., concur.

96 Cal.App.2d 427

**JONES et al. v. CITY OF SOUTH
SAN FRANCISCO et al.**
Civ. 14221.

District Court of Appeal, First District,
Division 1, California.

March 13, 1950.

As Corrected March 29, 1950.

Action by Lois Margaret Jones, an infant, by Roy Jones, her guardian ad litem and another, against the City of South San Francisco and Genevieve M. Iverson to recover for injuries sustained when struck by an automobile driven by the last named defendant. From a judgment of nonsuit of the Superior Court, San Mateo County, Aylett R. Cotton, J., in favor of the defendant city, the plaintiffs appealed. The Court of Appeal, Peters, P. J., held that, under the Public Liability Act, the city was liable for injuries proximately resulting from defective condition of its streets and sidewalks and that whether city's failure to maintain sidewalk in repair was proximate cause of plaintiff's injuries was a question for jury.

Judgment reversed.

1. Appeal and error ⇨856(1)

On appeal from judgment of nonsuit in favor of defendant city, city was entitled to raise for the first time on appeal a new ground for sustaining the nonsuit.

2. Municipal corporations ⇨756

Provision of Public Liability Act making municipalities liable for injuries resulting from defective condition of streets which have not been repaired within a reasonable time after acquiring knowledge of the defective condition was controlling with respect to any inconsistency with provision of Improvement Act of 1911 exempting municipalities from liability for defective condition of streets. Gen. Laws, Act 5619, § 2; St. 1911, p. 750, § 39.

3. Municipal corporations ⇨756

Codification in 1941 in the Streets and Highways Code of provision of Improvement Act of 1911 exempting municipalities from liability for defective streets did not impliedly repeal provision of Public Liability Act imposing liability upon municipi-

palities for injuries from such defects of which municipality has notice. Streets and Highways Code, §§ 5640, 5641; Gen. Laws, Act 5619, § 2; 1911, p. 750, § 39.

4. Statutes ⇨147

A codification or restatement of law by legislature operates as a continuation of old statute and effects no change in meaning or operation.

5. Municipal corporations ⇨755(1)

Under Public Liability Act a municipality or other governmental agency is liable to person proximately injured because of defective condition of streets or sidewalks if governmental agency had knowledge, actual or constructive, of such defective condition. Gen. Laws, Act 5619, § 2.

6. Negligence ⇨136(25)

The question of proximate cause is one of fact and not one of law.

7. Negligence ⇨136(25)

Where two independent actors are involved, whether act of person later in time breaks chain of causation and makes act of the earlier person a remote cause, or whether both acts concurred so that they are proximate causes are normally questions for trier of fact where act of second person is reasonably foreseeable.

8. Municipal corporations ⇨821(19)

In action against city for injuries sustained by pedestrians who, because of pool of water covering sidewalk area, were compelled to walk in the street and who were struck by automobile at night, whether city's negligence in failing to repair defective condition of sidewalk and street was proximate cause of injuries was a question for jury. Gen. Laws, Act 5619, § 2.

9. Municipal corporations ⇨803(1)

City which had negligently failed to maintain sidewalk in proper condition could not avoid liability to pedestrians struck by automobile while walking in street because of presence of pool of water covering sidewalk area, merely because pedestrians were not walking on left-hand side of street as provided by Vehicle Code. Vehicle Code, § 564.

Elkins & Ross, Harold Elkins, Saul N. Ross, San Bruno, James F. Boccardo, San Jose, Charles R. Wayland, San Bruno, for appellants.

Millington, Dell'Ergo, Weeks & Morrissey, Redwood City, for respondents.

PETERS, Presiding Justice.

Plaintiff Lois Margaret Jones (now Mrs. Gordner), then a minor, and plaintiff George K. Gordner, Jr. (now the husband of Lois) received serious injuries when hit by an automobile driven by defendant Genevieve Iverson (now Mrs. Finsterbusch) in South San Francisco. In addition to Miss Iverson, the City was joined as a defendant on the theory that it, with knowledge of the condition, so negligently maintained the street and highway at the scene of the accident that the sidewalk and street were flooded, thus requiring plaintiffs, who were walking on the sidewalk area, to leave the sidewalk and walk in the street, where they were hit.

At the close of plaintiffs' case, the City moved for a nonsuit on the grounds first, that, assuming the City was negligent, such negligence, as a matter of law, was not a proximate cause of the accident, and secondly, that the evidence showed contributory negligence on the part of the plaintiffs as a matter of law. Defendant Iverson moved for a nonsuit on the contributory negligence ground. The trial court denied the Iverson motion, but granted the nonsuit in favor of the City, stating that the motion was granted on the ground that the negligence of the City, if any, was not, as a matter of law, a proximate cause of the accident. The jury returned verdicts in favor of plaintiffs against defendant Iverson. The plaintiffs appeal from the judgment of nonsuit in favor of the City.

[1] At the threshold of this appeal we are met by the contention of the City, raised for the first time on appeal, that the nonsuit should be sustained for the reason that, under sections 5640 and 5641 of the Streets and Highways Code, a City is not liable for knowingly maintaining defective streets and sidewalks, even where the defective condition is the proximate cause of an injury

to a person not guilty of contributory negligence. The City may properly urge this defense, although it was not mentioned or considered by the trial court. "The correct rule is that grounds not specified in a motion for nonsuit will be considered by an appellate court only if it is clear that the defect is one which could not have been remedied had it been called to the attention of plaintiff by the motion." *Lawless v. Calaway*, 24 Cal.2d 81, 94, 147 P.2d 604, 610. The defect here claimed, if it existed, is of the type that could not have been remedied had it been called to the attention of appellants. This being so, respondents may properly raise the contention.

Before discussing the facts, therefore, we turn to a discussion of this point of law, because, if sound, it is a complete defense to the City, regardless of the facts.

The contention that a city is not liable to a person injured because of the defective condition of a public street allowed to exist after the city has knowledge of the condition, is a somewhat startling one. There are many cases in the books where liability has been imposed in such circumstances, without any reference, however, to sections 5640 and 5641 of the Streets and Highways Code, but decided after those sections were placed in that code. These cases have held that a municipality is liable for the defective condition of its street and sidewalks where the city has actual or constructive knowledge of the defective condition. See, for example, *Warren v. City of Los Angeles*, 91 Cal. App.2d 678, 205 P.2d 719; *Fackrell v. City of San Diego*, 26 Cal.2d 196, 157 P.2d 625; 158 A.L.R. 773; *Kirack v. City of Eureka*, 69 Cal.App.2d 134, 158 P.2d 270, and cases cited therein. All of these cases were incorrectly decided if the contention now made by the City is sound.

Liability in such cases is predicated on the Public Liability Act of 1923, Stats. of 1923, p. 675; *Deering's Gen. Laws*, Act 5619. Paragraph two of that statute reads as follows: "Counties, municipalities and school districts shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works

and property in all cases where the governing or managing board of such county, municipality, school district, or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such street, highway, building, grounds, works or property and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition."

The sections of the Streets and Highways Code relied upon by the City to free it from liability were added to that Code in 1941. Stats. of 1941, Chap. 79, p. 877. Section 5640, entitled "Immunity of city" reads as follows: "If, because any graded street or sidewalk is out of repair and in condition to endanger persons or property passing thereon, any person, while carefully using the street or sidewalk and exercising ordinary care to avoid the danger, suffers damage to his person or property, through any such defect therein, no recourse for damages thus suffered shall be had against the city."

Section 5641 provides who may be held liable, using the following language: "If the defect in the street or sidewalk has existed for a period of 24 hours or more after written notice thereof to the superintendent of streets, then the person on whom the law may have imposed the obligations to repair such defect in the street or sidewalk, and also the officer through whose official negligence such defect remains unrepaired, shall be jointly and severally liable to the party injured for the damage sustained; provided, that the superintendent of streets has the authority to make the repairs, under the direction of the legislative body, at the expense of the city."

These 1923 and 1941 statutes appear to be, and probably are, inconsistent. A consideration of their history and background, however, demonstrates to a certainty that where conflicting, the 1923 statute controls.

Sections 5640 and 5641 of the Streets and Highways Code were not enacted for the first time in 1941. In substance, they have been in our law since 1911 when the Improvement Act of 1911 was first passed. Stats. of 1911, Chap. 397, p. 730. Section 39 of that statute, Stats. of 1911 at p. 750, provided: "If, in consequence of any graded street or public highway or sidewalk, being out of repair and in condition to endanger persons or property passing thereon, any person, while carefully using said street or public highway, or sidewalk and exercising ordinary care to avoid the danger, suffer damage to his person or property, through any such defect therein, no recourse for damages thus suffered shall be had against such city; but if such defect in the street or public highway shall have existed for the period of twenty-four hours or more after written notice thereof to the said superintendent of streets, then the person or persons on whom the law may have imposed the obligations to repair such defect in the street or public highway, and also the officer or officers through whose official negligence such defect remains unrepaired, shall be jointly and severally liable to the party injured for the damage sustained; provided, that said superintendent has the authority to make said repairs, under the direction of the city council, at the expense of the city." Between 1911 and 1941 this section was never expressly amended. In 1941 the section was simply codified, and without substantial change placed in the Streets and Highways Code as the two sections above quoted, and section 39 of the 1911 act was repealed.

In 1940, it was expressly held that section 39 did not operate so as to relieve cities from liability created by the 1923 act. In *Ackers v. City of Los Angeles*, 40 Cal.App. 2d 50, at page 53, 104 P.2d 399, 400, appears the following: "Defendant contends that a city is not liable for the defective condition of its sidewalks, basing its argument upon the fact that by section 39 of the Improvement Act of 1911, St. 1911, p. 750, municipalities were exempted from liability to persons using a 'street or public highway, or sidewalk * * *'. It is

pointed out that the Public Liability Act of 1923, St. 1923, p. 675, § 2, makes cities liable for the 'defective condition of public streets, highways, buildings, grounds, works and property * * *' without specifically mentioning sidewalks. We need not give serious consideration to defendant's contention nor the plaintiff's argument that the Act of 1923 repealed section 39 of the Act of 1911 and that the term streets includes sidewalks (19 Cal.Jur. 16), for the reason that cities have been held liable for the defective condition of sidewalks in so many cases since the enactment of the Act of 1923 that it must be considered as settled law in California that the Public Liability Act of 1923 includes injuries resulting from the defective condition of sidewalks."

[2] The decision of this case is undoubtedly sound. In 1911 cities in California were not liable for torts committed while acting in a governmental capacity. The first part of section 39 of the Improvement Act of 1911 merely restated that common law principle. The second part of the section imposed a personal liability upon certain city officials if they failed to repair. Section 39 was the law until 1923, when the Public Liability Act was passed. By that statute a city was made liable to persons injured by the defective condition of streets and highways where the city had notice but failed to repair. This section imposed a new liability in tort on governmental agencies. Where inconsistent with section 39 of the Improvement Act of 1911, the 1923 statute controlled. *Ackers v. City of Los Angeles*, 40 Cal.App.2d 50, 140 P.2d 399. It did not entirely repeal, by implication, section 39, because that section still contained the liability imposed on public officials and still expressed the law applicable to governmental agencies where they had no notice, actual or constructive.

[3,4] The codification of section 39 in 1941 did not and could not impliedly repeal the provisions of the 1923 act. Such codification was not the enactment of a new statute. Section 2 of the Streets and Highways Code expressly provides that the provisions of that code "in so far as they are substantially the same as existing statutory provisions relating to the same subject

matter, shall be construed as restatements and continuations thereof and not as new enactments." Moreover, it is the settled policy of the California Code Commission, in recommending codification, not to make substantial changes in the law. *Sobey v. Molony*, 40 Cal.App.2d 381, 104 P.2d 868. It is also well settled that a codification or restatement of the law by the Legislature operates as a continuation of the old statute, and effects no change in meaning or operation. *In re Estate of Martin*, 153 Cal. 225, 94 P. 1053; *Perkins Mfg. Co. v. Clinton Const. Co.*, 211 Cal. 228, 295 P. 1, 75 A.L.R. 439; *Chambers v. Davis*, 131 Cal.App. 500, 22 P.2d 27; *Gastineau v. Meyer*, 131 Cal.App. 611, 22 P.2d 31.

Thus, the 1941 codification of section 39 added nothing to the legal effect of that section. The law remained as it was immediately prior to such codification, and, as already pointed out, the law then was, and now is, that where inconsistent the Public Liability Act of 1923 controls. It should be noted that these views are in precise accord with an opinion of the Attorney General adopting the opinion of Fred B. Wood, secretary of the California Code Commission, on this precise question. 3 Opinions of the Attorney General of California 203.

[5] Under the 1923 statute a governmental agency is liable to a person proximately injured by reason of the defective condition of its streets or sidewalks, if the governmental agency had knowledge, actual or constructive, of such defective condition. The City, while not seriously challenging the contention that plaintiffs' evidence shows a defective condition and shows knowledge of such condition on the part of city officials, does contend that such negligence was not, as a matter of law, a proximate cause of the accident. This it will be remembered, was the point upon which the trial judge granted the nonsuit. A consideration of this point requires a reference to the facts.

Just prior to midnight on October 20, 1943, the plaintiffs came out of a movie in South San Francisco. Plaintiff George Gordner, Jr. was then in the Navy and "keeping company" with Lois. They had

no automobile. Lois lived in Lindenville, a housing project located in South San Francisco. To reach this project it was necessary to walk along Linden Avenue, a street running generally north and south, within the City. Plaintiffs walked south, and on the west side of the street. There was no place for pedestrians to walk on the east side of the street. The paved street was about twenty feet wide, divided down the middle with a white traffic line. On the west side there was a ten-foot shoulder, and then a raised area about eight feet wide, that was intended as a sidewalk area for pedestrians. This strip was about six inches higher than the adjoining shoulder and was not paved, being simply covered with dirt. During rainstorms it became quite muddy.

The plaintiffs proceeded on this sidewalk area until they reached a place where the sidewalk area was entirely covered with a big pool of water. This pool extended out into the street to within a couple of feet of the white traffic line. The east side of the street was not covered with water. Plaintiffs testified that they lowered the umbrella they were carrying and looked in both directions before stepping off the sidewalk area to walk around the pool of water. Both testified that they did not observe the lights of any approaching vehicles. They proceeded around the pool and when in the street area were hit by an automobile being driven by the defendant Iverson. The jury has found that this defendant was negligent, and she has not appealed.

The failure to see the approaching automobile is explained by the fact that although Linden Avenue runs almost straight for a considerable distance north and south of the scene of the accident, it is by no means level. All witnesses agreed that several hundred feet north of the scene of the accident Linden Avenue crosses Colma Creek by means of a bridge. The bridge is higher than the highway so that there is a pronounced dip in the roadbed each side of the bridge. There are other low places in the highway apparently caused by the area settling, one such low place being

where the pool of water here involved was located.

There is substantial and practically uncontradicted evidence that prior to October of 1943, Linden Avenue and the sidewalk area were frequently flooded during rainstorms. An eyewitness, who arrived at the scene immediately after the accident, testified as to the existence of the pool covering the sidewalk, shoulder and west side of the highway. There was substantial evidence from which the jury could have found that this flooded condition existed for a considerable period prior to the accident and was known to the city officials, such as the works engineer, superintendent of streets and to members of the city council. There is substantial evidence that this flooded condition was caused by inadequate drainage facilities well known to the city officials to be inadequate. In fact, the City, sometime prior to October, 1943, had started to level the sidewalk area on the west side of Linden Avenue and to insert larger and more numerous drainage culverts, and prior to the accident had awarded a contract to a private contractor to pave the sidewalk area.

Thus, there was substantial evidence that the street and sidewalk were negligently maintained, and that the proper city officials had notice of this defective condition prior to the accident. The City does not seriously contend to the contrary, and if it did, such contention would be contrary to the record. The City does contend, however, and the trial court ruled that, as a matter of law, the negligence of Iverson broke the chain of causation, so that the City's negligence was not a proximate cause of the accident.

[6, 7] It is usually stated that the question of proximate cause is one of fact and not one of law. It is a question of foreseeability. Where two independent actors are involved, whether the act of the person later in time breaks the chain of causation and makes the act of the earlier person a remote cause, or whether both acts concurred in causing the injury, so that both are proximate causes, are normally questions for the trier of the fact where the act of the sec-

ond person is reasonably foreseeable. It is a rare case where the court may hold, as a matter of law, that the intervening act breaks the chain of causation because whether it was reasonably foreseeable is a question of fact and not of law. The second act will break the chain of causation only where, under no rational interpretation of the evidence, could the later act of negligence have been reasonably foreseen.

These principles have been established in this state for many years. One of the earliest and most frequently cited case on the subject is *Pastene v. Adams*, 49 Cal. 87, where a lumber company negligently piled lumber so that some of the ends stuck out into the private driveway of the lumber yard. X negligently drove his cart so that its wheels caught one of the projecting timbers and pulled the pile down on plaintiff, a pedestrian and customer of the lumber yard. The court, in affirming a judgment for the plaintiff against the lumber yard, held that since the lumber company was negligent in piling the timbers "the negligence continued until they were thrown down, and (concurring with the action of Randall) was a direct and proximate cause of the injury." 49 Cal. at page 90.

The rule of the *Pastene* case has consistently been followed in many cases where, because the first actor negligently maintained an obstruction in the public streets, the plaintiff has been required to go around the obstruction and has been injured as a result of the negligence of a second actor. In such cases it has been held that the second act of negligence was reasonably foreseeable and that both actors may be held. Thus, in *Fennessey v. Pacific Gas & Elec. Co.*, 20 Cal.2d 141, 124 P.2d 51, the defendant parked its truck between a street car passenger zone and the curb. This required X, in direct violation of a city ordinance, to drive on the street car tracks where he hit the plaintiff. A judgment against the defendant was affirmed on the ground that it was for the jury to say whether its negligence was continuing and concurrent, or whether it was a mere remote cause of the accident, and whether the act of X was reasonably foreseeable.

In *Mecchi v. Lyon Van & Storage Co.*, 38 Cal.App.2d 674, 102 P.2d 422, 104 P.2d 26, a moving van was parked so as to obstruct one entire side of a public street. B was thus required to drive on the wrong side of the street to get around the van, which he did in a negligent fashion and injured the plaintiff. A judgment against the moving company was affirmed, the court holding that the jury was justified in finding that the negligence of the moving company was concurrent with that of B.

In *Inai v. Ede*, 59 Cal.App.2d 549, 139 P.2d 76 (same case on a prior appeal, 42 Cal.App.2d 521, 109 P.2d 400), the defendant negligently parked his auto so that it projected into the highway. X negligently drove his car so that it hit the car of defendant and it ran into the plaintiffs who were trying to walk around defendant's car. A judgment against defendant was affirmed.

In *Hansen v. Market Street Ry. Co.*, 64 Cal.App. 426, 221 P. 955, the defendant water company excavated a trench in the street and, in violation of a city ordinance, left a pile of dirt in the street. This required plaintiff to walk around the pile, where he was injured by a street car. A nonsuit in favor of the water company was reversed, the court holding that whether its negligence was concurrent or remote, was for the jury. See, also, *McKay v. Hedger*, 139 Cal.App. 266, 34 P.2d 221; *Lacy v. Pacific Gas & Electric Co.*, 220 Cal. 97, 29 P.2d 781; *Merrill v. Los Angeles Gas & Elec. Co.*, 158 Cal. 499, 111 P.2d 534, 139 Am.St.Rep. 134, 31 L.R.A., N.S., 559; *Stasulat v. Pacific Gas and Elec. Co.*, 8 Cal.2d 631, 67 P.2d 678; *Gerberich v. Southern Calif. Edison Co.*, 5 Cal.2d 46, 53 P.2d 948; *Katz v. Helbing*, 215 Cal. 449, 10 P.2d 1001; 2 Restatement of Torts, § 453.

The test applied in such cases is whether the intervening negligent act was reasonably foreseeable. Thus, in *Mosley v. Arden Farms Co.*, 26 Cal.2d 213, 157 P.2d 372, 158 A.L.R. 872, the milk company negligently piled milk crates alongside a sidewalk. Some unknown person moved the crates into an adjoining field. Plaintiff was injured when his tractor ran into one of these crates hidden in the weeds. A judgment

against the milk company was affirmed, it being held that whether the negligent or unlawful act of the third person was reasonably foreseeable was a question of fact for the jury.

A good statement of the rule is found in *Sawyer v. Southern California Gas Co.*, 206 Cal. 366, 274 P. 544. There, the gas company connected a gas meter to a pipe that, unknown to it, inside a building, was uncapped. The company, however, did not turn on or authorize any one to turn on the meter. Many months later a third person turned on the gas and plaintiff was injured in the resulting explosion. A nonsuit in favor of the gas company was reversed. The court, quoting from *Hale v. Pacific Tel. & Tel. Co.*, 42 Cal.App. 55, 183 P. 280, stated, 206 Cal. at page 374, 274 P. at page 547: "The rule, as we understand it, applicable to such cases, is that where the original negligence of a defendant is followed by an independent act of a third person which results in a direct injury to a plaintiff, the negligence of such defendant may, nevertheless, constitute the proximate cause thereof if, in the ordinary and natural course of events, the defendant should have known the intervening act was likely to happen; but if the intervening act constituting the immediate cause of the injury was one which it was not incumbent upon the defendant to have anticipated as reasonably likely to happen, then, since the chain of causation is broken, he owes no duty to the plaintiff to anticipate such further acts, and the original negligence cannot be said to be the proximate cause of the final injury." Then, the court stated, 206 Cal. at page 376, 274 P. at page 548: "The probability of an accident happening through the acts of a third person in the manner in which it did happen, in the circumstances of the case, presented an issue of fact that may well have been submitted to the jury."

[8] In the instant case the City negligently permitted a large pool of water to exist, making the sidewalk area and half the street impractical for pedestrians to use. The City knew that a large number of pedestrians had to walk along that street.

Certainly, it was for the jury to say whether, as a result of the City's negligence, pedestrians were reasonably liable to walk in the street where they might be injured by automobiles.

The City relies primarily on the case of *Klarquist v. Chamberlain & Proctor*, 124 Cal.App. 398, 12 P.2d 664, 665 as establishing a contrary rule in sidewalk obstruction cases. In that case a contractor was building a sidewalk in complete accord with city ordinances. The sidewalk was blocked off lawfully. A pedestrian was forced, therefore, to walk around a parked truck and was hit by a negligently driven automobile. A judgment against the contractor was reversed. The court pointed out that here the construction work was being lawfully and properly performed, and held that, in such event, the contractor was not bound to anticipate "the reckless act of a third party." The court quoted from a New York case, *Storey v. The Mayor*, 29 App.Div. 316, 51 N.Y.S. 580, which contains some language contrary to that used by the California courts in the many cases above cited. It is interesting to note that in *Murphy v. Leggett*, 29 App.Div. 309, 51 N.Y.S. 472, which was decided by the same court that decided the *Storey* case and immediately precedes that case in the reports, a defendant was held liable who obstructed, unlawfully, the sidewalk.

Although there is some confusing language in the *Klarquist* case, that decision can be explained only on the theory that there the contractor was acting lawfully in obstructing the sidewalk. In other words, the real question was not whether the intervening act of negligence broke the chain of causation, but whether, in the first instance, the contractor was negligent. The court held that there was no evidence of negligence, so there was no liability. The case has been distinguished on this precise ground by the District Court of Appeal in *Inai v. Ede*, 59 Cal.App.2d 549, 139 P.2d 76 (same case on prior appeal, 42 Cal.App.2d 521, 109 P.2d 400), and by the Supreme Court in *Lacy v. Pacific Gas & Electric Co.*, 220 Cal. 97, 29 P.2d 781. If the case stands for the broad proposi-

tion that one who negligently blocks a sidewalk, as a matter of law, is not liable to one who is injured by the negligence of a third person while walking around the obstruction, the case is wrong and should be disapproved.

[9] The City makes a final contention that plaintiffs were guilty of contributory negligence as a matter of law because they were not walking on the left-hand side of the street as provided by section 564 of the Vehicle Code. The contention is palpably unsound. There was a sidewalk area for pedestrians on the west side of the street, and none on the other side. Plaintiffs were not walking in the street in the sense that those terms are used in section 564, but were walking around the pool intending to get back on the sidewalk area. The section has no application to the facts of this case.

The judgment of nonsuit is reversed.

BRAY, J., and SCHOTTKY, J., pro tem., concur.



96 Cal.App.2d 411

SPATARO et al. v. DOMENICO et al.
Civ. 17073.

District Court of Appeal, Second District,
Division 3, California.
March 10, 1950.

Action by Vito Spataro and Antonia Spataro against Domenico Domenico, and others to have a grant deed, absolute in form, declared a mortgage, for an accounting, for a reconveyance of the properties and to quiet title to the properties in plaintiffs. The Superior Court, Los Angeles County, Philip H. Richards, J., entered judgment for the defendants, and plaintiffs appealed. The District Court of Appeal, Vallee, J., held that evidence sustained trial court's finding that a good and sufficient consideration was made by grantees, that deed was intended as an

absolute conveyance, and that plaintiffs were guilty of laches.

Judgment affirmed.

1. Mortgages ⚡32(2)

In determining whether a deed, absolute on its face is a mortgage, intention of parties is controlling and in absence of any writing intention is manifested by and inferred from all facts and circumstances of transaction under which deed was executed, taken in connection with conduct of parties after its execution.

2. Mortgages ⚡39

Whether a deed absolute on its face is in fact a mortgage is a mixed question of fact and law.

3. Mortgages ⚡32(5)

In determining whether an instrument is a mortgage, test is whether there is a subsisting, continuing debt and a continuation of the relation of debtor and creditor and such fact is not only a circumstance tending to show conveyance is a mortgage, but is indispensable to existence of a mortgage since if there is no indebtedness for which conveyance is security, there can be no mortgage.

4. Mortgages ⚡32(5)

Ordinarily, there must be an agreement, express or implied, on part of a mortgagor to pay mortgagee a sum of money and where there is no promise to pay, a deed will not be construed to be a mortgage.

5. Mortgages ⚡36, 38(2)

The presumption is that a deed is what it purports to be and one who seeks to overcome such presumption has burden of producing clear and convincing proof.

6. Appeal and error ⚡1011(1)

Whether evidence offered to change ostensible character of an instrument is clear and convincing is a question for trial court and its determination in favor of either party upon conflicting or contradictory evidence is not open to review on appeal.

7. Mortgages ⚡38(1), 608½

In action to have grant deed, absolute in form, declared a mortgage, evidence

sustained findings that a good and sufficient consideration for conveyance was paid by grantees, that deed was intended as an absolute conveyance, and that plaintiffs were guilty of laches.

8. Mortgages ⇨38(1)

In action to have a grant deed absolute on its face declared a mortgage, evidence sustained findings that consideration for transaction was extinguishment of grantor's debt to grantees and assumption by grantees of encumbrance and delinquent taxes.

9. Mortgages ⇨38(1)

In action to have a grant deed, absolute on its face declared a mortgage, evidence sustained finding that debtor and creditor relationship no longer existed between parties subsequent to execution of deed.

10. Mortgages ⇨32(1)

In action to have a grant deed, absolute on its face, declared a mortgage, fact that grantors received no money at time of execution of deed was not, of itself, controlling.

Elbert E. Hensley, Los Angeles, for appellants.

Daniel W. Gage, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiffs from a judgment for defendants in an action to have a grant deed, absolute in form, declared a mortgage, for an accounting, for a reconveyance of the properties to plaintiffs, and to quiet their title thereto.

The complaint, filed May 15, 1947, alleged that on March 15, 1938, plaintiffs, as security for a loan of \$500, executed a grant deed to Domenico Domenico and Madalena Domenico, husband and wife, as joint tenants, covering two parcels of real property in Los Angeles County; that the deed, though absolute in form, was intended and agreed by the parties to be a mortgage on the property as security for the payment of the \$500 loan; that the reasonable market value of the property

at the time the deed was executed was \$19,000; and that the loan had been fully paid. Defendants denied these allegations except the execution of the deed, and pleaded laches, estoppel, statute of frauds, and that the deed had been executed for a valuable consideration and not given as security for any debt or obligation.

The court found that on March 15, 1938, plaintiffs executed the grant deed for a valuable consideration; a good and sufficient consideration was paid by the grantees; the deed was intended as an absolute conveyance and not as a mortgage; plaintiffs were guilty of laches. Judgment was for defendants, from which plaintiffs appeal.

[1-4] In determining whether a deed, absolute on its face, is a mortgage, the intention of the parties is controlling, and in the absence of any writing this intention is manifested by, and inferred from, all of the facts and circumstances of the transaction under which the deed was executed, taken in connection with the conduct of the parties after its execution. *Morris v. Rickmeyer*, 28 Cal.App.2d 253, 257, 82 P.2d 472; 17 Cal.Jur. 744, sec. 45. Whether a deed absolute is in fact a mortgage is a mixed question of law and fact. *Gronenschild v. Ritzenthaler*, 81 Cal.App.2d 138, 144, 183 P.2d 720. The test by which to determine whether the instrument is a mortgage is—was there a subsisting, continuing debt and a continuation of the relation of debtor and creditor? The fact is not only a circumstance tending to show that the conveyance is a mortgage, but is indispensable to the existence of a mortgage; if there is no indebtedness for which the conveyance is security, there can be no mortgage. 17 Cal. Jur. 783, sec. 83. Ordinarily, there must be an agreement, express or implied, on the part of a mortgagor to pay the mortgagee a sum of money. Where there is no promise to pay, the deed will not be construed to be a mortgage. *Goodfellow v. Goodfellow*, 219 Cal. 548, 554, 27 P.2d 898; *Davis v. Stewart*, 31 Cal.App.2d 574, 577, 88 P.2d 734; 17 Cal.Jur. 784, sec. 84.

[5,6] The presumption is that a deed is what it purports to be and one who seeks

to overcome such presumption has the burden of producing clear and convincing proof. *Beeler v. American Trust Co.*, 24 Cal.2d 1, 7, 147 P.2d 583. Such evidence must be "clear, convincing, and conclusive—something more than that modicum of evidence which appellate courts sometimes hold sufficient to warrant a finding where the matter is not so serious as the overthrow of a clearly express deed, solemnly executed and delivered." *Stevens v. Fetterman*, 76 Cal.App. 741, 753, 246 P. 102, 107. Whether the evidence offered to change the ostensible character of an instrument is clear and convincing is a question for the trial court and its determination in favor of either party upon conflicting or contradictory evidence is not open to review on appeal. *Beeler v. American Trust Co.*, 24 Cal.2d 1, 7, 147 P. 2d 583; *Baines v. Zuieback*, 84 Cal.App.2d 483, 488, 191 P.2d 67.

The facts stated in the light most favorable to respondents are these:

The real property involved was, prior to March 15, 1938, owned by plaintiffs for about forty years and consists of two parcels, non-contiguous, but located within close proximity to each other. In 1936 and up to March 15, 1938, plaintiffs were in serious financial straits. On June 29, 1935, the properties had been sold for delinquent taxes. They were encumbered with a mortgage and plaintiffs were delinquent in their payments thereon. In the early part of 1936, plaintiff, Vito Spataro, approached his nephew, Peter Principi, about renting a grocery store on one of the parcels of property, informing Peter he was afraid he might lose the properties, and needed the rental to meet payments due the bank. The grocery store which Vito sought to rent was in an extremely run-down condition and Peter was hesitant about renting it. Thereafter, defendant, Mrs. Domenico, Peter's mother-in-law, was approached by both Vito and Peter respecting the advancement of money for the necessary repair work and, subsequently, she advanced approximately \$1000 therefor with the understanding that it was to be repaid by plaintiffs each month at the rate of \$17.50, being one-half of the \$35 a

month plaintiffs were to collect from Peter. In addition, Mrs. Domenico advanced \$300 to plaintiffs to cover certain delinquent mortgage payments and taxes.

Mrs. Domenico testified that she spoke to Vito regarding the money he owed her and "all the time he said, 'Can't pay.' * * * I say, 'What I going to do? Am I going to lose this money?' He say, 'When I work I pay you.'" She testified that she was never repaid any part of the \$1000 or \$300, although she asked Vito for it many times. "Sometime" in 1937, Vito again approached Peter about borrowing money to meet part of the mortgage so the bank would renew the loan. Peter was unable to loan plaintiffs any money. Vito then told Peter, "I am going to burn up that place down on Marengo so the bank won't get it." He said, "The only way they are going to get it is burned down at ashes. That is the only way they are going to get it." The day following this conversation, Mrs. Spataro came to the home of Peter and his wife and told them her husband had burned the Marengo Street property and was in jail. Subsequently, the loss was settled by the insurance company for \$835, which money was paid to the bank which held it for the purpose of restoring the premises. The mortgage held by the bank matured on February 1, 1938. On March 15, 1938, \$4,465.24 was due on the mortgage. Plaintiffs were unable to meet the bank's demands.

On March 14, 1938, Vito informed defendants he was losing the properties and suggested that Mrs. Domenico take over in order not to lose what she had already advanced. Mrs. Domenico at first did not think the properties were worth the amount of the mortgage remaining unpaid, but Vito stated, "'You have put out so much money to these places * * * I rather see you take it in order not to lose it to the bank * * * I owe you \$1300.' He says, 'Tomorrow,' he says, 'we meet at the bank.'" The following day, March 15, 1938, Vito, Mrs. Spataro, Peter, Mrs. Principi, and Mr. and Mrs. Domenico went to the bank. They were informed that the bank, before renewing the loan, wanted \$1500 (being approximately one-third of the mortgage re-

maining unpaid) and the property redeemed from delinquent taxes. Vito stated he could not meet these demands, that he owed Mrs. Domenico \$1300, and was turning the property over to her. Mrs. Domenico then assumed the mortgage. The bank accepted \$500 cash from her in lieu of the \$1500 it was demanding, it being agreed that the balance of the \$1500 would be advanced by her within six months in restoring part of the property and that when this was done the \$835 insurance money held by it would be credited to the loan. It is this \$500 which plaintiffs claim as the loan for which the property was deeded to the Domenico for security only. In addition, Mrs. Domenico paid the delinquent taxes, receiving redemption certificates therefor, and put up additional collateral demanded by the bank. Plaintiffs then executed the grant deed to the Domenicos and it was recorded the same day.

Thereafter, the plaintiffs continued in possession of one of the parcels. It is conceded they paid no rent although there is evidence that rent was demanded of them. While this fact was a circumstance to be considered by the trial court in determining the character of the deed, it was not conclusive when considered with the other facts and circumstances of the transaction. After execution of the deed, plaintiffs did not exercise any of the prerogatives usually exercised by owners, with the possible exception of small expenditures for materials used in minor repairs. The Domenicos, on the other hand, did so. They paid all taxes on the premises from 1938 on, and spent \$3700 repairing the premises. They rented the premises, collected all rentals from the tenants, with the exception of plaintiffs, and paid all utilities. There is testimony that plaintiffs paid the water bills on the residence they were occupying until 1947, when the bills were changed into Mrs. Domenico's name, but this is directly contradicted by testimony that Marie Principi, on behalf of her mother, gave plaintiffs the money with which to pay these bills. No debtor-creditor relationship was shown to have existed be-

tween the parties after the execution of the deed.

Vito testified that the property was worth \$22,000 in 1938. Mrs. Domenico placed the value at \$3500. The bank appraisals of the two parcels as of January 10, 1938, totaled \$3750. The 1938 tax bills on both parcels reflect a total of \$2000.

[7-10] It is obvious that appellants' contention that the evidence is insufficient to support the findings that (a) a good and sufficient consideration was paid by the grantees, (b) the deed was intended as an absolute conveyance, and (c) appellants were guilty of laches, cannot be upheld. The consideration for the transaction was the extinguishment of the grantors' debt to the grantees and the assumption by the latter of the encumbrance and the delinquent taxes. That the relationship of debtor and creditor no longer existed between the parties subsequent to the execution of the deed is amply supported by the record. The total consideration paid by the grantees was \$5,887.51, which included the preexisting \$1300 indebtedness extinguished by them, the \$4,465.24 mortgage assumed by them, and \$122.27 paid by them in redeeming the property from delinquent taxes. Disregarding the valuation placed upon the premises by appellants, in view of the conflict in the evidence, it is evident, contrary to appellants' claim, that there was no great disparity between the value of the property and the consideration paid. The fact that the grantors received no money at the time of the execution of the deed is not, of itself, controlling. This contention was made in *Merchants' Holding Corp., Ltd. v. Grey*, 6 Cal.App.2d 682, 688, 45 P.2d 253, 256, where the court said: "Appellant * * * argues that as no money passed * * * there could not have been a sale. The Supreme Court has held that the term 'sale' does not necessarily mean a transfer for money only, and that the word frequently has a broader meaning. *W. F. Boardman Co. v. Petch*, 186 Cal. 476, 199 P. 1047; *Mansfield v. District, etc.*, Ass'n, 154 Cal. 145, 97 P. 150. The agreement to assume and pay the debt of \$20,000 as a considera-

tion for the house is entirely consistent with the idea of a sale." During the nine year period between the execution of the deed and the filing of the action plaintiffs made no claim to the property, made no effort to pay the taxes, made no demand for an accounting of the rentals, but all parties treated the conveyance as an absolute one.

Since the evidence fully justifies the conclusion that the deed was not a mortgage, no purpose would be served in discussing the several other contentions made by appellants. They are inconsequential and a ruling one way or another would in no wise affect the judgment on its merits.

Affirmed.

SHINN, P. J., and WOOD, J., concur.



96 Cal.App.2d 408

**SMALL v. TRANSCONTINENTAL &
WESTERN AIR, Inc.**

Civ. 17335.

District Court of Appeal, Second District,
Division 1, California.

March 10, 1950.

Action by Charlotte Small against Transcontinental & Western Air, Incorporated, for injuries sustained while plaintiff was fare-paying passenger on airplane. The Superior Court of Los Angeles County, Wilbur Curtis, J., denied defendant's motion for nonsuit and new trial, and defendant appealed. The District Court of Appeal, Drapeau, J., held that since substantial evidence in record supported verdict, District Court of Appeal was bound by such verdict.

Judgment affirmed.

**1. Appeal and error ☞1001(1)
Carriers ☞318(4)**

In action for injuries sustained by fare-paying passenger on airplane resulting from alleged negligence of defendant air-

line in failing to have illuminated sign at front of airplane cabin, "Fasten Seat Belts" turned on when flight became rough, evidence supported verdict for passenger, and District Court of Appeal was bound by such verdict.

2. Jury ☞10

Trial by jury in proper case is the right of every citizen guaranteed by Constitution of United States and by Constitution of California. Const. art. 1, § 7.

3. Jury ☞34(3)

Whenever an order of a judge directing a nonsuit infringes in the slightest degree upon constitutional power of jury to determine an issuable fact that order is void.

4. Evidence ☞6

It appears now to be common knowledge with regard to the operation of airplanes that downdrafts, which vary in effect according to their extent, are not uncommon.

Crider, Runkle & Tilson, Los Angeles, for Appellant.

Moore & Fisher, Los Angeles, for Respondent.

DRAPEAU, Justice.

Plaintiff was a fare-paying passenger on a TWA airplane flying from Wichita, Kansas, to Los Angeles. It was her second time in the air, for she was traveling on a round-trip ticket, and had a short time before gone from Los Angeles to Wichita.

Plaintiff testified that after the plane left Amarillo it commenced to roll and pitch; that some of the passengers were airsick; and that she was apprehensive of her safety and worried because the sign directing passengers to fasten their seat belts was not illuminated.

The captain and the co-pilot of the ship testified that the flight was routine, on a regular scheduled course; that it was not rough; and that they had no notice of adverse flying conditions anywhere along the route.

About halfway between Amarillo and Albuquerque, the plane encountered a down-

draft. Running into a rapidly descending current of air, the ship dropped almost straight down, and then abruptly surged up again on an ascending air current. The drop was so fast that the airline hostess flew to the roof of the plane, and then fell to the floor, covered with coats. Most of the passengers, like men on flying trapezes, shot out of their seats, up in the air, and then down to the floor, or into other seats not their own.

Plaintiff was thrown out of her seat and to the floor. She was badly injured. Her arm was broken; and, later on, she had to have an operation for an intestinal obstruction. She was given first aid and hospitalized at Albuquerque, and brought to Los Angeles a few days later.

In Los Angeles her arm was set and was in traction for twenty-eight days. She was in the hospital for some time, and kept from her work for a longer time, and she has permanently lost about 15% of the use of her shoulder.

Her action for personal injuries was tried by jury, with verdict and judgment for \$7,500. Motions for nonsuit and for a new trial were denied.

Plaintiff's principal claim of negligence is that the flight became rough, and that the illuminated sign at the front of the airplane cabin "Fasten Seat Belts" was not turned on. Defendant concedes that the sign was not on, but contends there was no necessity for it; that the flight was smooth and uneventful until, suddenly, without warning, the downdraft was encountered. Defendant contends that, therefore, plaintiff's injuries were because of an act of God, and that it was error for the trial court to deny defendant's motions for nonsuit and for a new trial. In support of this position, defendant quotes the following remarks of the court in deciding the motion for nonsuit:

"The Court: There is only the proof the plaintiff was going up and down sufficiently to cause the plaintiff to be uncomfortable and to be thrown around in her seat.

"Mr. Tilson: She did not say 'thrown around.'

"The Court: She did not use those words, but she illustrated words of that sort

by the movement of her body, on the witness stand, as she demonstrated it, * * *."

This statement helps the plaintiff's case on appeal. It adds to the record her gestures and movements, to amplify her verbal description of the roughness of the flight before the accident.

[1-3] Substantial evidence in the record supports the verdict. Therefore, under elementary rules of law, this Court is bound by the verdict. Trial by jury in a proper case is the right of every citizen, guaranteed by the Constitution of the United States and by the Constitution of California. Our California Constitution declares that that right shall "remain inviolate." Art. 1, § 7. Whenever an order of a judge directing a nonsuit infringes in the slightest degree upon the constitutional power of a jury to determine an issuable fact, that order is void. The Supreme and Appellate Courts of California have struggled to present this fundamental principle to the trial bench and to the bar of the state ever since adoption of the Constitutions of 1849 and 1879. It would do no good here to cite any of the multitude of California decisions upon this subject. They are easily found in any of the legal research books used by the profession.

The law of negligence in the operation of airplanes carrying passengers is developing now, as it did with railroads more than half a century ago. It appears now to be common knowledge with regard to the operation of airplanes that downdrafts, which vary in effect according to their extent, are not uncommon. It is true that such a manifestation of nature, like the weather, is commonly referred to as an act of God. So far as the weather is concerned it cannot be denied that airplane operators take every precaution against weather hazards. If it is possible to determine or even suspect that under certain conditions downdrafts are likely or possible, it would appear to be the duty of a prudent operator to take whatever precautions are necessary or available to guard against dangerous consequences.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

96 Cal.App.2d 524

BENNETT et al. v. LENOIR et al.

No. 14037.

District Court of Appeal, First District,
Division 1, California.

March 20, 1950.

Action by Ellen Bennett, R. N., and another against Mildred Lenoir, R. N., and others, to enjoin executive director and assistant executive director of nonprofit corporation organized for purpose of placing registered nurses in employment from operating an employment agency for nonprofessionals and for an accounting. The Superior Court for Alameda County, Leon E. Gray, J., entered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Schottky, J. pro tem., held that record sustained findings that contract by which corporation agreed to discontinue operation of placement agency for nonprofessionals and permit executive director to operate it as her own business was fair and reasonable, beneficial to corporation and ratified by members and directors with full knowledge of the facts so as to overcome any presumption of fraud or undue influence arising from confidential relationship, and that transaction did not require written consent of Labor Commissioner.

Judgment affirmed.

1. Corporations ⇨426(12)

Record sustained findings that contract by which nonprofit corporation organized for purpose of placing registered nurses in employment agreed to discontinue operation of placement agency for nonprofessionals and permit executive director to operate such agency as her own business in conjunction with and in same office as placement service of corporation was fair and reasonable, beneficial to corporation and ratified by members and directors with full knowledge of the facts, so as to overcome any presumption of fraud or undue influence arising from confidential relationship between executive director and corporation. Civ.Code, § 2235.

2. Contracts ⇨94(1)

The law is jealous of dealings between persons in confidential relationships and will scrutinize them searchingly, and even suspiciously, when the circumstances are

such as to leave doubt that they were fairly obtained and justly procured.

3. Appeal and error ⇨1008(1)

Whether transaction by which nonprofit corporation organized for purpose of placing registered nurses in employment agreed to discontinue operation of placement agency for nonprofessionals and permit executive director to operate such agency as her own business in conjunction with and in same office as placement service of corporation was fair and honest was a question for trial court.

4. Master and servant ⇨14½

Where nonprofit corporation organized for purpose of placing registered nurses in employment merely agreed to discontinue operation of placement agency for nonprofessionals and permit executive director to operate such agency as her own business, whereupon executive director obtained in her own name a license to operate employment agency and corporation retained the license which it owned, there was no sale or transfer of any interest in or right to participate in profits of employment agency within statute requiring written consent of labor commissioner to such sale or transfer. Labor Code, § 1595.

Hollister Smith, Oakland, for appellants.

Stanley D. Whitney, Alameda, Stanley C. Smallwood, Oakland, for respondents.

SCHOTTKY, Justice pro tem.

Ellen Bennett and Isabel Carl, registered nurses and members of the Directory of Registered Nurses of Alameda County, Inc., a nonprofit corporation organized for the purpose of placing registered nurses in employment, commenced an action against the directory and its directors and also against Jean Barthe and Bertha Baillard Cunliff, registered nurses, who were, respectively, executive director and assistant executive director, to restrain the latter two from operating an employment service for nonprofessional people under the name of Western States Placement Bureau or any similar name, or from the premises of the directory, and for an accounting of the proceeds of

such prior operation, on the ground that such service had been a subsidiary operation of the directory and had been obtained by defendants Barthe and Cunliff unlawfully and through fraud and undue influence upon the directors. The complaint alleged that plaintiffs brought the action in a representative capacity, and had made no demand upon the officers and directors of the corporation for the reason that such demand would have been useless because the officers and directors were under the domination and control of defendants Barthe and Cunliff. The trial court found in favor of defendants on all issues and this appeal is by plaintiffs from the judgment rendered in favor of defendants.

There was little, if any, conflict in the evidence, and the factual situation as disclosed by the record is as follows:

Defendant Jean Barthe was an employee and agent of the Directory of Registered Nurses of Alameda County, Inc., with the title of executive director. She was invested by said corporation with full authority in the management of corporation affairs and had power to employ and discharge all office force and employees of the corporation. She had authority generally to assume full charge and control of all of the activities of the corporation, subject only to the control of the board of directors. The board of directors and the corporation reposed complete trust and confidence in her. She had been executive director of the directory since its inception, a period of 16 years. She directed both the directory and the subsidiary operation of the placement service from the same premises. She was not a member of the board of directors but generally attended meetings of the board.

On December 28, 1946, a meeting of the board was properly called and held at Miss Barthe's house with all members present except one. At this meeting Miss Barthe called the attention of the directors to the fact that her contract of employment would expire at the end of 1946, that the past year had been a "very difficult" one financially, and that she desired to have some independent business—an employment agency of her own. The entire question of Miss Barthe's

employment was discussed, everyone present agreeing that they desired her to remain, and the directors suggested that she have her attorney draw up a proposed contract. This was the first time the question of the directory's relinquishing to Miss Barthe the service for placement of non-professionals had come before the directors, and at that time Miss Barthe explained to them that she thought such employment service was capable of earning \$800 to \$1,000 a month with proper handling (i. e., as a separate organization for nonprofessional nurses, technicians, etc., so that collections could more easily be enforced), but that during the year 1946 it had earned only "Six hundred and some dollars." The next meeting was held on January 25, 1947, at which time the contract here in dispute was presented to the board of directors by Miss Barthe. It was available for all the directors to read, though all may not have done so, and all agreed that it should be approved. A resolution to that effect was passed, but it was felt that it should be put before the entire membership of the directory. The contract provided that the directory was to pay to Miss Barthe a minimum of \$7,500 per year, commencing February 1, 1947; that she was to continue as executive director for five years with option to renew the agreement for a further term of five years, and was to pay all normal operating expenses of the directory office (excluding attorney's fees or extraordinary expenses); that the directory was to discontinue the operation of the placement service provided for nonprofessionals and thereby did "grant and assign to * * * [Miss Barthe] the right to operate said employment agency as her own business and for her own account, and to retain all of the proceeds and income of said employment agency for her own benefit." She was to "have the right to conduct said employment agency in conjunction with and in the same office occupied by the * * * [directory]" and "also have the right of placing all types of hospital, medical, household, restaurant, industrial and all allied types of help and employees."

Defendant Jean Barthe applied to the State Labor Commissioner for a license as

a commercial employment agency and procured a license effective as of April 1, 1947, in the name of Jean Barthe, doing business as Western States Placement Bureau, and said defendant also registered the name Western States Placement Bureau as the fictitious name of her personal employment agency with the County Clerk of Alameda County.

On April 2 and 3 the annual membership meeting was held,—on April 2 for those who worked at night, and on April 3 for those who were unable to come on April 2 because of work schedules. At that time the entire annual report, made up by Miss Barthe, which included the contract under consideration and the resolution of the directors at the January 25 meeting, was read to the members and approved in its entirety. Because subsequently there was some indication by rumor that there was dissatisfaction among the members with regard to the contract, a special membership meeting was called for April 15, at which 103 out of the approximately 315 members were present. The by-laws of the directory required a quorum of 30 per cent present for special meetings. The contract was read and discussed thoroughly, and 92 of the members voted in favor of the contract and 11 against it. The attorney for the directory, Mr. Meltzer, was out of town at the time the contract was submitted and ratified by the directors and membership, but it was submitted to the attorney a week or ten days later on his return, at which time he indicated that it was an excellent contract from the directory's standpoint. Miss Negley, the directory president after April 2, testified: "He threw the contract on the table, and he said, 'You are very fortunate to have a contract at that figure.'"

New officers and board of directors elected by the membership took office on April 2 and were such at the time of trial. Miss Negley testified that no demand ever had been made upon her or the board of directors to cancel or set aside the contract, and that the first thing she knew was the service of the summons in the instant action. She also testified, however, that the present board of directors would not have instituted suit to set aside the contract or to prevent

Miss Barthe from carrying on the placement service.

At the outset of the trial plaintiffs' attorney stated that all of the defendants with the exception of Miss Barthe, Miss Lenoir, a director, Miss Negley, the president since April 2, 1947, and a director, and the directory corporation had been dismissed from the present action.

Plaintiffs and appellants urge two main grounds for a reversal of the judgment: first, the defendants did not meet or overcome the presumption that the contract was entered into without sufficient consideration through fraud and undue influence; and, second, that the contract was void as a matter of law.

In support of their first contention appellants argue that defendant Jean Barthe was in a fiduciary position and they quote the following from section 498 of Restatement of Contracts as to the rule as to contracts entered into by fiduciaries: "'Where a beneficiary enters into a transaction with his fiduciary relating to matters within the scope of the fiduciary relation, the transaction is voidable, unless: (a) it is fair and reasonable, and (b) is assented to by all parties beneficially interested, with *knowledge* of their legal rights and of all relevant facts that the fiduciary knows or should know, and (c) these parties are of competent age and *understanding* and are not subjected to undue influence.'" (Emphasis added.)" Appellants also cite section 2235 of the Civil Code which provides: "'Presumption against trustees. All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence required by the trustee remains, by which he obtains any advantage from his beneficiary, are *presumed* to be entered into by the latter without sufficient consideration, *and* under undue influence.'" (Emphasis added.)"

[1] There can be no doubt that defendant Jean Barthe occupied a confidential relationship toward the corporation and that the board of directors reposed complete trust and confidence in her. The court so found and the record supports such finding. But the court also found that the facts con-

cerning the contract and its terms were fully and fairly presented to and considered by the board of directors and the membership, that defendant Jean Barthe in no way took any unfair advantage of them, and that she did not use the influence of her position to obtain any advantage of said corporation or the members thereof. The record supports these findings.

There is ample evidence from which it might be found that the contract was fair and reasonable and beneficial to the directory. Though the subsidiary placement service had a potential earning power greatly in excess of its actual income, there was evidence that this could not be realized under the limited control organization and the directory obtained through this contract the continued direction which it desired for its operation; the directory attorney who later was consulted stated that in his opinion it was a contract favorable to the directory; and various directors and officers of the corporation considered it provided for an arrangement to the directory corporation's benefit.

There is sufficient evidence to find that the members and directors assented to ratification of the contract with full knowledge of the facts. They had presented to them the annual report, financial and otherwise, which was prepared by Miss Barthe; there was no claim that it was inaccurate, and the annual audit was made by an outside firm. The contract was first discussed by the directors in December and again in January when it was ratified by them. It was then submitted to the membership as contained in the annual report, which was read all the way through to the assembled groups on April 2 and 3; and again the membership had the contract brought to its attention at the special meeting called on April 15 for that sole purpose.

[2,3] While it is true that the law is very jealous of dealings between persons in confidential relationships and will scrutinize them searchingly, and even suspiciously, when the circumstances are such as to leave doubt that they were fairly obtained and justly procured, yet it is for the trial court to say, after a consideration of the entire

evidence, whether the transaction was fair and honest. The learned trial judge in the instant case was doubtless satisfied that any presumption of undue influence was overcome and that the contract was fair and equitable and not the result of fraud or undue influence. Upon the record here we believe that it would be a usurpation of the legitimate function of the trial court for us to say that any presumption of undue influence was not overcome and that the judgment should have been in favor of appellants.

[4] There is little merit in appellants' final contention that the contract provided for a violation of Labor Code, section 1595 and therefore was void. Said section provides: "Transfer of interest or right as to profits: Consent. If any licensee sells, transfers, or gives away any interest in or the right to participate in the profits of the employment agency without the written consent of the Labor Commissioner the license of the employment agency shall immediately become void and thereupon be surrendered to the Labor Commissioner." No written permission of the Labor Commissioner was necessary for the transfer of any license, inasmuch as Miss Barthe merely obtained in her own name a license to operate an employment agency effective April 1, 1947. Miss Barthe testified that nothing actually was assigned, and that the placement agency previously operated by the directory for nonprofessionals was not a separate employment agency with separate license and identity but was simply an activity of the directory to which the members of the directory chose to give a separate name. Miss Barthe continued her direction of the business of the corporation and the directors thereof merely agreed to discontinue those activities of the directory for the placement of nonmembers, generally referred to as the agency, and to consent to the use by Miss Barthe of the trade name which had theretofore been associated with the agency. The directory retained the license which it owned, and Miss Barthe carried on, under her own license which she had procured, the employment service for nonmembers which under the directory had

been known as the agency. We are unable to perceive how the contract violated either the letter or the spirit of the Labor Code.

In view of the foregoing, the judgment should be and the same hereby is affirmed.

PETERS, P. J., and BRAY, J., concur.



96 Cal.App.2d 734

MODLIN v. WALTER'S FUR SHOP et al.
Civ. 4014.

District Court of Appeal, Fourth District,
California.

March 29, 1950.

Action by Robert Modlin against Walter's Fur Shop and others, to recover for loss of a mink coat allegedly delivered to defendants under a written consignment, wherein G. Giacomini was made a party defendant. The Superior Court of Fresno County, Stanley Murray, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Griffin, J., held that defendants were liable for loss of coat caused by theft under written agreement covering such loss.

Judgment reversed and trial court directed to enter judgment against defendants.

1. Bailment ⇨31(3)

Principal and agent ⇨23(3)

In action by wholesale furrier against retail furriers for loss of mink coat delivered to retail furriers by third party under written consignment, evidence established that third party was either an ostensible or undisclosed agent of wholesale furrier and that wholesale furrier was the owner of the coat.

2. Principal and agent ⇨143(1)

Although agent does not disclose to third parties his status in delivering goods to them, if agency actually exists, principal, without inclusion of agent as neces-

sary party, may maintain an action in his own name against third parties.

3. Bailment ⇨11

Generally, if subject of bailment perishes, or is lost, destroyed or damaged by accident, without fault of bailee, loss must fall on bailor unless by special contract bailee has made his liability absolute, in which case he will be held accountable.

4. Principal and agent ⇨143(2)

Where third party delivering mink coat to retail furriers under written consignment making retail furriers liable for theft, was either an ostensible or undisclosed agent of wholesale furrier who owned the coat, retail furriers could not escape liability to wholesale furrier for theft of coat on ground that they had no business dealings with wholesale furrier, notwithstanding there was uncertainty in written consignment as to whether loss should be paid to third party or wholesale furrier.

5. Parties ⇨35

In action by wholesale furrier against retail furriers for loss of mink coat delivered to them under written consignment wherein party delivering coat as agent for plaintiff refused to join action as plaintiff because of his friendship toward defendants and was made a party defendant, his position was that of a "party plaintiff".

Jacobs, Blanckenburg & May, San Francisco, for appellant.

Clyde E. Cate, Fresno, for respondents.

GRIFFIN, Justice.

Plaintiff appeals from an adverse judgment rendered in an action brought by him against defendants to recover for the loss of a mink coat delivered to defendants under a written consignment.

The material facts are undisputed. Plaintiff and one Giacomini each operated a wholesale furrier business in San Francisco at the same location. Plaintiff sold the higher priced furs and Giacomini those in

a lower bracket. Giacomini traveled over the State in making sales for himself as well as for plaintiff. There is no question that he had unlimited authority to act as agent for the plaintiff. Walter G. Kurkjian called at plaintiff's place of business and requested that the particular mink coat here involved be sent to Fresno, at defendants' place of business, for the purpose of showing it to a prospective customer. In his travels, Giacomini brought it with him, together with many other furs owned by him or by other furriers for which he made sales on commission.

The defendants admittedly received and accepted the furs and coat. One of the defendant partners, Walter G. Kurkjian, signed his initials on the original statement of consignment upon which the several furs were listed, including the coat here involved. A carbon copy of the original was made and left with defendants. Both the original and carbon copy contained the printed notation thereon: "The articles mentioned above are sent to you for inspection for 24 hours only with the distinct understanding that they remain the property of the manufacturer until bill of sale is rendered by the consignor. Consignee shall be responsible for any loss from fire or theft or negligence. This merchandise is to be returned upon demand." On the duplicate statement was printed the name "Jac-A-Me Furs—Wholesale—G. Giacomini—Consigned to *Walter's Fur Shop* *Fresno* Terms: *net* No Description Price". Then follow the numbers given to other furs. No number is inserted for the "(1) *Nat. Wild Mink Coat*", priced at \$3250.00. (Italics indicate hand-written portion of statement). The original contains the name "Robert Modlin &" over the printed words "Jac-A-Me Furs" and the same name is stamped opposite that designation. An additional telephone number is written on the original and the word "Memo" follows the word "net". The number "R-298" is inserted in the space provided on the original designation for the number of the mink coat. It was explained and understood by all of the par-

ties that the prefix "R" in front of the figures "298" indicated that it was a product of Robert Modlin. Defendants concede that they had been doing business with both Modlin and Giacomini prior to this time. The evidence is that the coat was stolen by a "shoplifter" from defendants' store. Defendants immediately phoned to plaintiff Modlin notifying him that the coat had been stolen and asked him to so inform Giacomini. Thereafter, through an attorney, plaintiff demanded from defendants \$3250 for the loss of the coat. Giacomini refused to join with plaintiff in instituting this action because of his friendship toward defendants. He was then made a party defendant.

On this evidence the trial court found that no act of negligence was chargeable against the defendants, which fact is conceded by plaintiff. It then found that defendants had no dealings concerning the mink coat with plaintiff Robert Modlin, and rendered judgment in favor of defendants. Giacomini, at the trial, corroborated Modlin's testimony in respect to his agency and the manner in which he delivered the coat to defendants; that he had no interest in the coat; and did not remember whether he told defendants at the time that it belonged to Modlin. He did testify, however, that he had handled Modlin's merchandise in connection with his business in consigning furs to the defendants a number of times prior to this occasion; that this same coat had been consigned to defendants on a prior occasion and returned by them; that defendant Walter G. Kurkjian called on the telephone and wanted it returned to show it to a customer. He accounted for the changes between the original and duplicate in the consignment agreement as follows: that these consignment receipts came in pads of 50 sheets with carbon between two sheets; that he probably neglected to list the number of this particular fur coat because it was not then available and it was inserted later by him on the original; that as to the printed name "Robert Modlin" they had an office boy who usually stamped five or six books ahead and it was probably

an oversight on his part in missing this particular duplicate. Modlin testified that Giacomini had many of these books printed and on hand and that it was his custom to use them in his business, too.

The only argument presented by defendants is that the original consignment statement was so altered and so materially changed that their liability thereunder was discharged; that although they may have been liable to Giacomini thereunder, that liability did not extend to plaintiff Modlin, citing Brannan's Negotiable Instruments Law, Sixth Edition, p. 1059; Bank of Commerce v. Webster, 70 Okl. 68, 172 P. 942, L.R.A.1918-F, 696, 698. Counsel for plaintiff sought an additional finding by the court that Giacomini acted as agent for plaintiff in the transaction, which request was refused.

[1] The undisputed evidence shows that there was either an ostensible or undisclosed agency existing between plaintiff and Giacomini, and that plaintiff was the owner of the coat.

[2-5] This case came before the appellate court before on another question. Modlin v. Walter's Fur Shop, 83 Cal.App. 2d 384, 188 P.2d 805. There it was held that although an agent does not disclose to third parties his status as agent, but the agency actually exists, the principal, without inclusion of the agent as a necessary party, may maintain an action in his own name against such third parties. It is the general rule that if the subject of the bailment perishes, or is lost, destroyed or damaged by accident, without any fault on the part of the bailee, the loss must fall on the bailor unless by special contract the bailee has made his liability absolute, in which case he will be held accountable. Los

Angeles Warehouse Co. v. American Distilling Co., 22 Cal.2d 402, 139 P.2d 641; 4 Cal.Jur., p. 22, sec. 13. In the instant case we find a direct agreement on the part of defendants to be responsible to the consignor for any loss from theft. The only possible uncertainty created by the claimed changes or alterations does not affect defendants' liability, but only creates some uncertainty as to whom they should pay for that loss. Giacomini was made a party defendant for the purposes stated. His position was that of a party plaintiff. Modlin v. Walter's Fur Shop, supra, 83 Cal.App.2d at page 389, 188 P.2d 805. He answered and claimed that he was not liable and that he was acting as agent for Modlin. The trial court gave judgment in his favor and, by inference, held that Giacomini was not entitled to the reimbursement.

In Cal.Jur. p. 854, sec. 131, it is stated that "Although it was held in an early California case that an undisclosed principal cannot sue the third person on a contract made by his agent since there is no privity of contract between them, this doctrine now seems to have been abandoned in favor of the more liberal view that the principal may hold the third party." (Citing cases.)

The evidence conclusively shows that there is no evidentiary support for the finding and judgment relieving defendants of liability to plaintiff under the agreement.

Judgment reversed and the trial court is directed to enter judgment against defendants (respondents herein) as prayed for in the complaint.

BARNARD, P. J., and MUSSELL, J., concur.

96 Cal.App.2d 783

PARKER v. BURROWS.

Civ. 17366.

District Court of Appeal, Second District,
Division 2, California.

April 3, 1950.

Action by Lillian May Parker against Lloyd A. Burrows, as guardian of the person and estate of Louisa J. Covey, incompetent, to quiet title to certain notes and one-half of sum of a joint bank deposit. The Superior Court, Los Angeles County, Carl A. Stutsman, J., entered judgment for plaintiff quieting title in an undivided one-half interest in both note and in and to balance of the bank account and the defendant appealed. The District Court of Appeal, McComb, J., held that evidence sustained finding that Louisa J. Covey was competent to contract at the time the transactions involved were completed.

Judgment affirmed.

Joint tenancy ⇐3

In action by daughter against guardian of mother, an incompetent, to quiet title to an undivided half interest to certain notes, and to balance of a joint bank account in names of daughter and mother, evidence sustained finding that mother was competent to contract at times transactions were entered into.

Charles A. Thomasset, of Los Angeles,
for appellant.

Andrew J. Copp, Jr. and H. Dexter McKay, Los Angeles, for respondent.

McCOMB, Justice.

Plaintiff filed an action to quiet title to the following personal property: (1) A promissory note in the principal sum of \$4,500, executed by William J. Grover and Jeraldine W. Grover, payable to Louisa J. Covey and plaintiff as joint tenants, which promissory note was secured by a deed of trust. This note will be hereinafter referred to as the Grover note. (2) An undivided one-half interest in a promissory note executed by Otis C. Briggs and Doro-

thy J. Briggs in the principal sum of \$4,350, payable to Louisa Covey, which note was secured by a deed of trust. Hereinafter this will be referred to as the Briggs note. (3) One half of the sum of \$2,123.46 on deposit with Western Federal Savings and Loan Association.

Trial was had without a jury and judgment entered for plaintiff, Lillian May Parker, quieting title in an undivided one-half interest in both the Grover and Briggs notes, and in and to the balance of the account at Western Federal Savings and Loan Association in the sum of \$1,117.04. It was also decreed that plaintiff recover from defendant Lloyd A. Burrows, as guardian of the person and estate of Louisa J. Covey, an incompetent person, the sum of \$1,161.65, as money collected by said defendant on the Grover and Briggs notes for plaintiff's benefit.

Facts: On May 19, 1938, Louisa J. Covey, who had been previously widowed by the death of her husband, the father of her three adult children, Dr. Clinton A. Burrows, Lillian May Parker and Dr. Lloyd A. Burrows, conveyed to plaintiff a house and lot on Maple Street in Pasadena, California, reserving in herself a life estate therein. On June 2, 1938, plaintiff and her husband conveyed their reversionary title in the property to their three sons subject to the life estate therein reserved by Mrs. Covey. On January 16, 1945, Mrs. Covey, as owner of the life estate, plaintiff, her husband, their three sons, and the wife of one of the sons, as owners of the reversionary estate, sold and conveyed the Maple Street property to William J. Grover and Jeraldine W. Grover, husband and wife, for \$6,800, comprising cash \$2,300 and a promissory note dated February 1, 1945, for the principal sum of \$4,500, secured by a trust deed payable to Louisa J. Covey and Lillian May Parker as joint tenants.

In 1946, to facilitate the formation of a trust for her mother, plaintiff assigned the Grover note, and endorsed thereon "Pay to the order of Louisa J. Covey (signed) Lillian May Parker." When it became evident that the proposed trust would not

be created, Mrs. Covey on March 22, 1947, executed a reassignment of the Grover note to plaintiff so as to reinvest in plaintiff a joint interest therein with herself, and later on June 12, 1947, restated such as assignment by a proper endorsement on the Grover note itself.

All installments that had matured to the date of trial on the Grover note were paid either to Mrs. Covey or to defendant as her guardian.

On April 4, 1946, Otis C. Briggs and Dorothy J. Briggs, husband and wife, executed a purchase price promissory note in the sum of \$4,350, payable to Louisa J. Covey. This note was secured by a deed of trust. This property had originally been acquired by plaintiff and her husband and they conveyed it to the Briggs for a consideration of \$5,000.70, cash in the sum of \$650.70, and the Briggs note above mentioned and deed of trust in the sum of \$4,350. The \$650.70 was paid to Mrs. Covey who subsequently deposited it in the Western Federal Savings and Loan Account together with the sum of \$1,980.50, which she had received in cash in connection with the Grover transaction and other monies belonging to her. The Western Federal Savings and Loan Association account was a joint bank account in the names of Louisa J. Covey and plaintiff.

Louisa J. Covey was adjudicated an incompetent in June, 1947.

This is the sole question necessary for us to determine:

Was there substantial evidence to sustain the trial court's finding that Louisa J. Covey was at all times mentioned in the foregoing statement of facts, prior to June 17, 1947, capable of contracting?

This question must be answered in the affirmative. Plaintiff testified that Mrs. Covey was at all times when she had conversation with her of a sound and understanding mind. Dr. Clinton A. Burrows, Mrs. Covey's son, testified that though she did not follow his advice, he believed she had full understanding of what she was doing; that she was not insane but that he criticized her judgment. Mrs. Bowles, a step-daughter of Mrs. Covey, testified

that when the latter opened the bank account with Western Federal Savings and Loan Association, she was quite positive Mrs. Covey understood questions asked by the representative of the bank.

Clearly the foregoing testimony was substantial evidence to sustain the trial court's finding that Mrs. Covey was competent to contract at the times here in question. (See Estate of McConkey, 33 Cal.App.2d 554, 563, 92 P.2d 456; Maxon v. Avery, 43 Cal.App.2d 155, 157 et seq., 110 P.2d 446; Estate of Perkins, 195 Cal. 699, 703, 235 P. 45.)

Affirmed.

MOORE, P. J., and WILSON, J., concur.



96 Cal.App.2d 545

NATTINI et al. v. DEWEY et al.

Civ. 17267.

District Court of Appeal, Second District,
Division 2, California.

March 20, 1950.

Louis A. Nattini and another sued J. W. Dewey and others for breach of employment contract alleging that plaintiffs were discharged without just cause prior to expiration of contract. The Superior Court of Los Angeles County, A. K. Wylie, Judge of Superior Court of Modoc County, rendered judgment for plaintiffs and defendants appealed. The District Court of Appeal, Moore, P. J., held that evidence supported finding that plaintiffs were discharged without just cause and that award of \$4,979.46 damages was not error.

Judgment affirmed.

1. Master and servant ⇨40(3)

In action for breach by couple employed as managers of mountain resort for one year, against owners, evidence sustained finding that couple was discharged by owners without just cause.

2. Master and servant ⇨21

Where contract entered into between owners and couple, employing couple as managers of mountain resort, authorized discharge of couple on two weeks' notice prior to expiration of term fixed on ground of nonrenewal of liquor licenses or other conditions beyond owners' control, owners who discharged couple without just cause on two days' notice, could not escape liability for breach by asserting at a later date announcement of county not to remove snow from county road and presence of snow on all roads leading to resort as ground for discharge.

3. Contracts ⇨156

A word of general meaning used in a contract after words of a specific class is to be deemed to include only things that refer to and are akin to the specified class.

4. Master and servant ⇨21

In employment contract whereby owners employed a couple as managers of mountain resort for one year but authorizing cancellation prior to its expiration in event continued operation of resort should become impractical by reason of cancellation or nonrenewal of any of the liquor licenses granted by the state or "by reason of other conditions beyond control" of the owners, quoted phrase referred only to such class of occurrences as the nonrenewal of any liquor license but not to snowfall on the road.

5. Master and servant ⇨40(3)

In action by couple against owners for breach of contract, employing couple for one year as managers of mountain resort, evidence sustained finding that at no time

during time fixed by contract did continued operation of resort become impractical because of nonrenewal of any of liquor licenses or by other conditions beyond control of owners.

Byron R. Bentley and Maurice Gordon, Los Angeles, for appellants.

Ralph W. Evans and Wood, Crump, Rogers & Arndt, Los Angeles, for respondents.

MOORE, Presiding Justice.

As owners of the Arrowhead Alpine Club, a mountain resort and hostelry, appellants employed respondents as managers and caretakers for one year commencing May 25, 1943. The contract of employment was in writing¹ which provided that it could be terminated upon two weeks' notice to respondents "in the event continued operation of the club is found to be impractical by reason of the cancellation or nonrenewal of any of the liquor or wine and beer licenses granted by the State of California or by reason of other conditions beyond the control of the Arrowhead Alpine Club." Respondents sued to recover (1) 25 per cent of the net earnings of the business for each calendar month of the term of employment totaling \$3,310; (2) \$8,000 loss of compensation. Appellants contended that they were compelled to close business operations on the 29th of October, 1943, and that even if the discharge was wrongful no profits or salary should be allowed for any time after that date.

The court found that respondents were discharged on October 5, 1943, without

1. "The term of this employment shall be from May 25, 1943, to May 25, 1944, and for such additional period as the parties hereto may in writing mutually agree upon. Provided, however, the term hereof may sooner be terminated (upon two weeks' notice to the Nattinis) in the event continued operation of the Club is found to be impractical by reason of the cancellation or nonrenewal of any of the liquor or wine and beer licenses granted by the State of California or by reason of other conditions beyond the control of the Arrowhead Alpine Club.

"V.

"The employment of other persons in the operation of the Club and its facilities and their rate of compensation shall be from time to time mutually agreed upon between the parties hereto, it being contemplated that in the event the activities of the club during the winter season should materially lessen that the Nattinis will personally perform such of the duties in connection with the operation of the Club as are reasonable in order to keep the cost of operation at a reasonable minimum."

cause and without notice of more than two days and awarded them judgment in the sum of \$4,997.46.

Appellants now demand a reversal on two grounds, to wit, (1) their liability terminated as of the date of closing the club since weather conditions rendered continued operations impractical; (2) error of the court in refusing to make findings that ingress and egress to and from the club after October, 1943, was over a secondary county road about one and one-half miles in length from a state highway; that such secondary road was maintained by the County of San Bernardino including the removal of snow; that in September, 1943, the county highway commissioner announced publicly that the county would not remove the snow from any county road during the approaching winter, and the snow that fell was not removed from the secondary road leading to the club; that the club ceased its operations after October 29 and did not resume operations until May 13, 1944.

[1-4] To the first contention the answer is that respondents testified and the court found that they were unceremoniously discharged on October 5, 1943, and were required at that time to leave the club within two days; that plaintiffs had fairly and reasonably complied with their agreement; that there was no just cause or reason under said agreement for the discharge of respondents at any time and they stood ready, able and willing to perform. Moreover, the court found that at no time during the term fixed by the agreement "did continued operation of the club become impractical by reason of * * * other conditions beyond the control of defendants." There is substantial testimony to support such findings. It is true that appellants introduced proof of ice and snow on the secondary road; of the county's announcement that it would not remove such snow; of the facts that it was not removed but was there from February until April and that snow fell in that region to a depth of six feet. But conceding arguendo that such conditions prevailed, appellants could not, after discharging respondents without cause on

two days' notice where the contract provided for a notice of two weeks, assert the county's announcement and the presence of snow and ice at a later date as grounds for the discharge. The contract says nothing about the inability of appellants to operate the club because of snow on the roads. In the interpretation of contracts it is the rule that a word of general meaning used after words of a specific class shall be deemed to include only things that refer to and are akin to the specified class. *Pasadena University v. Los Angeles County*, 190 Cal. 786, 790, 214 P. 868. Therefore it is a reasonable construction of the contract that the phrase "by reason of other conditions beyond the control of" refers to such class of occurrences as the "nonrenewal of any liquor or wine and beer licenses granted by the State" and not to snowfall on the road.

It is unreasonable to conceive that such a contract could have been made with the prospect of cancellation by reason of snow. One of the attractions of the rural roads and mountain retreats is the presence of snow in winter. Hence the parties must be deemed to have contracted with a knowledge of the frigid conditions that beset the San Bernardino mountains in winter. Since the coming of the snow season was a more probable event than the cancellation of liquor licenses, it is a reasonable interpretation of the writing that the phrase "other conditions beyond the control of the * * * Club," contemplated something other than snow on the road. If appellants had intended to make proof of the snowfall they should have pleaded it as a defense. They did not do so. Respondents alleged that "no other conditions beyond the control of the defendants made it impractical to operate the said property." To this appellants pleaded (1) a general denial and (2) "that plaintiffs were discharged for cause in that plaintiffs wilfully breached the terms of the agreement aforesaid and were guilty of misconduct in the performance of their services" and that the resort was closed from October 10, 1943, to June 1, 1944. Ice and snow were not mentioned. Appellants' act of discharging respondents on October 5 fixed their

relation to their former managers. The repudiation of the contract by appellants created a new status which was not modified by the snowfall.

The contract provided that "the term hereof *may* be sooner terminated (upon two weeks' notice to the Nattinis) in the event continued operation of the club is found to be impractical." That language granted appellants an election to terminate. It did not mean that a termination would automatically result from the occurrence of the anticipated condition. The language clearly implied that the notice was the *sine qua non* to the termination of the employment. Since the termination was dependent upon the choice of appellants, their privilege not having been exercised in the prescribed manner, there was no intention, choice or preference indicated in order to effect such termination and there was none.

Appellants conceive that they could discharge respondents, plead a negative pregnant and thereafter choose what conditions should effect a termination of the contract. While there was proof of the snowfall and evidence that the county did not remove the snow from the secondary road, appellants made no pretense of proving that they themselves could not at reasonable expense have removed the snow; in fact there was no evidence that the snow was not removed from the road.

[5] Appellants contend that their proposed finding was material "because if the road was not accessible during the winter months" it would of necessity follow that it was not practical to operate the club. The proposed finding contains no statement that the club was inaccessible during the winter. It merely says that the road "was thereby made impassable by automobiles at various times" but does not modify the "times" with any phrase as to the number or duration thereof. After evaluating the entire proof before it the court made finding 15 that "at no time during the term fixed by said agreement did continued operation of The Club become impractical by reason of the cancellation of nonrenewal of any of the liquor or wine or beer licenses granted by the State of California or by reason of other conditions beyond the control of the

defendants. The business of The Club was being operated on October 5, 1943, and such operations continued for at least a few weeks thereafter, and at all times during the term fixed by said agreement subsequent to October 5, 1943, The Club employed a man and his wife to reside upon the premises of The Club and to be in charge thereof as managers or caretakers or both." With the last sentence the court sealed the fortunes of this action. If the club employed another couple to reside upon the premises and to be managers thereof at the same salary as the minimum wages of respondents, appellants thereby established their obligation to respondents who were discharged without cause. The latter could have served as caretakers for the balance of their term and thereby have obviated the expense of food and rent which constitute a portion of their damages.

Appellants in their attack on finding 15 insist that the undisputed evidence shows that it was impractical to operate the club under the conditions of the winter subsequent to the discharge "in view of the inaccessibility to the club," because of the county's announcement and in the light of the intention of the parties" at the time the contract was entered into." There was neither finding nor proof that the continued operation of the club ever became impractical. If a condition did arise beyond the control of appellants it was incumbent upon them to prove that such condition beyond their control did arise and that it made continued operation of the club impractical and that they terminated the contract by reason of such condition. They made no such proof. Neither did they prove that it was necessary to keep the road so free from snow as to be without temporary interruption.

The basis of the award to respondents was \$18.50 per day. Since the justice of that charge is not attacked, there is no reason for disturbing the judgment. Respondents were entitled to recover their damages from October 7, 1943, to May 23, 1944.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

MOTT v. HORSTMANN.

Civ. 14240.

District Court of Appeal, First District,
Division 2, California.

March 27, 1950.

Rehearing Denied April 26, 1950.

See 217 P.2d 439.*

Suit by William Penn Mott, Jr., against Russell C. Horstmann, as Auditor of the City of Oakland, a municipal corporation, for a writ of mandate declaring rights and duties of parties in reference to respondent's rejection of certain salary claims presented by petitioner. The Superior Court of Alameda County, Ralph E. Hoyt, J., entered judgment for respondent, and petitioner appealed. On the appeal, respondent attacked that part of judgment denying indebtedness of petitioner to City resulting from petitioner's retention of certain fees from other municipalities. The District Court of Appeal, Nourse, P. J., held that appeal would be confined to single issue whether petitioner forfeited his office under terms of city charter, and that when petitioner accepted position with planning commission of county he thereupon relinquished all right to occupy his position with city, and that he was not entitled to compensation as a city officer.

Judgment affirmed.

1. Appeal and error ⇨839(1)

Where appellee did not attack judgment of trial court by taking an appeal, and pleadings set forth and case was tried on a single issue, decision of District Court of Appeal would be confined to that issue.

2. Municipal corporations ⇨142

The clear purport of charter section of municipal corporation that no person shall, except as may be authorized by council, hold any such office or position under city government while holding any office or position of profit under government of the state, of any other state, of United States, or of any other nation, government or country, is to prevent anyone holding a position of profit under city government while he is at the same time occupying another position of profit under some other government. St.1941, p. 3401, § 38.

* Subsequent opinion 224 P.2d 11.

3. Counties ⇨1

A "county" is a state agency. Pol. Code, § 3902.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "County".

4. Counties ⇨61

Since a county is not an independent unit like a municipal corporation, but is merely an agency of the state government, one holding a public office under a county holds under government of state. Pol. Code, § 3902.

5. Municipal corporations ⇨142

Where position with county was created by Board of Supervisors acting under statute, which prescribed manner of appointment, fixed terms of office, described in detail duties and responsibilities, and treated appointees throughout as officers, and ordinance required all appointees to take oath of office as provided by law, facts were recognized criteria of existence of a "public office" under statute providing no person shall hold any office or position under city government while holding any office or position of profit under government of state. St.1929, p. 1805; St. 1941, p. 3401, § 38.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Public Office".

6. Schools and school districts ⇨21

School districts, like counties, are political subdivisions of the state created for state purposes.

7. Municipal corporations ⇨142

Under statute authorizing creation of county planning commission and defining its powers and duties, commissioners were acting and holding their offices under government of state within statute forbidding a person to hold an office or position under city government while holding any office or position of profit under government of state. St.1941, p. 3401, § 38; Const. art. 4, § 19.

8. Municipal corporations ⇨210

Under city charter, providing that no person shall, except as may be authorized

by council, hold any office or position under city government, while holding any office or position of profit under government of state, when city superintendent of parks accepted, without authorization of city council, position with planning commission of county, which employment was incompatible with his employment by city, superintendent's position under city charter was automatically forfeited, and he was not entitled to compensation as city official thereafter. St.1941, p. 3401, § 38.

Buckley & Ehlers, Oakland, for appellant.

Stanley C. Smallwood, Oakland, for respondent.

NOURSE, Presiding Justice.

Petitioner sued for a writ of mandate "declaring the rights and duties of Petitioner and Respondent" in reference to respondent's rejection of certain salary claims presented by petitioner for services as Superintendent of Parks of the city of Oakland. Respondent had rejected the claim on the ground that petitioner had forfeited his office by his acceptance of another position with the county of Contra Costa.

The cause was tried on a written stipulation of facts. Respondent defended on the ground stated and on the further ground that he was required by the Oakland charter to withhold payment of the salary demands because petitioner had, during the period of employment, accepted fees and remuneration from two other cities and had failed to deposit such fees in the Oakland treasury as required by the Oakland charter. The trial court entered judgment adverse to petitioner as a result of the employment by Contra Costa County, and ruled that he was not required to deposit the fees collected from the other municipalities. Petitioner appealed from the whole judgment. Respondent now attacks that part of the judgment denying the indebtedness of petitioner resulting from his retention of these fees from the other municipalities.

[1] At the outset the parties argue the right of respondent to attack a portion of the judgment since he did not take an appeal. Notwithstanding the prayer of the petition for a declaration of rights the action is one in mandamus to require the respondent to perform an official duty. The pleadings were so framed and the cause was tried on that theory. The judgment declared that petitioner take nothing and our decision will be confined to the single issue whether petitioner forfeited his office under the terms of section 38 of the Oakland charter.

[2] The provisions of this section applicable to this discussion read, Stats.1941, p. 3401: "No person holding any office or *position* under the City Government * * * shall, except as may be authorized by the Council, hold any such office or position under the City government while holding any office, or *position of profit*, under the government of this State, of any other State, of the United States, or of any other nation, government or country." We have italicized the words "position" and "position of profit" because the inclusion of these words after the word "office" is a complete answer to all the petitioner-appellant's argument based on the assertion that the positions which he accepted were not incompatible "offices." The clear purport of the charter section is to prevent anyone holding a position of profit under the city government while he is at the same time occupying another position of profit "under" some other "government."

[3, 4] The universal rule is that a county is a state agency. Section 3902 of the Political Code provides: "This State is divided into counties * * *. The several counties * * * are hereby recognized as legal subdivisions of the state." This statute is recognized in the decisions. *Hill v. Board of Supervisors*, 176 Cal. 84, 167 P. 514; *Reclamation District No. 1500 v. Superior Court*, 171 Cal. 672, 154 P. 845; *Kahn v. Sutro*, 114 Cal. 316, 46 P. 87, 33 L.R.A. 620; 7 Cal.Jur., p. 387-389. Since the county is not an independent unit like a municipal corporation, but is merely an agency of the state government it follows

that one holding a public office under a county holds "under the government of this State."

[5] With this premise we should enquire whether the position occupied by petitioner in Contra Costa County was an office "under the government of this State" within the meaning of the charter. It was created by an ordinance of the board of supervisors acting under the statute of 1929, p. 1805. This statute prescribes the manner of appointment of the commissioners, fixes their terms of office, prescribes in detail their duties and responsibilities and treats them throughout as officers. The ordinance adopted pursuant to the statute named the three county officers who should serve "ex-officio", provided for the appointment of the other six members, and required all to take the oath of office "as provided by law." The county clerk has certified that petitioner herein was "duly appointed to the office of commissioner * * * for a term of three years." Following his appointment the appellant took and filed the statutory oath of office. All these are recognized criteria of the existence of a public office. 21 Cal.Jur. p. 820; *People ex rel. Chapman v. Rapsey*, 16 Cal. 2d 636, 107 P.2d 388, 390. The quotation in the *Rapsey* case from *Patton v. Board of Health*, 127 Cal. 388, 398, 59 P. 702, 78 Am. St.Rep. 66, is appropriate: "It seems to be reasonably well settled that where the legislature creates the position, prescribes the duties, and fixes the compensation, and these duties pertain to the public, and are continuing and permanent, not occasional or temporary, such position or employment is an office, and he who occupies it is an officer. In such a case, there is an unmistakable declaration by the legislature that some portion, great or small, of the sovereign functions of government are to be exercised for the benefit of the public, and the legislature has decided for itself that the employment is of sufficient dignity and importance to be deemed to be an office."

[6] The next question is whether it was an office under the government of this State." The appellant herein relies on *Leymel v. Johnson*, 105 Cal.App. 694, 288 P.

858, a case which held that a public school teacher was not a public servant holding employment "under this State" within the terms of section 19 of Article IV of the Constitution. The case is hard to reconcile with the universal holding that school districts, like counties, are political subdivisions of the state created for state purposes. *Skelly v. Westminster School District*, 103 Cal. 652, 658, 37 P. 643; *Ridge v. Boulder Creek, etc. School Dist.*, 60 Cal.App.2d 453, 140 P.2d 990; *Butler v. Compton Junior College Dist.*, 77 Cal.App.2d 719, 728, 176 P.2d 417; *Dillon on Municipal Corporations*, sec. 23.

[7] The case of *Satterwhite v. Garrison*, 34 Cal.App. 734, 168 P. 1053, 1054, is much easier understood, and at the same time is more applicable to the question here presented. In that case it was held that a deputy district attorney of a county held an "office * * * under this state" in contemplation of section 19 of Article IV of the Constitution. There a distinction was made between the inhibitions against "officers of the state government" and officers holding "under the state." Here the charter section prohibited the holding of another office "under the government of this State"; and hence the rule of the *Satterwhite* case is controlling. The general statute authorizing the creation of the county planning commission and defining its powers and duties was the only law under which the commissioners could be appointed or could perform any official functions, and those functions were all prescribed by the legislature of the State. If the commissioners were not acting and holding their offices "under" the government of the state there is no sensible interpretation of the charter section.

Was the double employment authorized by the Oakland city council under the terms of section 38 of the Charter? Petitioner was appointed Superintendent of Parks by the Oakland Park Directors on August 28, 1946. On November 24, 1947, he was appointed commissioner of the Contra Costa Planning Commission for a term of three years, and took the statutory oath of office as such official on December 2, 1947. On

April 27, 1948, petitioner resigned from his office in Contra Costa County, and on February 3, 1949, the city council of the city of Oakland passed a resolution purporting to give its consent to the holding of the double offices.

[8] The ineffectiveness of this resolution for any purpose seems clear. Section 38 permits the holding of two positions when "authorized by the Council." The power of appointment to the position of Superintendent of Parks rests wholly in the Board of Park Directors. This board had acted on August 28, 1946, without an authorization of the council that the appointee could accept other incompatible employment. When such employment was accepted by petitioner on December 2, 1947, the office under the Oakland charter was automatically forfeited. If the so-called waiver by the city council's resolution of February 3, 1949, was effective for any purpose that purpose was to permit the Park Commissioners to make another appointment subject to the terms of the resolution.

There is a difference of opinion as to the effect of an acceptance of a second office, some authorities holding that when the two positions are incompatible the acceptance of the second automatically forfeits the first; others hold that he is merely ineligible to hold the second and that his appointment thereto is either void or voidable. See 42 Am.Jur. pp. 940, 942. California follows the first which is known as the common law rule. Many of the cases examined follow this rule when the two offices are incompatible though there is no statute expressly declaring them to be such. The question of incompatibility then becomes one of fact and the rule of automatic forfeiture rests on the theory of public policy.

In our case the public policy is expressly declared in the charter section which forbids the acceptance of a second office and the charter, apparently in an express approval of this common law rule, declares that an officer of the municipality shall not "hold any such office" after accepting any "position of profit" of another public agency. This language clearly implies an

intent to forfeit the municipal office whenever the occupant accepts or is "holding" any other such office or position of profit.

We conclude that when the petitioner accepted the position with the Contra Costa planning commission he thereupon relinquished all right to occupy his position with the city of Oakland. Whether this be called a resignation or an automatic forfeiture makes no difference in the result. It is sufficient that the judgment of the trial court holding that petitioner was not entitled to compensation as an officer of the city of Oakland after he had accepted the position with the county of Contra Costa is in accord with the great weight of authority and the decisions of this state. See *People Ex rel. Chapman v. Rapsey*, 16 Cal. 2d 636, 644, 107 P.2d 388.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.



BROKAW v. BLACK-FOXES MILITARY INSTITUTE et al.

BROKAW et al. v. BLACK-FOXES MILITARY INSTITUTE et al.

Civ. 17117.

**District Court of Appeal, Second District,
Division 3, California.**

March 14, 1950.

Hearing Granted May 11, 1950.*

Action by Robert Brokaw a minor, by Martha Mears Brokaw, his guardian ad litem, against Black-Foxes Military Institute, Hollywood Commercial Building, Inc., a corporation, Elvin E. Martin, and others, and by Robert Brokaw, a minor, by Martha Mears Brokaw, his guardian ad litem, and Martha Mears Brokaw against Black-Foxes Military Institute, and Hollywood Commercial Buildings, Inc., a corporation, for damages for personal injuries. The Superior Court of

* Subsequent opinion 231 P.2d 816.

Los Angeles County, Thomas J. Cunningham, J., entered a judgment for plaintiff against Hollywood, and Hollywood appealed. The District Court of Appeal, Vallee, J., held that evidence sustained finding that Hollywood was negligent in permitting minor to leave school premises, and was not excused from its negligence by any intervening acts of others.

Judgment affirmed.

Shinn, P. J., dissented.

1. Schools and school districts ⇨8

Where parent gave school authorities definite and specific instructions that son was not to be permitted to leave premises of school except under supervision of one of officers of school or certain other designated persons, under school rules providing that authority for absence must originate with parent, a contract was made by which school agreed that it would not permit son to leave premises of school except on conditions stated.

2. Torts ⇨12

Accompanying every contract is a common law duty to perform thing agreed to be done with care and faithfulness, and a negligent failure to observe conditions is a tort in addition to a breach of the contract.

3. Torts ⇨12

Whenever there is a contract and something to be done in course of employment which is subject of that contract, if there is a breach of duty in course of employment persons injured by breach may recover damages in tort.

4. Negligence ⇨2

Irrespective of contracts, if relationship of parties is such that a duty to take due care arises therefrom, and party upon whom duty rests is negligent, an action for tort will lie.

5. Parent and child ⇨1, 15

One of duties of parents to their children is to shield and protect them from injury, and one who stands to a child in loco parentis has same duty and is bound to use reasonable care to shield and protect child from injury.

6. Schools and school districts ⇨8

Where school accepted responsibility for child, and agreed not to permit child to leave premises of school except under supervision of one of officers of school, or certain other designated persons named by parent, school stood in relation of loco parentis to child, and had duty to shield and protect child from injury.

7. Negligence ⇨2

One who voluntarily takes custody of another under circumstances such as to deprive other of his normal power of self-protection, or to subject him to association with persons likely to harm him, is under duty of exercising reasonable care to control conduct of third persons and prevent them from intentionally harming other or conducting themselves as to create an unreasonable risk of harm to him, if actor knows or has reason to know that he has ability to control conduct of third person, and knows or should know of necessity and opportunity for exercising such control.

8. Negligence ⇨9

"Negligent conduct" is failure to do an act which is necessary for protection or assistance of another, and which actor is under a duty to do.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Negligent Conduct".

9. Schools and school districts ⇨8

Where school authorities permitted a minor student to leave school premises and accompany another minor in automobile against express request of student's parents, and student suffered injuries in automobile accident, question of school's negligence was for jury.

10. Negligence ⇨56(1.4)

A consequence which follows directly either from defendant's act or from a foreseeably caused intervening act is "proximate cause" of any resulting injuries.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Proximate Cause".

11. Negligence ⇨62(1)

An "intervening cause" is one which actively operates in producing harm to

another, after actor's negligent act or omission has been committed.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Intervening Cause".

12. Schools and school districts ☞8

Where school authorities permitted minor student to leave school premises and accompany another minor in automobile against express request of student's parents, and student suffered injuries in automobile accident, whether school was relieved from liability to student for injuries caused by conduct of other minor, or driver of truck with which he collided, was for jury.

13. Schools and school districts ☞8

Where school authorities permitted a minor student to leave school premises and accompany another minor in automobile against express request of student's parents, and student suffered injuries in automobile accident, school was liable to student not for act or omission of other minor, but for its own act in permitting minor to leave premises which set in operation active force which was proximate cause of student's injuries, and which continued active until happening of accident.

Tripp & Callaway, Los Angeles, for appellant.

Robert J. Sullivan, and Lewis L. Clarke, Jr., Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by defendant Hollywood Commercial Buildings, Incorporated, doing business as Black-Foxe Military Institute, from a judgment for plaintiff, Robert Brokaw, in two consolidated actions for damages for personal injuries.

One action is predicated on alleged negligence of appellant in permitting respondent, a minor in the custody of appellant, to leave the campus of Black-Foxe Military Institute, a military school conducted by appellant, contrary to instructions of his parent. The complaint in this action alleged that the defendants "so negligently,

carelessly and without regard for the safety of plaintiff Robert Brokaw and without the consent or permission of his parent, Martha Mears Brokaw, the defendants and each of them, contrary to their customs and rules and against the wishes of Robert Brokaw's parent, Martha Mears Brokaw, permitted or allowed the plaintiff Robert Brokaw to leave or be absent from the campus or school grounds of the Black-Foxe Military Institute; that as a direct and proximate result of the aforesaid plaintiff Robert Brokaw was involved in an automobile accident and received serious and permanent personal injuries." The other action is predicated on alleged negligence of appellant in driving an automobile in which it is alleged respondent was a paying passenger.

Black-Foxe Military Institute is a private military school for boys conducted by appellant in Los Angeles. Robert Brokaw, twelve years of age, was enrolled in the school in September, 1946, for the term 1946-1947 as a paying boarding student. He had attended two prior years. The Institute's "Cadet Handbook" provided that "Authority for absence must originate with the parent or guardian and such authority must be directed to the Commandant in the form of a written excuse." Whenever instructions were received from a parent, very careful notes were taken with reference to those instructions and everyone on the staff who was concerned was informed in detail concerning those instructions. At the time Robert was first registered at the school his mother advised the school authorities that he was not to leave the school grounds unless under the supervision of the officers of the school or with a Mr. and Mrs. Frankel or a Mr. and Mrs. Hicks.

On February 15, 1947, a Saturday, Elvin E. Martin, one of the defendants, a young man under twenty-one years of age who was attending college and at the same time acting as a part-time employee of appellant, while off duty, returned to the school in his father's automobile to pick up some of his personal belongings. One of Martin's duties was to take the students on trips on certain Saturdays. While at the school

he observed Robert and several other students and asked them why they had not gone on appellant's regular week-end excursion to Long Beach. Being informed that they lacked spending money, he offered to take them in his father's automobile to his mothers' home in Whittier where his mother would prepare lunch for them, and from there to Long Beach to visit the amusement pike. Martin also offered to lend the boys spending money from his personal funds. Accepting Martin's offer, the students, including Robert, went with Martin to the office of Lt. Redmond, the officer of the Institute in charge, and asked Redmond for permission to leave the premises to go to Whittier and Long Beach with Martin in Martin's automobile. Redmond granted them permission on condition that Martin return the students to the Institute before 8:30 p. m. Redmond was the only person who had authority to permit the students to leave the Institute's premises.

The students left the premises in Martin's father's automobile, Martin driving. On the way to the home of Martin's mother, Martin's automobile collided with the rear end of a truck and Robert was severely injured.

The cause was tried by a jury. Motions of Hollywood Commercial Buildings, Incorporated, for a judgment of nonsuit and for a directed verdict were denied. A special interrogatory was submitted to the jury, asking "was defendant, Elvin E. Martin, at the time and place of the accident here involved, acting as the agent of the defendant, Black Fox Military Institute, and also in the course and scope of his authority at said time?" The jury answered, "Yes." A consolidated verdict was rendered in favor of Robert and against Hollywood Commercial Buildings, Incorporated. No verdict was rendered either for or against Martin. From the judgment which followed, Hollywood Commercial Buildings, Incorporated, appeals.

Appellant's specifications of error are: 1. No negligence was established as against appellant. 2. The act of granting permission to minor respondent to leave the grounds of the military institute was not the proximate cause of his injuries. 3.

The court erred in denying appellant's motions for a judgment of nonsuit and for a directed verdict because there was no evidence that Martin was the agent of appellant acting within the course and scope of his employment.

[1] The contention that it was not established that appellant was negligent is without merit. It is argued that to constitute an actionable tort there must be a duty owing by the defendant to the one injured and that appellant owed no duty to respondent. The rules of the school provided that authority for absence must originate with the parent. Pursuant thereto the parent gave the school authorities definite and specific instructions that Robert was not to be permitted to leave the premises of the Institute except under the supervision of one of the officers of the school or certain other designated persons. A contract was thereby made by which appellant agreed that it would not permit Robert to leave the premises of the Institute except on the conditions stated. *Hitchcock Military Academy v. Myers*, 76 Cal.App. 473, 476, 245 P. 219.

[2, 3] An obligation is defined as "a legal duty, by which a person is bound to do or not to do a certain thing", Civ.Code, sec. 1427, and may arise either "from the contract of the parties or the operation of law." Civ.Code, sec. 1428. It is elementary that the same wrong may be both a breach of contract and a tort. The existence of a contract with one party may furnish the occasion for a tort obligation to another. A contract promise may itself be the instrument by which a tort is committed. *Prosser on Torts*, p. 201, sec. 33. Accompanying every contract is a common law duty to perform the thing agreed to be done with care and faithfulness, and a negligent failure to observe these conditions is a tort. *Oklahoma Natural Gas Co. v. Pack*, 186 Okl. 330, 97 P.2d 768; *Conn v. Hunsberger*, 224 Pa. 154, 73 A. 324, 25 L.R.A.,N.S., 372, 132 Am.St.Rep. 770, 16 Ann.Cas. 504; *Flint & Walling Mfg. Co. v. Seckett*, 167 Ind. 491, 79 N.E. 503, 12 L.R.A.,N.S. 924; *Anno. 12 L.R.A.,N.S., 924*. "[W]henever there is a contract and something to be done in the course of the

employment which is the subject of that contract, if there be a breach of duty in the course of the employment, the persons injured by the breach may recover damages in tort." *Loup v. California Southern R. Co.*, 63 Cal. 97, 99; *Fisher v. Pennington*, 116 Cal.App. 248, 251, 2 P.2d 518; *Green v. Hanson*, 103 Cal.App. 430, 432, 284 P. 1082; *Williamson v. Pacific Greyhound Lines*, 67 Cal.App.2d 250, 253, 153 P.2d 990. Injuries to passengers on carriers are familiar examples of the application of these principles. 4 Cal.Jur. 979, sec. 118; see also *Harding v. Liberty Hospital Corp.*, 177 Cal. 520, 522, 171 P. 98, and cases there reviewed. The contract that respondent was not to be permitted to leave the premises of the Institute except under the supervision of an officer of the school or the other designated persons, imposed the duty on appellant not to permit him to leave under any other circumstances. The contract made by appellant with respondent's parent implied that appellant would exercise ordinary care and diligence to see that respondent did not leave the school premises except on the conditions prescribed. Cf. 56 C.J. 173, sec. 24.

[4-6] Irrespective of contract, if the relationship of the parties is such that a duty to take due care arises therefrom, and the party upon whom the duty rests is negligent, an action for tort lies. *Atlantic & Pacific R. Co. v. Laird*, 164 U.S. 393, 17 S.Ct. 120, 41 L.Ed. 485; *Warfield Natural Gas Co. v. Clark's Adm'x*, 257 Ky. 724, 79 S.W.2d 21, 97 A.L.R. 971. One of the duties of parents to their children is to shield and protect them from injury. One who stands to a child in *loco parentis* has the same duty and is bound to use reasonable care to shield and protect such child from injury. *Satariano v. Sleight*, 54 Cal.App.2d 278, 284, 129 P.2d 35; *Buelke v. Levenstadt*, 190 Cal. 684, 687, 214 P. 42; *Cashen v. Riney*, 239 Ky. 779, 40 S.W.2d 339, 341; *Burnett v. Allen*, 114 Fla. 489, 154 So. 515, 518; 38 Am.Jur. 686, sec. 40; Anno. 27 A.L.R. 1018. Appellant stood in the relation of *loco parentis* to respondent. 56 C.J. 852, sec. 1088; 47 Am.Jur. 426, sec. 173.

[7, 8] "One who * * * voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty of exercising reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor (a) knows or has reason to know that he has the ability to control the conduct of the third persons, and (b) knows or should know of the necessity and opportunity for exercising such control. Comment: a. The rule stated in this Section is applicable to * * * a private school." Restatement, Torts, sec. 320. Negligent conduct may be "a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do." Restatement, Torts, sec. 284.

[9] In the light of these principles, it cannot be said, as a matter of law, that appellant was not negligent in permitting respondent to leave the premises of the Institute.

[10, 11] The next contention is that the negligence of appellant, if the evidence warranted a finding of negligence, was not "the" proximate cause of injury. "A consequence which follows directly either from the defendant's act or from a foreseeably caused intervening act is proximate." *Carpenter, Proximate Cause*, 16 So. Cal. L. Rev. 18. An intervening cause is one which actively operates in producing harm to another after the actor's negligent act or omission has been committed. Restatement, Torts, sec. 441.

"The following rules from the Restatement of Torts with respect to proximate causation have been approved in California (*Mosley v. Arden Farms Co.*, 26 Cal.2d 213, 219, 157 P.2d 372, 158 A.L.R. 872; *Stasulat v. Pacific Gas & Electric Co.*, 8 Cal.2d 631, 637, 67 P.2d 678), and are applicable in the present situation:

"Section 447—'The fact that an intervening act of a third person is negligent

in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if (a) the actor at the time of his negligent conduct should have realized that a third person might so act.'

"Section 449—'If the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby.'

"Section 453, Comment (a): 'If the facts are undisputed, it is usually the duty of the court to apply to them any rule which determines the existence or extent of the negligent actor's liability. If, however, the negligent character of the third person's intervening act or the *reasonable foreseeability of its being done* is a factor in determining whether the intervening act relieves the actor from liability for his antecedent negligence, and under the undisputed facts there is room for reasonable difference of opinion as to whether such act was negligent or foreseeable, the question should be left to the jury.' (Italics added.)" *McEvoy v. American Pool Corp.*, 32 Cal.2d 295, 298, 195 P.2d 783, 786. Appellant's negligence need not have been the sole cause of the injury; it is enough if it was a proximate cause. *McEvoy v. American Pool Corp.*, 32 Cal.2d 295, 298, 195 P.2d 783; *Westover v. City of Los Angeles*, 20 Cal.2d 635, 639, 128 P.2d 350; *Goehring v. Rogers*, 67 Cal.App. 253, 259, 227 P. 687, opinion of Supreme Court on denial of hearing.

[12] In view of these rules we cannot say, as a matter of law, that appellant is relieved from liability for negligence by the intervening conduct of Martin or the driver of the truck with which he collided. Appellant cannot escape responsibility for its failure to perform its duty merely because of intervening acts, the likelihood of which it reasonably should have foreseen. The jury could have found, in view of the frequency of automobile accidents, that ap-

pellant should have foreseen that either Martin or a third person might cause the type of accident which occurred. *McEvoy v. American Pool Corp.*, 32 Cal.2d 295, 299, 195 P.2d 783; *Bunch v. Eason*, 95 Cal.App. 2d 845, 214 P.2d 28.

[13] Whether Martin was or was not the agent of appellant is immaterial. In the action predicated on appellant's negligence in permitting respondent to leave the premises of the Institute respondent did not seek to impose liability under the doctrine of *respondeat superior*. Appellant was held liable, not for the act or omission of Martin, but for its own act. The implied finding of the jury was that appellant's act in permitting respondent to leave the premises of the Institute in Martin's automobile set in operation the active force which directly caused respondent's injuries; and that appellant's wrongdoing continued active until the happening of the accident. See *Maberto v. Wolfe*, 106 Cal. App. 202, 206, 289 P. 218; *Waltemath v. Western States Realty Co.*, 9 Cal.App.2d 583, 585-586, 50 P.2d 451; *Barsom v. City of Reedley*, 38 Cal.App.2d 413, 420, 101 P.2d 743.

Affirmed.

WOOD, J., concurs.

SHINN, Presiding, Justice.

I dissent. The action was for negligence and not for breach of contract. Appellant throughout has conceded it was under a duty to exercise ordinary care. All the evidence of conversations between plaintiff's mother and the school authorities at the time plaintiff was enrolled, with respect to the conditions under which he might leave the school grounds, was irrelevant and confusing to the jury.

We must answer the question, "Wherein was appellant negligent?" The main opinion does not furnish an answer to this question. The jury's implied finding of negligence is accepted as conclusive. It is not conclusive, and should not be allowed to stand, unless it is supported by substantial evidence. It has no support in the evidence.

For approximately a year Martin had been a part time employee of appellant, one of his duties being to take boys on automobile trips, although he was not acting within the scope of his employment in taking plaintiff for a ride in his own car on the day of the accident. It is not questioned that he was an experienced and careful driver.

The holding of the main opinion is that anyone who rides or allows a boy to ride in an automobile with a competent and careful driver is thereby guilty of negligence. That is the entire case so far as negligence is concerned.

In my opinion the jury's implied finding of negligence is unsupportable in law or reason. The judgment rests upon that finding and should be reversed.



96 Cal.App.2d 700

MEALY et ux. v. SUNLAND REFINING CORPORATION.

Civ. 4007.

District Court of Appeal, Fourth District,
California.

March 28, 1950.

Rehearing Denied April 10, 1950.

Hearing Denied May 25, 1950.

Action by J. A. Mealy and wife against the Sunland Refining Corporation to have a deed declared a mortgage, for a reconveyance, and for an accounting. From a judgment of the Superior Court of Fresno County, Clark Clement, J., in favor of the defendant, the plaintiffs appealed. The Court of Appeal, Barnard, P. J., held that the evidence was sufficient to sustain a finding that deed was intended as an absolute conveyance subject only to encumbrances of record and to right of plaintiffs to repurchase the property within one year.

Judgment affirmed.

1. Mortgages ⇨36

Burden of proving that deed absolute in form was intended as a mortgage to se-

cure a continuing debt is upon parties so claiming.

2. Mortgages ⇨36

A strong presumption exists that a deed is what it purports to be, and presumption should prevail unless evidence to contrary is clear and convincing.

3. Appeal and error ⇨1008(1)

Whether evidence offered to establish an intention to change ostensible character of deed is clear and convincing, is for the trial court.

4. Mortgages ⇨33(5)

Taking of deed subject to an option to repurchase is circumstance to be considered in determining whether deed is intended as mortgage, but is not in itself controlling.

5. Mortgages ⇨32(2, 6)

Surrounding circumstances are to be considered in determining whether deed absolute in form was intended as a mortgage, but controlling consideration is intent of the parties, and secret intention of one party will not change character of the transaction.

6. Mortgages ⇨38(1)

In action by husband and wife against refining corporation to have a deed on filling station property declared a mortgage, for a reconveyance, and for an accounting, evidence sustained finding that the parties had intended deed to constitute an absolute conveyance, subject only to encumbrances of record and to right of husband and wife to repurchase property within one year.

7. Mortgages ⇨32(6)

Where witnesses for grantors testified that property was worth between \$6,000 and \$7,000 at time deed was given, and witnesses for grantee gave it a value of from \$2,500 to \$3,500, while actual cost to grantee amounted to \$3,163.57, deed could not be held to be a mortgage because of alleged disparity between value of the property and price paid.

8. Appeal and error ⇨1050(1)

Admission of parol evidence which was significant only in the event of an ac-

counting was not prejudicial where no accounting was had.

H. A. Savage, Fresno, for appellants.

Stammer & McKnight, Fresno, for respondents.

BARNARD, Presiding Justice.

This is an action to have a deed declared to be a mortgage, for a reconveyance, and for an accounting.

As a part of its business the defendant leased a large number of service stations and subleased them to operators who would sell its products. Its office was in Fresno, and one Olsen was its manager and one Kohler its credit manager. The plaintiffs owned four lots in Selma upon which they operated a service station and a small store. On August 20, 1938, they leased the property to the defendant with a rental based upon the amount of Sunland gasoline sold, with a guaranteed minimum of \$50.18 per month. Under an arrangement between them, the plaintiffs continued to operate the business and to purchase gasoline from the defendant. Their business grew steadily worse and in July, 1940, they had come to the conclusion that they could not go on with it, and that they were "going to lose everything." At that time gasoline sales were running less than 1000 gallons a month and netted them only \$30 to \$40 a month, part of the real property was mortgaged, two attachments had been levied, taxes were delinquent, and they were unable to meet other bills. They had owed the defendant over \$900 since 1938, and had never been able to reduce that debt. The defendant had brought suit and attached the property in April and had secured a judgment for \$961.55 in May, 1940. Execution was issued and levied but the property had not yet been sold thereunder.

On July 23, 1940, the plaintiffs deeded the property to the defendant. The deed was absolute in form and was recorded on the same day. At defendant's request, the plaintiffs remained in possession for about a month. The defendant recorded a satisfaction of its judgment, made book entries

showing the debt was paid, and stopped sending monthly bills. It also paid the mortgage, paid off a contract on the equipment, paid off an attachment levied by another creditor, and paid the delinquent and current taxes. These payments, with its own judgment, amounted to \$3,163.91. On August 21, 1940, the defendant leased the property to one Mathews for three years. He took possession two or three days later, and the plaintiffs vacated the premises. On September 1, 1943, the defendant again leased the property to Mathews for five years.

While Mathews was unable to make any profit for a year or two, he built up the business so that sales of gasoline had increased to over 11,000 gallons in October, 1944. On October 24, 1944, more than four years after the deed was given, the plaintiffs appeared at the defendant's office in Fresno and served upon Mr. Kohler a written demand for a reconveyance of the property which stated that their deed was given as a mortgage and security for their debt; that they believed the debt was fully paid by the rents and profits which were to be applied thereon; and that they offered to pay the balance, if any. Mr. Kohler told them that he had no authority to act and would have to submit the matter to Mr. Olsen, who was in the east. Without waiting for a reply, this action was filed on the same day.

The first trial resulted in a judgment for the plaintiffs, but a new trial was granted because of the insufficiency of the evidence. On a second trial before a different judge the court found, among other things, that all of the parties intended the deed to constitute a complete and absolute conveyance of the property, subject only to incumbrances of record and the plaintiffs' right to repurchase the property within one year; that none of the parties intended the conveyance to be a mortgage or any form of security; and that the plaintiffs had not exercised their right to repurchase the property within one year. Judgment was entered accordingly, a motion for new trial was denied, and the plaintiffs have appealed from the judgment. The main contentions here are 'that the uncontradicted evidence

shows that (this deed) was a mortgage, because given as security for a debt;" and that "in transactions between necessitous men and their creditors, courts of equity, * * * will compel the creditor to give back that which he has taken with unclean hands."

[1-5] The law applicable to such a situation is well settled. The burden is upon the party so claiming to prove that a deed absolute in form was intended as a mortgage to secure a continuing debt. *Gronenschild v. Ritzenthaler*, 81 Cal.App.2d 138, 183 P.2d 720. There is a strong presumption that a deed is what it purports to be, which should prevail unless the evidence to the contrary is clear and convincing. *Wehle v. Price*, 202 Cal. 394, 260 P. 878; *Beeler v. American Trust Co.*, 24 Cal.2d 1, 147 P.2d 583; *Deniz v. Ferraiz*, 91 Cal.App. 2d 416, 205 P.2d 113. Whether or not the evidence offered to establish an intention to change the ostensible character of the instrument is clear and convincing is a question for the trial court. *Beeler v. American Trust Co.*, 24 Cal.2d 1, 147 P.2d 583, 587. In that case, the court said: "It is without doubt the law, as repeatedly declared in our decisions, that clear and convincing evidence is required to justify a court in finding that a deed which purports to convey land absolutely in fee simple was intended to be a mortgage. 'That a deed purporting in its face to convey the title absolutely may be shown by parol evidence to be something else—namely, a mortgage—is a striking exception to the general rule, and it has been universally held that the character of the instrument cannot be thus changed except upon clear and convincing evidence.'"

The fact that a deed was taken subject to an option to repurchase, while a circumstance to be considered, is not in itself controlling. *Robinson v. Barnard*, 5 Cal.App.2d 396, 42 P.2d 711; *First Nat. Trust & Savings Bank of San Diego v. Edmonds*, 28 Cal.App.2d 26, 81 P.2d 1052. While the surrounding circumstances are to be considered, under all of the authorities, the controlling consideration is the intent of the parties and the secret intention of one party will not be effective to

change the character of the transaction. *Wehle v. Price*, 202 Cal. 394, 260 P. 878. *Deniz v. Ferraiz*, 91 Cal.App.2d 416, 205 P.2d 113.

[6] Mr. Kohler testified that a few days before July 23, 1940, he went to this service station in response to a call from Mr. Mealy; that Mealy referred to their attachment and said that he was financially involved and could not pay his debts which were beginning to close in on him; that he was just "sunk" and that he wanted to make a proposition regarding the station; that Mealy then stated "that he would deed us the property in payment of our account, if we would take care of the mortgage that was on the lots, and also take care of the payments" on a sales contract covering some of the equipment; that he told Mealy that they would accept his proposition in full payment of his account; that Mealy said he had discussed the matter with his wife and she approved; that at this first meeting Mealy asked whether, if they would deed the property, he would give them the privilege of repurchasing it within one year by paying up all moneys that the defendant might advance on the station, plus interest; that he told them he did not have that authority but would have to get it from Mr. Olsen; that he returned with the deed on July 23; that they then went to a notary, after picking up Mrs. Mealy, where the Meals executed the deed; and that he then returned to his office where he told Mr. Olsen, as he had told him before, that he had verbally agreed that the Meals should have one year in which to repurchase the property upon paying the defendant "all the money that was involved." Mr. Kohler further denied that he had at any time promised to give the plaintiffs a letter setting forth the terms of any oral agreement.

Mr. Olsen testified that the first he knew of this transaction was when Mr. Kohler told him "that Mr. Mealy had suggested that he give us a deed to the property in satisfaction of our judgment" upon the condition that they were to allow him to repurchase the property at any time within a year, by paying the amount due to the defendant plus any money it might pay

in protecting the property or any of the equipment, plus interest at 7% and expenses; that he agreed to this and had his attorneys prepare the deed; that when Kohler returned with the executed deed he told him to record it and ordered the proper entries to be made in the books cancelling the Mealy debt; and that a satisfaction of the judgment was "recorded in the court." He further testified that two or three days after the deed was given Mr. Mealy came to his office and said he would like to get a letter confirming his understanding with Mr. Kohler in reference to the taking of the deed; that the matter of a letter had not been previously mentioned to him; that he told Mealy he would be glad to have such a letter prepared; that Mealy told him "his understanding was that he could repurchase it within a year. He had hopes he could raise the money to do so"; that on the same day he dictated a memorandum expressing, in layman's words, his understanding of the agreement; that he sent this to his attorneys and explained what was desired; that his attorneys prepared and returned to him a letter for this purpose, together with an acknowledgment that the statements in the letter "are correct"; that he expected Mealy to return for the letter and wanted this acknowledgment signed when the letter was delivered; that Mealy did not return and the letter remained in his files; and that he heard nothing further from Mealy prior to the filing of this action.

The memorandum prepared by Olsen, which was undated, stated: "This will confirm Mr. Kohler's advice to the effect that in consideration of you and your wife deeding to us that certain real estate which we have covered by attachment, we in return will give you an option to repurchase said property from us at any time on or before May 1st 1941."

It further stated that the consideration for said repurchase would be "All of your indebtedness to us as of this date together with interest" and costs and expenses incurred in protecting defendant's title to the property. The letter prepared by the attorneys was addressed to Mr. Mealy, and

dated July 29, 1940. It stated that the deed had been recorded and in consideration thereof the defendant's judgment had been satisfied. It then stated that in the event Mealy should wish to purchase the property on or before May 1, 1941, the defendant would be willing to sell it to him at a price which would reimburse it for the amount of the judgment with costs and attorneys' fees, and all money which the defendant might be obligated to expend to protect its title or to remove liens and incumbrances, plus interest at 7%; that the consideration for this agreement was the cancellation of the present lease to the defendant and Mealy's agreement to immediately remove himself from the premises upon notice from the defendant; and that the letter was to confirm the fact that the parties intended the deed as an absolute conveyance and that it had not been given for purposes of security.

Mr. Mealy testified that Kohler came to the station about a week before the deed was signed and suggested that he deed the property to the defendant. He testified that Kohler stated that this would be a protection to both parties; that they would pay off the mortgage and equipment liens; that they would rent the station and credit the rentals received upon his debt and these bills; that "they agreed to pay the taxes and I could redeem the property at any time after that"; that he told Kohler he did not care about giving a deed; that Kohler told him they would give him a letter, signed by Olsen, agreeing to reconvey the property "any time that you pay us back the money we are out"; that he said he would be willing to do this and Kohler said he would go back to Fresno and get a deed; that Kohler returned with a deed about a week later but did not bring the letter; that he refused to sign the deed "until you produce the letter"; that Kohler said Olsen was out of town and he would get the letter signed and bring it down; that they went to his home and he asked his wife to sign the deed; that his wife called Kohler a "crooked snake" and refused to sign the deed; that he persuaded his wife to sign the deed because Kohler had promised a letter stating that they

could redeem the property at any time; that they then executed and delivered the deed; and that Kohler said he would bring that letter down as soon as Olsen got back. He also testified that four or five day later he telephoned to Kohler who said that Olsen was out of town, and that on his return Kohler would bring the letter; that after the date of the deed he stayed on about a month as Kohler asked him to operate the station and see if he could find a renter for it, and that he never went to the defendant's office in Fresno at any time prior to October 24, 1944. However, he testified in his deposition that he was up there about five months after the deed was given, at which time Kohler told him he knew nothing about the letter.

Mrs. Mealy testified to the same effect about the execution of the deed. She testified that she refused to sign the deed without the letter; that Kohler said he would bring a letter in a day or two which would state "that they would run the station and credit us with what they took in, and after they had gotten enough collected, * * * they would redeem it back to us" and "we was to redeem the place at any time"; that she still asked for the letter and told Kohler she had no faith in him; that her husband told her she better sign and she finally signed it; that about a month later she went to the defendant's office and inquired about the back taxes and asked about the letter that was promised; that she was given the figures of the back taxes which had been paid and was told that Kohler knew nothing about the letter; and that she never saw Kohler again until October 24, 1944. In her deposition, which was taken before a court reporter in October, 1944, Mrs. Mealy testified that just before the deed was signed Mr. Kohler promised to produce the letter "if we would sign the deed." After several evasive answers as to what the contents of the letter were to be, she was asked "Was there anything said about what was to be in the letter?" She replied, "No". A little later she was asked, with reference to this conversation with Mr. Kohler, "Did he tell you what the Sunland was going to do with the property if you deeded it to

them?" She replied, "No, he didn't tell me." More than a month later, after discussing the matter with her attorney, she changed her answers to these two questions so that the first answer read: "Yes. He said the letter protected us—that we could redeem at any time if we paid them the difference between what they collected and what we owed, and when they collected enough to pay them off, they would deed our property back to us"; and the second answer read: "Yes. That they were going to operate it and credit us with the income."

In support of the claim that the evidence was insufficient the plaintiffs mainly rely on two writings as conclusively proving that Kohler had promised a letter in advance and that, after the deed was given, the debt continued to exist and the defendant still recognized that the plaintiffs were the owners of the property. It is first argued that the memo prepared by Olsen, as above referred to, discloses Kohler's previous promise to give a letter, and that it recognized that the debt still existed at that time because it refers to plaintiff's indebtedness "as of this date." This memo purports to confirm the fact that there had been a repurchase agreement, but not that a letter had previously been promised. It clearly refers to the agreement under which the deed had just been given and accepted, and it was obviously intended to refer to the time of that transaction which was thus to be confirmed. It was prepared by a layman and was intended to be neither final nor technically correct. It is further argued that the defendant, in the two leases later given to Mathews, recognized that the plaintiffs still owned the property. These leases contained a statement to the effect that the lessor was holding under a lease from the owner of the premises, that this was a sublease, and that the lessee agreed to do nothing which would impair the rights of the lessor under the original lease. These leases were on printed forms, with this clause near the middle of two pages of fine print. There is evidence that the defendant leased a large number of stations, that practically all of these were leased from the owners of the land and subleased to an operator, and that

the defendant mistakenly overlooked this clause in using its usual printed form for the Mathews leases. These two matters are a part of the surrounding circumstances and were properly presented for consideration, but they are not controlling.

The presumption is in favor of this deed, and there is substantial evidence to the same effect. The surrounding circumstances tend to support that conclusion. It hardly seems reasonable that the defendant would agree to give up its favorable position under its judgment and execution, to pay all bills and operate the station indefinitely for the benefit of the plaintiffs, and to allow them to "redeem" at any time in the future. While claiming to have been especially concerned in receiving a promised letter, and while claiming that the defendant repudiated that promise shortly after the deed was given, the plaintiffs did not again contact the defendant or take other action for more than four years. The credibility of the witnesses was for the trial court, and the plaintiffs' own testimony is quite suggestive in this regard. Under applicable rules it must be held that the evidence is sufficient to support the findings as to the intention of the parties, and that the conflicting evidence is not so clear and convincing as to justify a reversal.

[7] It is further argued that the deed must be held to be a mortgage because of the disparity between the value of the property and the price paid by the defendant. Three witnesses for the plaintiffs testified that the property was worth between \$6,000 and \$7,000 at the time the deed was given. Three witnesses for the defendant gave it a value, at that time, of from \$2,500 to \$3,500. It appears, without conflict, that in accordance with its claimed agreement it cost the defendant \$3,163.57. Under the conflicting evidence, it cannot be held there was any discrepancy which could be controlling. *Wehle v. Price*, 202 Cal. 394, 260 P. 878.

[8] It is contended that the court erred in allowing parol evidence to vary the terms of the leases from the defendant to Mathews. These leases provided for a

rental of \$10 a month, plus one cent a gallon for the gasoline sold. Evidence was received that the defendant waived the one cent per gallon provision, and that this rental was never paid. Aside from other considerations, the plaintiffs were interested in this matter only in the event of an accounting, and neither error nor prejudice appears. A further contention that four of the incidental findings were unsupported by the evidence, is without merit.

A final contention is made with respect to the matter of laches, which was found as a conclusion by the court. In view of the other findings, and the evidence in support thereof, this matter is immaterial.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



96 Cal.App.2d 571

**PEOPLE v. GLOBE & RUTGERS
FIRE INS. CO. et al.
No. 14158.**

District Court of Appeal, First District,
Division I, California.
March 22, 1950.

Action by the People against Globe & Rutgers Fire Insurance Company and against Carl N. Swenson Company for declaratory relief to determine liability under a marine policy insuring against particular average loss. The Superior Court, City and County of San Francisco, James G. Conlan, J., entered a judgment for plaintiff against the insurer, and the insurer appealed. The District Court of Appeal, Bray, J., held that the cost of dredging to recover a broken spud from an insured marine dredge was a particular average loss within the policy.

Judgment affirmed.

I. Insurance ⇨125(3)

Where marine insurance policy stated that policy was subject to English law and uses, California courts would refer to

English law to decide issues arising thereunder.

Facts.

2. Insurance ☞478

Under marine policy insuring a dredge and providing that insurer would not pay for repairs attributable to particular average loss under a stated amount, and also requiring insured to minimize loss under the policy, item incurred in dredging for recovery of broken spud to permit repairs as quickly and as reasonably as possible was not incurred for preservation of the insured subject matter and hence was an item for which insured could recover under particular average clause.

3. Insurance ☞665(4)

In action by State as owner of marine dredge on policy insuring against particular average loss, evidence sustained findings that services of state's Chief Engineer were necessary to repair of dredge and that a 5 per cent inspection fee was reasonable.

Hauerken & St. Clair, San Francisco, for appellant.

Fred N. Howser, Attorney General, Harold B. Haas, Deputy Attorney General, Miriam E. Wolff, Deputy Attorney General, for respondent People.

Victor A. Chargin, Gerald S. Chargin, San Jose, for respondent Carl N. Swenson Co.

BRAY, Justice.

In an action for declaratory relief brought by plaintiff, People of the State of California, against defendants Globe and Rutgers Fire Insurance Company, a corporation,¹ and Carl N. Swenson Company, a corporation,² plaintiff recovered judgment against Globe in the sum of \$2051.01. Judgment that plaintiff take nothing was rendered in favor of Swenson. Globe alone appealed.

Although the items are disputed, there is practically no dispute as to the facts. The State of California, through the Board of State Harbor Commissioners, in 1943 entered into a contract with Swenson under which the State, using its own dredge, was to perform certain dredging work for Swenson. The latter had an overall job under contract with the United States Navy. The State was to take out marine insurance on the dredge used, the premiums for which were to be, and were, paid by Swenson. Swenson also agreed to pay for any damage to the dredge not covered by marine insurance. The State obtained the insurance with Globe. Aside from a \$1000 deductible clause, the policy provided that Globe would not pay for repairs attributable to "particular average" loss, unless the total of such loss exceeded 3 per cent of the value of the insured equipment (\$3000 here, since the dredge was valued at \$100,000).

The dredge was injured and the State, after several revisions, presented a claim to Globe for \$3,051.01, less the \$1000 deduction. Globe denied the claim on the ground that deducting the items not properly chargeable to particular average, the claim did not come to \$3000. Swenson paid the State the deducted \$1000 (as Swenson was liable for any damage not covered by the insurance), but refused to pay more on the ground that the particular average loss exceeded \$3000, and hence should be paid by Globe. To effect a solution in the nature of interpleader, plaintiff brought an action for declaratory relief. The court found that the particular average loss was \$3051.01, and gave plaintiff judgment against Globe alone for \$2051.01 (as before stated \$1000 was deductible).

The policy issued by Globe was known as the "American Hulls (Pacific) 1938 Deductible Average Form." It contained a provision "D. Warranted to be subject to English law and usage as to liability for

1. Hereinafter referred to as "Globe."

2. Hereinafter referred to as "Swenson."

It was stipulated that Swenson was a

partnership and the pleadings considered amended accordingly.

and settlement of any and all claims.”³ In April, 1943, an accident occurred, in which the “spuds” of the dredge (large beams which go down to the bucket which does the actual dredging) were broken. The dredge was taken to a pier where the broken spuds were removed and spare spuds installed. The State originally estimated the total cost of repairs, installation and replacement would be about \$2000. A surveyor employed by Globe estimated the cost at \$2500. On December 9, 1943, the State presented a claim to Globe for \$2801.72. (This was under the \$3000 minimum and hence not payable by Globe.) Thereafter the State submitted a revised claim amounting to \$3051.01. Globe refused to pay, claiming that certain items hereafter mentioned were not properly chargeable to particular average. After this suit was brought the State asked and was granted leave to amend its complaint to include an item of \$256.78 for “Cost of installing new spuds on dredge.” The State did not increase its claim in that amount, but wanted the item considered in determining if the amount attributable to particular average exceeded \$3000. The court found that the particular average loss was in excess of \$3000, exclusive of charges, if any, under the “sue and labor” clause of the policy and of charges for salvage or “any charge other than the reasonable cost of repairs to the dredge.”

Question Presented.

Globe challenges the court's findings as to three items only. These will be considered seriatim. As to the first item, Globe's main contention is that it is not chargeable under the particular average clause of the policy as that term is defined under English statutory and case law, but under other provisions. As to the second and third items, Globe contends mainly that they are not allowable at all. If any two of the three items are improper charges, the total particular average loss would be below \$3000 and hence Globe would not be liable for any particular average loss.

3. At the trial it was stipulated that the English law and usage might be proved

The Marine Insurance Act of 1906 (6 Edw. 7, c. 41) provides in part: “64.—(1) A particular average loss is a partial loss of the subject-matter insured, caused by a peril insured against, and which is not a general average loss. (2) Expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called particular charges. Particular charges are not included in particular average.”

“65.—(2) ‘Salvage charges means the charges recoverable under maritime law by a salvor independently of contract. They do not include the expense of services in the nature of salvage rendered by the assured or his agents, or any person employed for hire by them, for the purpose of averting a peril insured against. Such expenses, where properly incurred, may be recovered as particular charges or as a general average loss, according to the circumstances under which they were incurred.’”

“78.—(1) Where the policy contains a suing and labouring clause, the engagement thereby entered into is deemed to be supplementary to the contract of insurance, and the assured may recover from the insurer any expenses properly incurred pursuant to the clause, notwithstanding that the insurer may have paid for a total loss, or that the subject-matter may have been warranted free from particular average, either wholly or under a certain percentage.

* * * (4) It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimizing a loss.”
1. Item:—“Dredging for Recovery of Broken Spud—\$175.”

This amount was included in the original claim. This charge arose as follows: After the spare spuds were put on the dredge, the State was making a new set of spare spuds. Due to the war there was a shortage of materials and it was found that to obtain a new spud point would require perhaps 6 months delay and would cost over

in the same manner as California law would be proved.

\$500. The State therefore decided to retrieve the broken spud point and weld it onto the old spud. They dredged for it, succeeded in recovering it, and welded it to the spud. Globe does not dispute that the work was done, that \$175 is a reasonable charge, and that Globe is liable to plaintiff for it, but contends that it is not liable under the particular average clause. Globe contends that under the policy it was the duty of the State to take all reasonable measures for the recovery of the thing insured and for its preservation from greater loss and that in recovering the spud point the State was so doing and the cost thereof is a "particular charge" as distinguished from "particular average" and is only recoverable under the "sue and labor" provision of the policy.

[1,2] As the policy is subject to English law and usage, recourse must be had to English law to decide the issues. *Canton Ins. Office v. Woodside*, 9 Cir., 90 F. 301; *Boole v. Union Marine Ins. Co., Ltd.*, 52 Cal. App. 207, 198 P. 416. As stated in the extracts from the Marine Insurance Act hereinbefore set forth, "particular average" means a "partial loss of the subject-matter insured" and does not include expenses incurred for its safety or preservation, for salvage or for "general average" (which means a total loss). For practical application particular average means the reasonable cost of repairing the subject matter insured. Particular average does *not* include the cost of measures taken for the recovery of the thing insured or for its preservation from a greater loss. *Kidston v. Empire Insurance Co.* (1866) L.R. 1 C. P. 535, affirmed in (1867) L.R. 2 C.P. 357. Such matters are recoverable under the sue and labor clause of the policy. *White Star S.S. Co. v. North British & Merc. Ins. Co., D.C.*, 48 F.Supp. 808. Both parties concede the law to be as above set forth. However, plaintiff contends that Item 1 is a part of the reasonable cost of the repairs to the dredge, while defendant contends it is the cost of measures taken for the recovery of the thing insured or for its preservation from greater loss. Neither side has cited a case where the facts are similar. In *Ciconett v. Home Ins.*

Co., D.C., 80 F.Supp. 429, it was held that the expenses of an unsuccessful attempt to raise a sunken towboat were recoverable under the sue and labor clause in a marine insurance policy. Defendant reasons that by analogy, the raising of the spud point in our case must necessarily come under that clause. There is a distinction, however, between attempting to raise or raising the thing insured, i. e., the dredge, and the recovery of a small part of the dredge for purposes of repair.

In *Indianapolis Insurance Co. v. Mason et al.*, 11 Ind. 171, a boat sank in the river, damaging a load of hay to the extent of less than 20 per cent of its value. The court held that the freight charges in sending the hay, after the accident, to its destination to save the loss of the cargo, could not be added to the amount of damages to the hay to bring the loss over the 20 per cent required to make the insurance company liable. Such a ruling, however, is not authority for the proposition claimed here, that dredging for the point was not an expense of repair but rather one of minimizing loss. Loss of cargo is considerably different from repairs to the ship.

The basic question to be determined here is whether the questioned items are in connection with repairs to the dredge, or are in connection with the preservation of the dredge or expenses incurred in minimizing loss. It is a close question. In a sense, the expenses in Item 1 might be considered as incurred in carrying out the provision of the policy which required the assured to minimize the loss. However, it seems more reasonable to consider them as a part of the cost of repair. Had the State gone to a warehouse or sent east for the necessary spud point there is no question but that the cost of getting such point would have been considered a part of the cost of repair. Here the State recovered the point from the mud. It was not acting in "preservation of the subject-matter insured," the dredge. It was merely repairing a spare part for the dredge. Nor, strictly speaking, was it taking "such measures as may be reasonable for the purpose of averting or minimizing a loss." It was acting to get the repairs done as quickly

and as reasonably as possible, and the cost thereof is a part of the cost of repairs.

2. Item:—"Engineering and Inspection Fee 5%—\$145.29."

[3] This item was added to the revised claim. Globe contends that it was unnecessary for the State to provide any engineering or inspection in connection with the repairs, and that the amount charged is arbitrary and its reasonableness not proved. Globe admits that if the services were necessary they would come within the definition of particular average. The State's Assistant Chief Engineer testified to performing the following services: He surveyed the damage on a visit to pier 43 shortly after the accident, decided that it would be necessary to put in the spare spuds, and got busy on securing bids for a derrick to lift the old spuds out and put the spares in. It was difficult to find an available derrick because of the war work, but he finally made arrangements with Healy-Tibbits Company. When arrangements had been made for the derrick, he started to arrange about having new spare spuds constructed. In this connection he drew up specifications, had them mimeographed, and mailed them to wooden ship-building companies around the bay, asking for bids. He then canvassed the bids, and let a contract to the low bidder. Because of a change on the dredge, he had to send out a modification of the specifications. He spent about four days making all of these arrangements. In addition, the dredge superintendent, another State employee, spent about four days inspecting the work as it progressed. He considered that the 5 per cent fee claimed was reasonable compared to fees usually charged for such work. If the fee had been computed according to the actual working time of the two men, plus a reasonable overhead, it would have exceeded the amount actually claimed, which was set at 5 per cent purposely, to be reasonable. He was not paid anything extra for all of the work involved, but he was forced to postpone all of his regular duties during that time.

Bull v. Insurance Co. of North America, 2 Cir., 218 F. 616, does not apply to the situation here. There, a charge for "Su-

perintending repairs—\$82" which included \$70 paid for services of the insured's own salaried employee, was disallowed because "it was not shown what his salary was, so there was no way to ascertain what would be the pro rata for the time he was employed on this job (the \$70 is an arbitrary charge)." 218 F. at page 618. In our case the engineer detailed at some length the services rendered in preparing specifications, preparation of bids, and inspection of the work, and the time of himself and the superintendent it took. (Globe's own engineer testified that supervision of the work was necessary.) The charge of 5 per cent was not arbitrary; it was stated to be a sum less than the reasonable charge for the hours involved.

Defendant contends that the *Bull* case, *supra*, is authority for the proposition that fees for preparation of plans, supervision and inspection cannot be allowed unless all proper repair charges cause the loss to exceed the 3 per cent (here \$3000) minimum of the particular average clause, and cannot be availed of to increase the loss to 3 per cent. The *Bull* case does not so hold. It does hold that charges for "Surveys, Protest charges, [and] Adjuster's charges", 218 F. at page 618, can be considered only if the loss otherwise exceeds the 3 per cent (none of these charges are included here). The court in that case allowed the cost of "Superintending repairs" to be included in the computation of the 3 per cent loss.

The court found the services necessary and the charge reasonable. Having in mind that the State usually requires specifications for and bids on work to be done for it and requires that such work be under state inspection, there is sufficient evidence to justify the court's finding that the services were necessary in the repairing of the dredge. Also the fact that a detailed charge for the time involved would have resulted in a higher charge justifies the court's finding that the charge was reasonable.

3. Item:—"Cost of Installing New Spuds on Dredge—\$256.78."

This item was added at the trial by an amendment to the complaint. It was a

charge made for the wages of the crew for the 12 hour period that the dredge was laid up for repairs, on the theory that the crew were assisting in the work of installing the new spuds. No claim was made for it, it being used merely for the purpose of showing that the full cost of the repairs to the dredge exceeded \$3000, and hence brought the submitted claims within the particular average provision of the policy. Inasmuch as we find that Items 1 and 2 were properly chargeable to particular average, and adding them to the repair charges which are conceded by Globe to be correct, brings the total amount to \$3051.01, it is unnecessary to consider this item further.

The judgment is affirmed.

PETERS, P. J., and SCHOTTKY, J.
pro tem., concur.



**SOUTHERN CALIFORNIA JOCKEY CLUB,
Inc. v. CALIFORNIA HORSE RACING
BOARD et al.**
Civ. 17437.

District Court of Appeal, Second District,
Division 2, California.

March 24, 1950.

As Corrected March 27, 1950.

Rehearing Denied April 10, 1950.

Hearing Granted May 15, 1950.*

Application by Southern California Jockey Club, Inc., (a corporation) for a determination that conducting of horse race meetings would be consistent with public interest and would subserve purposes of statutes. The California Horse Racing Board denied the application, and applicant filed petition for writ of mandate and complaint for injunction and declaratory relief against California Horse Racing Board, and Loyd Wright, and others, as members thereof. The Superior Court of Los Angeles County, Stanley Mosk, J., upheld the constitutionality of the licens-

ing provision of the statute, and entered judgment for defendants, and applicant appealed. The District Court of Appeal, Moore, P. J., held that statute granting board power to grant all applications, or refuse to issue a license to any applicant without prescribing ascertainable standards for guidance of the board, violated Constitution and was void.

Judgment reversed.

1. Administrative law and procedure ⚡209
Constitutional law ⚡62

The delegation by the legislature of uncontrolled discretion to an administrative agency is a nullity.

2. Administrative law and procedure ⚡208
Constitutional law ⚡62

The legislature may delegate authority to administrative boards to adopt and enforce reasonable rules for effectuating purposes of a statute, but it may not invest such boards with a purely arbitrary discretion, or delegate to board power to determine what law shall be in a particular case, or to adopt rules which abridge, enlarge, extend, or modify statute creating right, and legislature must provide standards for guidance of administrative agency. Const. art. 1, § 21; art. 4, § 25, subd. 19.

3. Constitutional law ⚡60

The legislature cannot delegate power to make law which necessarily involves a discretion as to what it shall be, but the legislature has power to confer an authority or discretion as to execution of law to be exercised under and in pursuance of the law. Const. art. 1, § 21; art. 4, § 25, subd. 19.

4. Administrative law and procedure ⚡209
Constitutional law ⚡62

A statute, to be a valid delegation of authority to an administrative board to exercise a discretion concerning valuable rights or privileges, must prescribe ascertainable standards for guidance of those selected to exercise such discretion. Const. art. 1, § 21; art. 4, § 25, subd. 19.

5. Administrative law and procedure ⚡209
Constitutional law ⚡62

States ⚡4.3

Theaters and shows ⚡2

Statute creating horse racing board and permitting board to grant all applica-

* Subsequent opinion 223 P.2d 1.

tions or refuse to issue a license to any applicant arbitrarily, without prescribing ascertainable standards for guidance of those selected to exercise discretion, constituted such delegation of authority as was inhibited by state constitution forbidding delegation of legislative authority, and violated federal constitution guaranteeing a republican form of government, and was void. Business and Professions Code, §§ 19400-19663; Const. art. 1, § 21; art. 4, § 25, subd. 19, § 25a.

6. Constitutional law ☞24

Where horse racing board derived its licensing power from statute, constitutional sanction of statute, by a constitutional amendment duly adopted, did not constitute authority to remove valid provisions from statute by amendatory statute, insert other void provisions, and then assert that amendatory statute was valid on basis that original statute was authorized by constitutional amendment. Business and Professions Code §§ 19400-19663; Const. art. 1, § 21; art. 4, § 25, subd. 19, § 25a.

7. Statutes ☞64(8)

Part of statute as amended, authorizing horse racing and establishing horse racing board which was valid in itself, was not separable from void licensing section which failed to prescribe ascertainable standards for guidance of board and entire statute was void. Business and Professions Code, §§ 19400-19663, 19480, 19480.5; Const. art. 1, § 21; art. 4, § 25, subd. 19.

Athearn, Chandler & Farmer, Hoffman & Angell, F. G. Athearn, Leigh Athearn, San Francisco, for appellant.

Fred N. Howser, Attorney General, Kenneth E. Lynch, Assistant Attorney General, Howard S. Goldin, Deputy Attorney General, for respondents.

MOORE, Presiding Justice.

Appellant was obviously incorporated for the purpose of conducting horse race meetings at Puente. With a view to accomplishing that object it filed an application with respondent board for a determination that the conducting of such meetings will be consistent with the public interest and will subserve the purposes of the Horse Racing Act. The matter having been duly tried, the board determined and adjudged that the applicant had failed to establish that the conducting of horse race meetings at the proposed track would be in the public interest and would subserve the purposes of the Horse Racing Act and made its order denying the application.¹ Appellant then presented the matter to the superior court by petition for writ of mandate and complaint for injunction and declaratory relief in which it attacked the constitutionality of the licensing provisions of the Horse Racing Act and alleged that the evidence was insufficient to support the implied findings of the board. Issue having been joined by respondent's answer and return, trial was had, findings made and judgment entered upholding the constitutionality of the licensing provisions of the Horse Racing Act and the sufficiency of the evidence to support the determination that the holding of horse racing meetings at Puente would not subserve the purposes of such act. Inasmuch as the court is in agreement upon the unconstitutionality of the provisions relating to the granting or denying of annual licenses for race tracks, a decision of that issue will suffice for the purposes of this action.

Appellant contends that the vice of the statutes authorizing licenses for race tracks lies in the fact that there has been an unconstitutional delegation of power from the legislature to the Horse Racing Board; that there are no limits set upon the board's

1. Business and Professions Code, sec. 19480.5: "The board shall not issue a license to conduct a horse racing meeting at any place, inclosure, or track, not used for horse racing meetings prior to July 1, 1941, unless prior to the beginning of the construction or preparation

of such place, inclosure, or track for horse racing meetings, the board, upon application in such form as it may require, has determined that conducting horse racing meetings at such place will be in the public interest and will subserve the purposes of this chapter."

discretion in granting such permits. Section 19480 of Business and Professions Code² provides that the board "may issue * * * a license" to any applicant to conduct a horse racing meeting at any place if he "has complied with the provisions of this chapter." That section is followed by section 19480.5 to the effect that such license shall not issue to conduct a horse racing meeting at any place unless prior to the beginning of the construction of such place the board has determined that such meetings "at such place will be in the public interest and will subserve the purposes of this chapter." In other words, no license can issue until the meeting place has been approved and thereafter it "may" not issue at the pleasure of the board. The two statutes put the law in a state of confusion and uncertainty which requires a consideration of the origin and constitutional basis of the Horse Racing Act.

Prior to 1933 there was no constitutional provision relating to horse racing. The only statutes that affected it were sections 337a, 337b, 337c and 337d of the Penal Code, enacted in 1921 and previous years. They forbade (1) bookmaking, (2) receiving money wagered upon the result of contests of "skill, speed or power of endurance of man or beast", (3) permitting any inclosure to be used or occupied for any purpose prohibited by the statute, (4) making bets upon the results of contests of skill, speed or power of endurance. Also they inhibited giving or receiving bribes for the purpose of causing a participant in contests of skill and of endurance other than the superior man or beast to win. Under such statutes horse racing was in effect forbidden for the evident reason that horse racing does not thrive unless it is made profitable by some plan for wagering on the results of the races.

In 1933 the legislature enacted the Horse Racing Act, Stats. 1933, ch. 769, p. 2046, whereby the California Horse Racing

Board was created with state-wide jurisdiction. Also, the statute gave the board power to issue two kinds of annual licenses, namely, (1) to the person or corporation holding any horse racing meeting where wagering is permitted, and (2) to "horse owners, riders, agents, trainers, stewards, starters, timers, judges and others acting as officials. * * * No qualified person shall be refused such license, nor shall such license be revoked without just cause." The act also provided for the board (1) to have power to award racing dates to track operators, (2) to apportion racing days permitted in the respective counties to such licensees as shall in the judgment of the board "appear to be for the best interests of legitimate racing and of the public." By the phrase "the best interests of legitimate racing and of the public" a fixed and adequate standard was prescribed whereby the board might determine which tracts should each year be awarded racing days.

Sections 9 and 11 of the act of 1933 were mandatory. Section 9 provided that "Upon the award to any application and upon payment of license fees * * * the board *shall* issue a license", permitting the licensee during the days awarded to him to conduct horse race meetings at its track and wagering on the results thereof. Section 11 of the act provided that upon the filing of a written application for a license in accordance with the act and "upon the payment of the license fee * * * it *shall be within the power* of the board to issue a license to the applicant to conduct a horse race meeting." The language used in both the quoted sections makes it mandatory upon the Racing Board to issue the license. *Chase v. United States*, 256 U.S. 141 S.Ct. 471, 65 L.Ed. 801; *Robinson v. Payne*, 20 Cal.App.2d 103, 106, 66 P.2d 710. The guiding rules prescribed by the act of 1933 lacked nothing in clarity or effectiveness. The board was vested with discretion to award or deny racing

2. "The board may issue to any person who makes application therefor in writing, who has complied with the provisions of this chapter and who makes the deposit to secure payment of the license fee

required by this article a license to conduct a horse racing meeting in accordance with this chapter at the place, inclosure or track specified in the application."

dates to any track in the event it should find that the interests of the public as well as of racing should require such decision. But if the board had awarded the dates for racing it became obligatory upon the board to issue a track license on receipt of the fee.

During the legislative session of 1933 an act was adopted providing for the submission to the qualified electors at a special election on June 27, 1933, of an amendment to the constitution. Stats.1933, p. 841. The amendment³ was adopted and is now known as section 25a of Article IV. The effect of the amendment was to ratify and confirm the Horse Racing Act and to make it completely effective. *Sandstrom v. California Horse Racing Board*, 31 Cal. 2d 401, 404, 189 P.2d 17, 3 A.L.R.2d 90. By such act of the people, section 337a et seq. of the Penal Code were rendered ineffective as to betting on horse races at licensed tracks.

Under the act of 1933 the board had authority to grant or deny a track license, but the standards for guidance were controlling upon the board. In such condition the act was valid and workable. But the legislature was not satisfied with the act which had been ratified by the people in 1933. By the Horse Racing Act adopted in 1941, Statutes 1941, p. 669, the legislature added chapter 4 to Division VIII of the Business and Professions Code. Secs. 19400 to 19663. The result of such addition is that all the existing law applicable to the licensing of horse racing is embraced within such chapter. Instead of the mandatory language contained in sections 9 and 11 of the original 1933 act, the Business and Professions Code now has the permissive section 19480. While it permits the board to issue a license, and applicant has two handicaps to overcome be-

fore such event may occur, namely, (1) he must make application for the board to determine that the conducting of horse racing meetings at the place designated in the application will be in the public interest and "will subserve the purposes of this chapter"; (2) should the decision of the board grant the application, the board is at liberty under section 19480 to grant or deny a license to conduct a horse racing meeting. This brings us to a consideration of the validity of section 19480.

[1,2] It is elemental that the delegation by the legislature of uncontrolled discretion to an administrative agency is a nullity. While the legislature may delegate authority to administrative boards to adopt and enforce reasonable rules for effectuating the purpose of a statute, it may not invest such boards with a purely arbitrary discretion; neither may it delegate to a board the power to determine what the law shall be in a particular case, *In re Peppers*, 189 Cal. 682, 688, 209 P. 896; *In re McLain*, 190 Cal. 376, 381, 212 P. 620, or to adopt rules "which abridge, enlarge, extend or modify the statute creating the right." *Blatz Brewing Company v. Collins*, 69 Cal.App.2d 639, 645, 160 P.2d 37, 41. The legislature must provide standards for the guidance of the administrative agency. 11 Am.Jur. 955, sec. 240; *U. S. v. L. Cohen Grocery Co.*, 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516; 14 A.L.R. 1045. In *Jersey Maid Milk Products Company v. Brock*, 13 Cal.2d 620, 91 P.2d 577, the statute was attacked on the ground that it leaves the designating of the marketing area of milk producers solely and entirely in the uncontrolled discretion of the director of agriculture. While rejecting the attack made, the court held that if there is no designation of any standard of measurement in the act by which the di-

3. "The Legislature *may* provide for the regulation of horse races and horse race meetings and wagering on the results thereof. The provisions of an act entitled 'An act to provide for the regulation and licensing of horse racing, horse race meetings, and the wagering on the results thereof; to create the California Horse Racing Board for the regulation, licensing and supervision of said

horse racing and wagering thereon; to provide penalties for the violation of the provisions of this act, and to provide that this act shall take effect upon the adoption of a constitutional amendment ratifying its provisions,' are hereby confirmed, ratified, and declared to be fully and completely effective; provided, that said act may at any time be amended or repealed by the Legislature."

rector may be guided, with no limitation or direction in the exercise of the power so given, then it is a void attempt to delegate legislative power to an administrative officer.

[3] The true distinction is between the delegation of power to make law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done. To the latter no valid objection can be made.

[4, 5] From the foregoing the rule is established that to be a valid delegation of authority to an administrative board to exercise a discretion concerning valuable rights or privileges, the statute must prescribe ascertainable standards for the guidance of those selected to exercise such discretion. Section 19480 is devoid of such guiding rules or standards. The board may grant all applications or refuse to issue a license to any applicant and still comply with the section. It may refuse a license because it does not like the location which it has but recently approved. It may refuse a license because its members are opposed to racing and betting on religious or moral grounds, or because they have interests in the successes of established race tracks or in other locations. Thus arbitrarily to grant special powers to a triumvirate enables the latter to control the success or failure of an applicant for a license to operate a horse racing meeting at an approved place or to grant or deny any applicant without strict regard for his merit. It is more than a rule-making power. It is such delegation of authority as is inhibited by the organic law, Calif.Const., Art. I, sec. 21; Art IV, sec. 25, subd. 19, and is violative of the Federal Constitution guaranteeing a republican form of government.

[6] Respondent contends that "since the Horse Racing Act of 1933 was given express constitutional sanction by a constitutional amendment duly adopted, the authority of respondent board to adopt a licensing scheme as to all licenses provided for in the act stems directly from the Con-

stitution of the State and that no question of unconstitutional delegation of authority arises." In support of such contention respondents cite *Sandstrom v. California Horse Racing Board*, 31 Cal.2d 401, 189 P.2d 17, 3 A.L.R.2d 90. Of course, the Constitution has not by explicit terms conferred such powers upon the board as those of which they now claim to be possessed. The people approved the legislative act of 1933. There is nothing in the constitutional amendment, sec. 25a to indicate that the approval of the original act is *carte blanche* authority to remove valid provisions from the act approved, insert others that are void and then assert the latter's validity on the basis that section 25a authorized amendments to the first act. The authorization to amend implied that the amendments would comport with the old act and with other pertinent provisions of the Constitution. The *Sandstrom* decision related to licenses of trainers of the horses who were subject to rules of the board. Such rules were declared valid as having been made by the board pursuant to the act of 1933 giving it "full power to prescribe rules, regulations and conditions." By nothing said in the *Sandstrom* decision or in section 25a can it be concluded that the legislature is no longer bound by the constitutional limitations upon the delegation of power. Indeed, the very fact that the act of 1933 specified standards for the guidance of the board's discretion in granting dates and annual licenses to tracks indicates a desire of the people to have the delegation of power restricted. The removal of those restraints can be ascribed to nothing more than an oversight by the legislators when in 1941 they attempted to codify the statutes enacted for the governance of horse racing and wagering. While some powers of the board may derive from the constitution, its licensing powers are of purely statutory authority, see *Blatz Brewing Co. v. Collins*, 88 Cal.App.2d 438, 199 P.2d 34, and since they grant arbitrary power to the board, they are void.

Section 25a, *supra*, was not authority for the legislative attempt in 1941 to grant the board power to determine the merits

of applications for track licenses with no standards for guidance. That amendment merely ratified the statute already enacted which provided for the automatic issuance of a license whereas by section 19480 the license is dependent upon the native endowments of the board members. The board contends that standards are provided by section 19480.5 which requires the board to determine that conducting horse racing meetings at the place designated will be in the public interest and will "subserve the purposes of this chapter." But such language does not determine the issuance of a license. They contend also that section 19562⁴, Business & Professions Code, provides a standard in that it declares "the encouragement of agriculture and the breeding of horses" is the purpose of the chapter. Although a requirement that the action of the board be governed by the purposes of an act may establish a sufficient standard, *Jersey Maid Milk Products v. Brock*, 13 Cal.2d 620, 658, 91 P.2d 577, that principle is unavailing here. There is nothing said in section 19480 about the board's actions being based on the purposes of the act. If such had been the legislative intent, it would have provided that the license issue automatically upon determining an application under section 19480.5 favorably to the applicant.

4. "It is hereby declared that since the purpose of this chapter is the encouragement of agriculture and the breeding of horses in this State a sum equal to 10 per cent of the first money of every purse won by a 'California bred' horse shall be paid by the licensee conducting the horse racing meeting to the breeder of such animal. A 'California bred' horse, within the meaning of this section, shall, prior to January 1, 1944, be deemed to be a foal dropped by a mare in California, whether conceived in California or not, and after January 1, 1944, shall be deemed to be a foal dropped by a mare in California after being bred in Cali-

In *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 S.Ct. 241, 79 L.Ed. 446, the court held a delegation to the President improper and rejected a contention that the purposes and policy of the act provided a standard or rule for the guidance of the President.

[7] The board argues that appellant is not entitled to attack section 19480 for the reason that it has not obtained a favorable determination of its application under 19480.5 and thus has not "complied with the provisions of this chapter" as specified in 19480. In other words, since appellant is not injured by the latter section it cannot attack that statute. While that contention acknowledges a favored doctrine it is not pertinent here. Although 19480.5 is valid in itself, it is not separable from, and cannot be used as a shield to protect section 19480.

Section 19480 contains the basic licensing power in Article 4 of Chapter 4 which deals with "Licenses for Track Operators." All other sections of the article follow it and qualify it and are utterly meaningless without it. Since it is void the remaining sections fall.

The judgment is reversed.

McCOMB and WILSON, JJ., concur.

fornia and remaining in California until the foal is weaned. The board shall by rule provide for the registration of all 'California bred' horses.

"Every licensee conducting a horse racing meeting shall run at least one race each racing day to be known as a 'California bred race' which shall be limited to California bred horses as defined in this section.

"If, however, sufficient competition cannot be had among such class of horses, the race may, with the consent of the board, be eliminated for the day and a substitute race provided."

96 Cal.App.2d 531

LA VIGNE v. LA VIGNE.

No. 14098.

District Court of Appeal, First District,
Division 1, California.

March 20, 1950.

Hearing Denied May 18, 1950.

Divorce action by Beatrice Alice LaVigne against Everett Phillip LaVigne on ground of extreme cruelty. Defendant filed a cross-complaint for divorce. The Superior Court in and for the City and County of San Francisco, Robert McWilliams, J., awarded plaintiff an interlocutory decree of divorce, all of community property, denied defendant's cross-complaint, and defendant appealed. The District Court of Appeal, Bray, J., held that evidence was sufficient to sustain granting plaintiff a divorce, and that court did not abuse its discretion in awarding community property to plaintiff.

Affirmed.

1. Divorce ⇨184(10)

On appeal from decree granting wife a divorce for extreme cruelty, District Court of Appeal had duty to determine if testimony substantially supported trial court's finding that defendant was guilty of extreme cruelty.

2. Divorce ⇨127(4)

In divorce action based on grounds of cruelty, all acts of cruelty charged by party to whom decree is granted need not be corroborated, but corroboration of a single act of cruelty may be sufficient.

3. Divorce ⇨127(4)

In divorce actions, principal object of rule requiring that plaintiff's testimony be corroborated, is to prevent collusion between parties, and in absence of showing of collusion in a contested action, if court is satisfied that prevailing party is entitled to a decree, decree may be granted upon evidence which is only slightly corroborated.

4. Divorce ⇨130

In divorce action, evidence sustained finding that husband was guilty of extreme cruelty to wife, and that wife was entitled to divorce.

5. Divorce ⇨150

In divorce actions, a finding of grievous mental suffering is a finding of an ultimate fact rather than a conclusion of law, and where no counterfindings are proposed or any objection is made to proposed findings made, finding that party is guilty of extreme cruelty is sufficient.

6. Appeal and error ⇨181

If objections could have been obviated if made in court below, a party cannot urge them for first time on appeal.

7. Divorce ⇨249(1)

In divorce action, where community estate amounted to \$10,050, and husband was in arrears \$3600 in temporary alimony and wife was allowed \$400 attorney's fee, and those amounts were ordered paid out of community, award to wife of remainder of community was not excessive, and did not constitute an abuse of discretion.

Albert Waldstein, Edmund J. Holl, San Francisco, for appellants.

John T. Rudden, Jr., San Francisco, for respondent.

BRAY, Justice.

The superior court awarded plaintiff wife an interlocutory decree of divorce on the ground of extreme cruelty, and all of the community property, denying defendant husband's cross-complaint on the same ground. Defendant appealed.

Questions Presented.

1. Insufficiency of the evidence. 2. Failure of the court to find upon the specific allegations of cruelty. 3. Abuse of discretion in awarding the community property.

1. Evidence.

[1] The evidence was conflicting. Evidently the court believed the plaintiff and her corroborating witnesses. Our duty is to determine if their testimony substantially supported the court's finding that defendant was guilty of extreme cruelty. *Oakley v. Oakley*, 82 Cal.App.2d 188, 185 P.2d 848.

The parties were married in 1930 and separated in May, 1946. Plaintiff testified that, particularly the last two or three years before their separation, defendant treated her in a cool manner; many times told her he did not love her, and when she asked him why he stayed with her if he did not love her, he replied that "he would always be sure of a clean body when he got me and he got it for nothing"; he struck her many times, kicked and choked her, and that in 1945 he had threatened to kill her; that he would curse her mother and talk about her; that he called her brother a "dumb cluck" and said he would not support her but wanted the brother to do so; that when she was operated on he went out celebrating; he could not be found for three days when his consent was necessary for her second operation; that he refused to pay the hospital and doctor bills, saying that "he didn't give a damn where I made the money"; that her brother and mother paid these bills; that he treated her very disrespectfully and showed no affection towards her; that his course of conduct had adversely affected her health.

A Mrs. Harman testified that during the married life of the LaVignes and particularly in the last three or four years, she had visited their home as often as once a week; that defendant during the last years was always surly and snappy towards his wife; "would never call her by name, but 'Get this,' and 'Get that,' or 'Do this.'" The witness asked defendant one day why he did not show his wife some affection and he said, "Oh, the hell with her, she's nothing but a cold potato"; that if plaintiff spoke when they were sitting at the table eating, defendant would tell her to "shut up"; that the way he spoke to plaintiff made plaintiff very nervous. One night they went to the neighborhood show and defendant would not walk or sit with her and plaintiff.

Witness Jones, brother of plaintiff, testified that defendant ordered plaintiff around—"get me this and get me that, wanted her to cater to him all the time," and that "He didn't seem to treat her very nice" and "She was very upset"; that after the separation defendant followed plain-

tiff on one occasion and on a street corner said to her, "I will get even with you another time" and "Give me all the money and I will give you a divorce."

Mrs. Santos testified that she lived in the same flat building as did plaintiff and defendant from 1935 to 1942 and that she was in and out of their home "like my own house"; that defendant used to quarrel and fight with plaintiff and "swear once in a while to her"; that he came home drunk sometimes and would say, "'You go down to the corner and buy me some beer.' She used to go out, raining or pouring"; that defendant criticized plaintiff by saying, "I don't like her," "You are too old for me"; that when he was drinking he suggested that the witness was young "and why I didn't go out with him." The witness called plaintiff on these occasions and told her to take defendant away and plaintiff would drag him out. The witness asked defendant, "Don't you like her?—she do everything for you, she clean and she cook for you and goes and buy everything for you: What more do you want?" and he answered, "Oh, I don't want any more, I got my blonde some place."

Defendant denied mistreating plaintiff in any way, claimed that he had always been a good husband to her and that she constantly nagged him and that she had the entire handling of the community money. Two sisters of defendant corroborated defendant's testimony.

[2,3] Defendant contends, first, that the matters testified to by plaintiff do not justify a finding "that the defendant wrongfully inflicted upon the plaintiff grievous mental suffering" and secondly, that there is no corroboration of plaintiff's testimony. It is not necessary to discuss the first point, as a mere reading of plaintiff's testimony as herein outlined shows that the contention is not well founded. As to the second point, it is important to bear in mind the rule in cases of this kind. "The extent of the corroboration necessary for the granting of a decree of divorce is not defined in any of our statutes. It is not necessary to corroborate all of the facts of cruelty charged by the party to whom the

decree is granted. Where a number of charges of cruelty have been made, corroboration of a single act of cruelty may be sufficient. [Citations.] Moreover, the rule requiring corroboration is not so strictly applied in hotly contested divorce actions as it is in actions where a decree is demanded upon the default of the opposing party. The principal object of the corroboration rule is to prevent collusion between the parties, and where it is clear from the evidence in a contested action that there is no collusion the court is justified in granting the decree upon evidence which is only slightly corroborated if otherwise the court is satisfied that the prevailing party is entitled to a decree. [Citations.]” *McGann v. McGann*, 82 Cal.App. 2d 382, 386, 387, 186 P.2d 424, 427, quoting from *Serns v. Serns*, 70 Cal.App.2d 527, 161 P.2d 417.

Plaintiff testified that defendant, among other things, had told her he did not love her, that he treated her very disrespectfully and showed no affection towards her. These matters were definitely corroborated by her witnesses as above set forth. Such corroboration, under the rules above set forth, was sufficient even though the charges of striking plaintiff and other acts of cruelty were not corroborated, and even though the court stated, at the end of the case, “there is merit on both sides * * * both of them have not lived up to their marital obligations with reference to the treatment by each of the other. I think there has been undoubtedly nagging and unnecessary fault finding on both sides” and that he had decided “by a rather close margin” that plaintiff was entitled to the divorce.

2. Findings.

[4-6] The court found “That it is true that the defendant wrongfully inflicted upon the plaintiff grievous mental suffering; that it is not true that the plaintiff was guilty of extreme cruelty against the defendant, as set forth in the cross-complaint of the defendant.” It did not find on the specific charges of cruelty set forth in the complaint, which were as fol-

lows: “(a) That defendant has repeatedly told plaintiff he did not love her; (b) That defendant has repeatedly told plaintiff he would kill her; (c) That defendant has repeatedly told plaintiff she was not a good wife, because she refused to go out and work and support defendant; (d) That defendant has repeatedly insulted plaintiff’s family and friends; (e) That defendant has, on many occasions, struck plaintiff; * * *” The record shows that a copy of the findings was served upon defendant’s counsel August 5, 1948. They were signed and filed on September 2. No counter findings were proposed, nor was any objection to the proposed findings made. No request for specific findings was made. Defendant contends that the judgment is void because of the failure of the court to make specific findings rather than the one of the ultimate fact of cruelty. That a finding of “grievous mental suffering” is a finding of an ultimate fact rather than being a conclusion of law was held in *LaMar v. LaMar*, 30 Cal.2d 898, 902, 186 P.2d 678, overruling earlier cases relied upon by defendant in this connection. Defendant cites many cases to the effect that specific findings are necessary in a divorce case. Some of the later of these are discussed in *LaMar v. LaMar*, supra, 30 Cal.2d at page 901, 186 P.2d 678, wherein it is pointed out that those cases were decided prior to the adoption in 1939 of section 426b of the Code of Civil Procedure which permits pleading extreme cruelty, in the absence of a demurrer, generally rather than specifically. While the *LaMar* case holds that the general finding is all that is necessary, in the absence of objection, it is doubtful if it would support a general finding alone, were a request for specific findings made or the general finding objected to. The allegations of cruelty in the *LaMar* case were general and differ from the allegations in the complaint here in that respect. However, even prior to the enactment of section 426b the courts uniformly refused to reverse a divorce judgment for lack of specific findings where no such findings were requested nor objection made to the general finding. In *Del Ruth v. Del Ruth*,

75 Cal.App.2d 638, 171 P.2d 34 (cited by defendant), where the only finding was that the cross-defendant had wrongfully inflicted upon the cross-complainant "grievous mental suffering", the court said 75 Cal.App.2d at pages 644-645, 171 P.2d at page 37: "If special findings are requested, it would be error for the court to refuse them, but if no special findings are requested and no objection is made to a proposed general finding, the only objection to such general finding which can be raised later is that it is insufficient to support the judgment. The findings criticized were not mere conclusions of law; they were findings of ultimate fact and were sufficient to support the judgment. *Ungemach v. Ungemach*, 61 Cal.App.2d 29, 40, [142 P.2d 99]. Plaintiff had an opportunity to object to the general findings and to demand special findings. Section 634 of the Code of Civil Procedure requires that proposed findings be served and that no findings be signed until the expiration of five days after such service. The purpose of the requirement is to afford the opposing party an opportunity to object to the form or substance of the proposed findings and to propose other findings. The opportunity thus afforded gives rise to a duty to make objection, and if none be made, the right to object must be deemed to have been waived. * * * In divorce cases findings may be waived by the parties as in other cases. *Waldecker v. Waldecker*, 178 Cal. 566, [174 P. 36]. If there may be a valid waiver of findings, there may be a valid waiver of special findings, and we think that here the findings of cruelty may not be questioned on appeal on the ground of error because they were not specific. The general rule is stated in 2 California Jurisprudence, page 248, section 74: 'It is a well settled rule that a party cannot urge, for the first time on appeal, objections which could have been obviated if made in the court below. This doctrine is founded partly upon a sort of estoppel, for where the objection is one which could, if made in the court below, have been obviated, it would be clearly unjust for a party to withhold his objection until his appeal, when it is too late to correct the defect.'"

3. Community Property.

The court found that at the time of separation there was cash and bonds totaling \$13,100; that of this sum \$3050 was the separate property of plaintiff, and the balance of \$10,050 was community property; that most of the furniture was plaintiff's personal property, only a small portion being community property. In the interlocutory decree of divorce the court ordered, in addition to plaintiff receiving the said \$3050 and certain furniture as her separate property, that all of the community property, namely, \$10,050 and the balance of the furniture, be awarded to plaintiff. It further ordered that plaintiff charge the portion of said \$10,050 which was in the bank (approximately \$8900) "with all alimony payments now due herein to plaintiff from defendant, as well as the attorney fees and costs heretofore and now ordered paid"; that defendant pay plaintiff \$75 per month as alimony until the further order of the court, \$400 attorney's fees in addition to \$100 theretofore awarded, and court costs.

On motion for new trial, the court modified the interlocutory decree by reducing the alimony from \$75 to \$5 per month until the further order of the court, "with leave to the plaintiff, if her needs make it necessary so to do, to petition this court for an increase in the amount of said alimony a reasonable time prior to the exhaustion of her separate funds and the exhaustion of the community funds awarded to her by this decree." In making said modification the court filed a "Memorandum Opinion on Motion for a New Trial" in which it stated: "As I mentioned on the argument of the motion for a new trial, having awarded the plaintiff a divorce on the ground of the defendant's cruelty, I am impliedly required to award her more than one-half of the community assets, the proportion to depend on the particular circumstances of the case. *Crouch v. Crouch*, 63 Cal.App.2d 747, 756, 147 P.2d 678. This apportionment of the community property that I must make to the wife is one to which she is entitled as of right. In addition the defendant is under the obligation to pay the plaintiff alimony. The

theory underlying this requirement is that the husband entered into an obligation which bound him to support his wife during the period of their joint lives, and that 'by his own wrong he forced her to sever the relation which enabled her to compel the performance of this duty, and that he is required to make compensation for the offense committed by him which has deprived her of the benefit of the obligation.' *Arnold v. Arnold*, 76 Cal.App.2d 877, 886, 174 P.2d 674.

"The defendant's conduct in wholly disregarding the order of this court made in May, 1946, which sum then ordered to be paid approximated approximately \$3600 up to the time of the entry of the interlocutory decree, indicated to me that he would probably disregard any order that I might make for the payment of alimony unless forced to comply by contempt proceedings. I therefore concluded that the simplest method of assuring the wife's support was to award her all of the community property, which I did. The alternative open to me would have been to award the plaintiff a portion of the community property and then to impress a lien on the defendant's portion as security for the payment of the alimony awarded. The ultimate effect would have been the same. * * *

"I may also add that in considering the proper apportionment of the community property, it should be borne in mind that the defendant admitted that since he separated from his wife in May, 1946, he had earned approximately \$3000.00, which of course was community property, and that he had given his wife no part of this sum."

Defendant contends that in awarding plaintiff the entire community property the court abused its discretion, particularly as the court had stated, as above set forth, that by a "rather close margin" it had decided that plaintiff was entitled to the divorce. As said in *Barham v. Barham*, 33 Cal.2d 416, 431, 202 P.2d 289, 298: "The divorce having been granted to plaintiff on the ground of defendant's extreme cruelty, it was within the discretion of the trial court to award her as the innocent spouse

all of the community property. [Citations.]"

In view of the situation of the parties and the reasons given by the court for awarding plaintiff all of the community property, including the reduction of the amount of alimony to be paid, we cannot say that the court abused its discretion.

Defendant criticizes the court's order to the effect that when plaintiff's funds near the exhaustion point she may petition for an increase of alimony, on the ground that this gives her "carte blanche" to dissipate her funds and then seek alimony. The obvious answer to this contention is that if and when plaintiff seeks an increase in alimony, the court will undoubtedly inquire into the diminution of her funds to determine whether or not she has dissipated them.

[7]—Defendant points to section 148 of the Civil Code, which permits a reviewing court to revise the community property award of a trial court, even though the latter's action is discretionary, and asks that we exercise such power here. While we are not concluded by the determination of the trial court, we do not deem this a case in which we should revise its award, particularly in view of the fact, as stated in the court's memorandum, that defendant at the time of the interlocutory decree had not complied with the court's previous order and was in arrears in alimony approximately \$3600. The court allowed plaintiff an additional \$400 attorney's fee. Adding this to the \$3600 made \$4000 due to plaintiff from the defendant. This the court ordered paid out of the community \$10,050, leaving a balance of \$6050, or only \$1025 more than one-half of all the community property, except the furniture. The court's finding "that *some small part thereof* [the furniture] is community property" (emphasis added), is not challenged. Such an award is not excessive.

The judgment and decree is affirmed.

PETERS, P. J., and SCHOTTKY, Justice pro tem., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

96 Cal.App.2d 666

PEOPLE v. STEWART.

Cr. 2159.

District Court of Appeal, Third District,
California.

March 27, 1950.

James Stewart, true name Markwood, was convicted in the Superior Court for Sacramento County, Raymond T. Coughlin, J., of violating the statute making it an offense to willfully commit any lewd or lascivious act upon or with the body of a child under the age of 14 years, and he appealed from the judgment and an order denying a new trial. The District Court of Appeal, Adams, P. J., held that the evidence supported the conviction.

Judgment and order affirmed.

1. Infants $\hookrightarrow$ 20

Evidence supported conviction of violating the statute making it an offense to willfully commit any lewd or lascivious act upon or with the body of a child under the age of 14 years. Pen. Code, § 288.

2. Criminal law $\hookrightarrow$ 1144

All presumptions are in favor of a conviction on appeal.

George E. Foote, Sacramento, for appellant.

Fred N. Howser, Attorney General, by Gail A. Strader, Deputy, for respondent.

ADAMS, Presiding Justice.

Appellant was convicted by a jury of a violation of section 288 of the Penal Code, the victim being a boy of the age of eleven years. Motion for a new trial was denied. The only ground of this appeal is insufficiency of the evidence.

The parents of the boy lived in a guest house which they operated. The boy's bedroom was in the basement of the house, while his parents slept on the first floor. Appellant moved into the guest house on December 22, 1948, paying in advance the charge for room and board for one week. His room was in the basement, across the

hall from the boy's room, there being a light in the hall ceiling between the two rooms.

On the evening of December 23rd there was a party in the guest house which was attended by some 30 or 35 people, including defendant. It broke up about midnight. At the trial the boy testified that he went to bed about 11:00 o'clock; that about 2:00 o'clock a. m. he awoke to find the defendant trying to get on top of him, feeling around his private parts, and committing other lewd acts; that after a few minutes he made his escape and went upstairs where he reported the incident to his parents. He stated that his room was dark and he could not there identify his assailant, but that when he reached the top of the stairs he looked back and saw defendant's face in the light; that defendant was then headed toward his own room, rubbing his hands over his hair and fixing or smoothing his clothes. He clearly identified Stewart, and said that it looked to him as if defendant were coming out of his (the boy's) room, and that no one else was in the hall. He told his parents that Stewart "was in my room doing nasty things." There was also testimony that defendant left the guest house the next morning and did not return.

After his arrest defendant told a detective that early in the morning of the 24th he went to a hotel and spent the remainder of the night; but later he changed his story and said that when he left the guest house he went to the home of a former employer in whose car he slept until morning. When asked if he had had anything to do with the boy he said he did not remember of doing it, and if he did the things charged he should be punished for it. Admissions of several prior felony convictions were made with reluctance.

[1,2] We think the foregoing is sufficient to sustain appellant's conviction, and, on motion for a new trial, the court so held. All presumptions are in favor of the judgment on appeal. There is no question of the commission of the offense by someone; and on the question of identity of the assailant the court held, in *People v. Alexander*, 78 Cal.App.2d 954, 956, 178 P.2d 813,

where a jury was waived, that whether a witness is accurate in his observation of an accused person is a matter for determination of the trial court, and that even if the witness has had but a glimpse of the features of an accused, if his testimony carries conviction it is sufficient. Also see *People v. Deal*, 42 Cal.App.2d 33, 108 P.2d 103 (hearing in Supreme Court denied) where, in a case of questioned identity, the court quoted from *People v. Farrington*, 213 Cal. 459, 463, 2 P.2d 814, to the effect that on appeal the finding and action of a trial court (on motion for a new trial) will not be disturbed unless it can be said, as matter of law, that there was no evidence to support the conviction; and it was also said that whether the identity was sufficiently convincing was a question of fact for the jury. To a like effect see *People v. Young*, 102 Cal. 411, 413, 36 P. 770; *People v. Rolfe*, 61 Cal. 540, 543; *People v. Flood*, 41 Cal.App. 373, 377, 182 P. 766.

The judgment and order denying a new trial are affirmed.

SPARKS, Justice pro tem., and PEEK, J., concur.



96 Cal.App.2d 661

PEOPLE v. DUARTE et al.
Cr. 2150.

District Court of Appeal, Third District,
California.

March 27, 1950.

Clarence Duarte and Evelyn Baxman were convicted of robbery of the first degree and burglary of the second degree in the Superior Court, Sacramento County, B. F. Van Dyke, J., and they appealed. The District Court of Appeal, Adams, P. J., held that accomplice's testimony as to defendants' complicity in robbery was sufficiently corroborat-

ed and that instructions regarding circumstantial evidence were proper.

Affirmed.

1. Criminal law §511(1)

In prosecution for armed robbery and burglary, accomplice's testimony was sufficiently corroborated to sustain conviction.

2. Criminal law §511(2, 3)

Corroborating evidence is sufficient if it connects defendant with commission of crime in such a way as reasonably to satisfy fact finding body that accomplice is telling truth and inculpatory participation need not be direct nor need it extend to every fact and detail, it may be circumstantial and is sufficient even though slight, if it tends to connect defendant with commission of crime.

3. Criminal law §784(4), 789(4)

In robbery prosecution, where testimony of accomplice was direct, and such circumstantial evidence as was relied on was introduced in corroboration of his testimony, instructions that if jury could reasonably account for any fact in case on a theory that would admit of defendants' innocence, that it was their duty to do so, and that if jury had any reasonable doubt of defendants' guilt they should acquit them, and that crime may be proven by circumstantial as well as direct evidence but that facts and circumstances must be consistent with each other and inconsistent with any reasonable theory of innocence, and must show guilt beyond a reasonable doubt were proper.

4. Criminal law §822(1)

Instructions must be read as a whole.

George I. Lewis, Sacramento, for appellants.

Fred N. Howser, Attorney General, by Doris H. Maier, Deputy, for respondent.

ADAMS, Presiding Justice.

Clarence Duarte and Evelyn Baxman, together with John Duarte, brother of Clarence, David Amina and Robert Walton, were charged with four counts of armed

robbery and two counts of burglary. Amina and Walton entered pleas of guilty. John Duarte pleaded guilty to one count and then testified for the prosecution. Clarence and Evelyn were convicted on count three, robbery of the first degree, and count five, burglary of the second degree. Motions for a new trial were denied and the convicted defendants have appealed, urging, as grounds for reversal, that their convictions were based upon the testimony of John Duarte, an accomplice whose testimony was not sufficiently corroborated, and that there was reversible error in the giving and the refusing of certain instructions.

The victim of the armed robbery was one Jerry Comstock, who operated a grocery store at 40th Street and 12th Avenue, in Sacramento, from whom, under threat of arms, was taken cash amounting to some \$600, and his watch and wallet.

The burglary involved a building occupied by one George La Brasca as a service station in Sacramento, from which the defendants took a pistol needed for proposed operations of the gang.

John Duarte, testifying as to the burglary, stated that on the evening of September 26, 1948, he and Clarence, together with Baxman and Amina, were riding in Clarence's car; that they needed a gun for future operations and Clarence said he knew that La Brasca kept one in his service station. Clarence parked the car in front of the station, told Amina where the gun was kept, then drove away, leaving John and Amina to secure the weapon. Amina broke a window, reached through and secured the revolver, and the two then returned to the car, which was parked a block away. The gun was handed to Clarence. When he attempted to start his car he was unsuccessful, so he telephoned for a "wrecker." John's testimony in this connection was corroborated by Clarence who admitted telephoning for a towcar, and by Elmer Sims who testified that he responded to such a call, and upon arrival found Clarence, Baxman and John Duarte; that he had seen Clarence on previous occasions and recognized him; that he towed the car, described as a 1937 or 1938 Oldsmobile

sedan, to a garage. He also testified that a few days later he saw Clarence, Baxman and John at that garage, at which time Clarence sought to borrow some money from him. Mrs. Griffay, wife of the garage operator, testified that she saw Clarence's car at the garage on the date that it was towed in, and recognized it, as they had previously repaired it.

La Brasca testified that when he opened his station on the 27th he found glass on the floor, and that his revolver, which had been kept on a shelf in plain sight, was missing; also that Clarence had been in the station many times, and he had seen Baxman there. He identified the gun shown to him as the one stolen from his station. Police officer Faria, of Oakland, testified that that gun had been found on defendant Amina when he was arrested in Oakland in October of 1948.

Regarding the robbery of Comstock, John Duarte testified that on the evening of September 28, 1948, he and his co-defendants were riding in Clarence's car; that Clarence asked if they wanted to "pull another job," and when they assented he said that Evelyn knew Comstock's place, so they drove there. Clarence and Evelyn entered and bought a few things, then told John and Amina to go in. This they did and held up Comstock. When they left they threw away the telephone which they had torn out, and ran across an adjoining lot. Thereafter Clarence and Evelyn picked them up. Comstock testified that two men entered the store, bought milk and ice cream, and when he turned to ring up the money one of them stepped around with a pistol in his hand, ordered him to leave the drawer open and get the money out; that the money was put in a bag and he was then taken to a rear room and bound, and his watch and wallet taken. The men then ripped out the telephone and warned Comstock not to sound an alarm for five minutes. At the trial he identified Amina as the man with the gun, and John as his companion; he also identified his watch.

Arden Lane and his wife both testified that a car was parked near their residence near the Comstock store on the evening of

the robbery; that it had been around two or three times, and, being curious because it seemed to have no muffler, Lane walked out to take a look; that after a few minutes two men ran across a lot next to the store. One came to the car, then walked toward 14th Avenue; that the car then headed toward 12th Avenue, without lights.

Some two weeks later Clarence sought to borrow \$17 from George Bulgar, the owner of a place called the Lion's Den, and Bulgar made the loan, taking Comstock's watch as security. Two days later Clarence and Evelyn were arrested in the Oldsmobile sedan registered to Clarence. John Duarte was standing beside it. There was evidence of an arresting officer that the car had a "sharper exhaust report to it than normally is on a car." The Lanes also inspected it and said it resembled the one they had seen near their home, and Elmer Sims identified it as the one he had towed in the night of the burglary of La Brasca's service station. The thirteen-year-old son of Evelyn testified that he heard his mother say to Clarence that "If you went in the right way you would have got more." He also said that he had ridden in Clarence's car with his mother, and it made "a pretty loud noise" as though the muffler might be cracked. Clarence Duarte, after his arrest, made contradictory statements with respect to his activities.

[1] We are satisfied that the foregoing shows sufficient corroboration of John Duarte's testimony.

[2] In the recent case of *People v. Henderson*, 34 Cal.2d 340, 209 P.2d 785, our Supreme Court said that corroborating evidence is sufficient if it connect the defendant with the commission of the crime in such a way as reasonably to satisfy the factfinding body that the accomplice is telling the truth; and that inculpatory participation need not be direct nor need it extend to every fact and detail; that it may be circumstantial, and is sufficient, even though slight, if it tends to connect the defendant with the commission of the crime. Also see *People v. Trujillo*, 32 Cal.2d 105, 110-111, 194 P.2d 681; *People v. Negra*, 208 Cal. 64, 69-70,

280 P. 354; *People v. Yeager*, 194 Cal. 452, 473, 229 P. 40 cited in the *Henderson* case.

Appellants' second contention on appeal is that the trial court erred in failing to give to the jury several proposed instructions on circumstantial evidence. The proposed instructions were apparently based upon an assumption that a finding of the guilt of these appellants was dependent upon circumstantial evidence alone. Such is not the case. The testimony of John Duarte was direct, and such circumstantial evidence as was relied upon was introduced in corroboration of his testimony. In *People v. Savage*, 66 Cal.App.2d 237, 247, 152 P.2d 240 (hearing in Supreme Court denied), it was held that where the proof is not entirely circumstantial it is not error to refuse an instruction requiring the jury to adopt the interpretation which would admit defendant's innocence, and reject that which would point to his guilt.

In *People v. Klinkenberg*, 90 Cal.App.2d 608, 204 P.2d 47, 613 (hearing in Supreme Court denied), it was stated that where there is direct evidence connecting defendants with the commission of the offense charged, and circumstantial evidence is only incidental or corroborative, the court is not required to instruct the jury on the rules of evidence applicable to circumstantial evidence; that it is not the law that each fact in a chain of circumstances that will establish a defendant's guilt must be proved beyond a reasonable doubt; that a reasonable doubt that would warrant acquittal is one that results or arises from a consideration of all of the evidence.

[3] The trial court in this case did instruct the jury that if they could reasonably account for any fact in the case upon a theory that would admit of defendants' innocence, that it was their duty to do so, and that if they had any reasonable doubt of their guilt they should acquit them. On circumstantial evidence it instructed them as to the difference between direct and circumstantial evidence, that crime may be proven by circumstantial as well as direct evidence, but that facts and circumstances must be consistent with each other, and in-

consistent with any reasonable theory of innocence, and must show guilt beyond a reasonable doubt.

[4] Instructions must be read as a whole, and as we read those given we are satisfied that the jury in this case were adequately and correctly instructed.

The judgments and the orders denying a new trial are affirmed.

PEEK, J., concurs.



96 Cal.App.2d 777

PEOPLE v. HAMILTON.

Cr. 4413.

District Court of Appeal, Second District,
Division 1, California.

March 31, 1950.

Flora Hamilton was convicted by the Superior Court of Los Angeles County, Thomas L. Ambrose, J., of possession of cocaine and heroin, and she appealed. The District Court of Appeal, Doran, J., held that stipulation of counsel to submit the matter on transcript of the preliminary and exhibits introduced at time of preliminary did not deprive defendant of right to have trial court observe demeanor of witnesses on the stand.

Affirmed.

1. Stipulations ☞14(8)

Stipulation of counsel that prosecution relied on transcript of the preliminary and exhibits introduced at time of the preliminary did not deprive defendant of right to have trial court observe demeanor of witnesses on the stand.

2. Criminal law ☞1210

Where defendant was convicted on first count of information charging possession of cocaine and on the second count charging possession of heroin, defendant's sentence to county jail for a term of one year on each count, sentences to run consecutively, was not improper as providing

for confinement in county jail for a period of time, "in excess of that permitted by law". Health and Safety Code, § 11500.

David Silverton, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Dan Kaufmann, Deputy Attorney General, for respondent.

DORAN, Justice.

This is an appeal from the judgment.

Defendant was accused by information of a violation of section 11500 of the Health and Safety Code. One count charged the possession of cocaine and the other heroin. It was also charged that defendant had theretofore been convicted of two felonies, grand theft and attempted grand theft, and had served a term therefor in the state prison for each offense.

Defendant pleaded not guilty and denied the prior convictions. Trial by jury was waived and, "it was stipulated that the case be tried on the transcript of the preliminary and the exhibits introduced at the time of the preliminary". Defendant was found guilty as charged in both counts. "The prior convictions were stricken in the interest of justice", and the defendant sentenced to the county jail for a term of one year on each count, sentences to run consecutively.

[1,2] It is contended on appeal that because of the stipulation of counsel to submit the matter on the transcript that "defendant was deprived of the right which the Court had to observe the demeanor of the witnesses on the stand". It is also contended that by the judgment as imposed, defendant will be confined in the county jail for a period of time, "in excess of that permitted by law".

No authorities are cited in support of the above contentions.

The appeal is without merit; the judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

WILLETT & CRANE, Inc. v. CITY OF PALOS VERDES ESTATES et al.

Civ. 17368.

District Court of Appeal, Second District,
Division 1, California.

March 30, 1950.

Rehearing Denied April 17, 1950.

Hearing Denied May 25, 1950.

Action by Willett & Crane, Inc., against the City of Palos Verdes Estates and others, to have a zoning ordinance declared void. The Superior Court, Los Angeles County, Joseph W. Vickers, J., entered judgment for the defendants, and the plaintiffs appealed. The District Court of Appeal, White, P. J., held that evidence sustained determination that ordinance was not unreasonable or arbitrary and that city complied with provisions of statutes governing zoning ordinances and that trial court did not commit prejudicial error in denying plaintiff's motion to reopen its case in chief during final argument after both sides had rested.

Judgment affirmed.

Doran, J., dissented.

1. Municipal corporations ⇨122(2), 601(1)

Every intendment is in favor of a zoning ordinance and that the enactment of such an ordinance by a city is a proper exercise of the police power and adopted to promote general welfare.

2. Municipal corporations ⇨601(17)

The fact that a court may not agree with the legislative determination does not authorize the judicial branch of the government to substitute its judgment for that of the zoning authority if there is any reasonable justification for the action of the latter.

3. Constitutional law ⇨70(1)

The legislative determination that facts exist which make law necessary must not be set aside or disregarded by courts, unless legislative decision is clearly and palpably wrong and error appears beyond reasonable doubt from facts or evidence which cannot be controverted, and of which courts may properly take notice.

4. Municipal corporations ⇨625

Where the reasonableness of a zoning ordinance is fairly debatable, ordinance must be upheld.

5. Municipal corporations ⇨601(7)

Zoning ordinance allocating a total of 38 lots out of 5,200 lots, for business and commercial use in city having population of 1,500 was not invalid in view of fact that 75 percent of one business area was vacant and plaintiff's lots were valuable and useful for residential purposes.

6. Municipal corporations ⇨122(3)

In action to have zoning ordinance declared void as arbitrary and unreasonable, evidence sustained finding that city complied with statutory provisions governing enactment of zoning ordinances. Gen. Laws, Act 5211c.

7. Trial ⇨377(2)

A motion to reopen a case in chief after both sides have rested is directed to sound discretion of trial court.

8. Trial ⇨377(2)

A trial court may properly refuse to reopen a case for the introduction of additional evidence when there is no showing of any excuse for not having produced it at trial or of due diligence and where evidence, if received, cannot produce a different result, as where proposed evidence is merely cumulative or no issue was raised by pleadings to which offered evidence is relevant.

9. Appeal and error ⇨1047(4)**Trial** ⇨377(2)

Where, after both sides had rested and during final arguments, plaintiff moved to reopen its case in chief, and motion was prompted by an observation or statement emanating from court, but there was no showing that plaintiff's rights were prejudiced or that if evidence had been received it would have brought a different result, denial of motion was not prejudicial error.

McLaughlin & Hutchinson, Los Angeles, for appellant.

Donald Armstrong, Torrance, for respondents.

WHITE, Presiding Justice.

The appellant, a property owner in the respondent city, appeals from an adverse

judgment in an action to have a zoning ordinance declared void. Appellant's complaint contained two counts, one to enjoin respondent city from enforcing such ordinance; the other seeking declaratory relief declaring the ordinance void. According to the appellant's brief, "The action challenged the validity of the ordinance on the ground that it was unreasonable, and discriminatory, and * * * that respondent city did not follow the applicable statutory procedure in adopting the ordinance". The ordinance is termed by appellant, "a perversion of standard zoning principles", and one "substantially legislating business out of the city".

The respondent city, avers appellant's brief, "comprises an area of 3,200 acres adjacent to the Pacific Ocean between Redondo Beach and Torrance that began as a real estate subdivision in the early twenties and was finally incorporated as a city of the sixth class in July, 1940. * * * It is subdivided into 5,200 lots of which approximately 475 are improved with residences. * * * The subdividers * * * created an elaborate set of restrictions" which do not terminate until 1960.

Appellant's eleven lots were classified as business properties. These restrictions, however, "did not prohibit their use as residential properties", but, according to appellant's brief, "they were so plotted that they were impractical for use as residential lots, both because they fronted upon the principal public thoroughfare * * * and because several of the lots were too narrow to accommodate residences of the character being built in that locality". It appears that the frontages of most of appellant's lots were 48 or 50 feet, although a few were wider. These lots are vacant, and are located in four different blocks of the subdivision.

The trial court found that "The population of the City of Palos Verdes Estates is 1500, and the business buildings * * * are sufficient to take care of the business and shopping needs of the people now living in the City". Plaintiff's opening statement refers to the subdivision as "fairly dead all these years until recently"; in appellant's brief it is said that "Because

of its isolated location the subdivision remained fairly static until after the commencement of the Second World War". In 1944, after the city's incorporation, but before adoption of the zoning ordinance, appellant had prepared plans for a shopping center to be erected on its property.

The zoning ordinance here under consideration, enacted in June of 1948, "classified all lots as residential excepting thirty lots in the Malaga Cove district and eight lots in the Lunada Bay district". Appellant's lots, in what is known as the Val Monte district, are thus zoned as residential property, rather than according to the subdivider's classification of business property.

The appellant contends that the zoning ordinance is void because "monopolistic and unreasonable" in that "it allocates a total of 38 lots out of a total of 5,200 lots for business and commercial use, including parking space", and disregards "established principles of zoning which recognizes that a normal population for a city of 5,000 residential lots is 18,500, and that such a population would require at least 36 acres for commercial shopping centers to support it". The ordinance is criticized for disregarding other established principles of zoning, requiring "that neighborhood shopping centers should be available to residents at a distance or radius of from one-fourth to one-half a mile", etc.; and for disregarding "the physical location of appellant's lots * * * at the intersection of the two most important thoroughfares * * * and their consequent unfitness for residential purposes", and "ignores the fact that appellant's lots have been plotted, subdivided and restricted for business and commercial use".

The ordinance is also attacked "for the reason that no public hearing was held before the City Planning Commission on the plan of zoning embodied in the ordinance", and that the action taken by the Planning Commission was not recorded on the zoning map, as required by zoning statutes. The trial court's refusal to reopen the case "during the closing arguments after the court had indicated its intention to decide the case on the issue of what business properties might be necessary in the

next few years", is also assigned as reversible error.

At the trial, plaintiff's expert witness, Mr. Alexander, gave testimony as to proper zoning practices in respect to shopping centers, etc., upon which testimony, uncontradicted, appellant bases the contention that the present zoning ordinance is unreasonable. There was evidence to the effect that appellant's lots were valuable and usable for residential purposes. The trial court in the company of counsel made a tour of the city, visiting the property in question and the surrounding territory.

The trial court found that the zoning ordinance was not unreasonable or void for any of the alleged reasons; that two public hearings were noticed and held prior to the adoption thereof; that plaintiff's property had not been rendered valueless or useless by the adoption of said ordinance. It was further found that plaintiff's lots "are valuable and useful as residential properties, although in the future should that part * * * surrounding plaintiff's properties become fully developed, they will be worth slightly more as business property." From these findings the court concluded that plaintiff was entitled to no relief.

As pointed out in respondent's brief, no cases have been cited in support of appellant's contention that it is necessary that a zoning ordinance should "provide shopping centers within a one-half mile of every residential lot". One of the cases cited in appellant's brief, *Zahn v. Board of Public Works*, 195 Cal. 497, 513, 234 P. 388, 395, says: "The power of the city council to zone is not limited in our opinion to the protection of established districts. To so hold would be to defeat in a large measure the very purpose of zoning which is to control future development in the best interest of the city. Zoning in its best sense looks, not only backward to protect districts already established, but forward to aid in the development of new districts according to a comprehensive plan having as its basis the welfare of the city as a whole."

Respondent's brief calls attention to the recent case of *Lockard v. City of Los*

Angeles, 33 Cal.2d 453, 202 P.2d 38, 43, 7 A.L.R.2d 990, holding that "The wisdom of prohibitions and restrictions is a matter for legislative determination, and even though a court may not agree with that determination, it will not substitute its judgment for that of the zoning authorities if there is any reasonable justification for their action." It is also there said, 33 Cal. 2d at page 467, 202 P.2d at page 46, 7 A.L.R.2d 990, that "the fact that some hardship is experienced or that it may be more profitable to make other use of the property is not controlling in determining whether the regulations are arbitrary or unreasonable".

Wilkins v. City of San Bernardino, 29 Cal.2d 332, 338, 175 P.2d 542, 547, holds that "A city cannot unfairly discriminate against a particular parcel of land", but that "the mere fact that some hardship is experienced is not material, since 'Every exercise of the police power is apt to affect adversely the property interest of somebody.' * * * It is not sufficient for him (plaintiff) to show that it will be more profitable to him to make other use of his property, or that such other use will not cause injury to the public, but he must show an abuse of discretion on the part of the zoning authorities and that there has been an unreasonable and unwarranted exercise of the police power."

[1,2] Bearing in mind the rule that every intendment is in favor of such ordinances as the one now before us, that the enactment of such ordinance as a whole is a proper exercise of the police power and adopted to promote the general welfare, we are necessarily confronted with the question of whether the application of the ordinance to appellant's property is so oppressive and unreasonable as to amount to an illegitimate exercise of the police power. The wisdom of the prohibitions and restrictions is a matter for legislative determination. The fact that a court may not agree with the legislative determination does not authorize the judicial branch of the government to substitute its judgment for that of the zoning authority if there is any reasonable justification for the ac-

tion of the latter. In fact, as was said in *Lockard v. City of Los Angeles*, supra, 33 Cal.2d at page 461, 202 P.2d at page 43, 7 A.L.R.2d 990, quoting from *In re Miller*, 162 Cal. 687, 696, 124 P. 427:

[3] "The rule is well settled that the legislative determination that the facts exist which make the law necessary must not be set aside or disregarded by the courts, unless the legislative decision is clearly and palpably wrong and error appears beyond reasonable doubt from facts or evidence which cannot be controverted, and of which the courts may properly take notice."

[4, 5] Under the facts of the instant case, it is manifest that the reasonableness of the ordinance is fairly debatable. Therefore, the ordinance must be upheld. *Reynolds v. Barrett*, 12 Cal.2d 244, 249, 83 P.2d 29.

There is evidence in the record that prior to the passage of the ordinance by the Council of respondent city, a citizens committee was appointed to make a zoning study and make a report to the city council. The committee in the course of their study employed John Richerson, an Engineer for the Los Angeles County Regional Planning Commission, to give it technical assistance and advice. The committee reported to the council of respondent city which turned the report over to the city planning commission, which latter commission was also advised and assisted by Mr. Richerson. The planning commission held two public hearings and the city council held three before the ordinance was finally adopted. While it is true that but two business districts are provided for in the ordinance, the trial court found upon competent evidence that a business area commonly known as the Malaga Cove Business Area was created and laid out in Palos Verdes Estates in 1924 with a front footage of 2,100 feet. In 1924 and 1925, two two-story business buildings and one service station and garage were built in said Malaga Cove Business Area. Since 1925 no other business buildings have been erected in said Malaga Cove Business Area, except one two-story multiple dwelling and

office building, which at the time of trial was nearing completion. The three buildings, the gas station and garage occupy front footage of less than twenty-five percent of the total amount of front footage in said Malaga Cove Business Area. The court further found that the vacant seventy-five percent of said Malaga Cove Business Area is available for, and can be conveniently used for business buildings. That the population of the city of Palos Verdes Estates is 1,500, and that the business buildings in the Malaga Cove Business Area are sufficient to care for the business and shopping needs of the people now living in the city of Palos Verdes Estates. There was also evidence given by witnesses called by appellant that the latter's lots were valuable and usable as residential lots.

Appellant's assigned reasons for the contention that the ordinance here in question is unreasonable and monopolistic may be said to fall into two categories. The first is that the ordinance does not provide sufficient business area. The second is that appellant's property should have been zoned for business. In the light of the court's finding that seventy-five percent of the area now zoned for business is vacant, and the rule laid down in *Reynolds v. Barrett*, 12 Cal.2d 244, 83 P.2d 29, appellant's argument relative to the first category must fall. The same may be said of appellant's argument relative to the second category because of the principles announced in *Lockard v. City of Los Angeles*, supra, and *Wilkins v. City of San Bernardino*, supra.

[6] A reading of the record in the case now engaging our attention convinces us that the finding of the trial court that respondent city complied with the provisions of the California Conservation and Planning Act, Gen.Laws, Act § 5211c, is supported by the evidence. From a perusal of the pertinent sections of the Act, we are satisfied that the construction placed thereon by the trial court was such as to make the Act effective in its entirety, and avoided a construction that would have rendered it partly ineffective or inefficient. 50 Am.Jur., pp. 361, 362.

[7] We are satisfied that the trial court did not commit prejudicial error in denying appellant's motion to reopen its case in chief. The motion was made after both sides had rested and during the final arguments. The motion was evidently prompted by an observation or statement emanating from the court. Such a motion is directed to the sound discretion of the trial court. In the case at bar we find no showing of abuse of discretion, no showing that appellant's rights were prejudiced, or that if the evidence had been received it would have brought about a different result. In 24 Cal.Jur. 770, the rule is thus stated:

[8] "A trial court may properly refuse to reopen a case for the introduction of additional evidence when there is no showing of any excuse for not having produced it at the trial or of due diligence; where the evidence, if received, can not produce a different result, as where the proposed evidence is merely cumulative; or where no issue was raised by the pleadings to which the offered evidence is relevant."

[9] In ruling upon the motion to reopen the case, the court said, in part: " * * * but the court should not permit a re-opening in a case at this late date unless there appears to be, first, a necessity therefor, and, secondly, that through no fault of counsel the evidence in question has not been presented. Now, that is particularly true when the question arises in counsel's mind by reason of a statement or an observation or a question emanating from the Court. As you know, I am very free in attempting to bring out all phases of the case and all phases of points of argument and issues so that we can look at them from every direction for the purpose of arriving at sound conclusions. That is hardly a good ground for asking that additional evidence be permitted after the parties have all rested. It is perfectly conceivable that if I permitted it and during the ensuing argument I asked another question which raised doubts in counsel's mind as to whether the evidence had been fully presented, a like request could properly be made. In view of the fact that

this is not something that has suddenly arisen, not something that could not have been foreseen but, rather, was something that should have been foreseen and, further, that in itself it would not be determinative, the motion is denied."

It must therefore, be held that the ruling of the court was free from prejudice or error.

For the reasons herein stated, the judgment is affirmed.

DRAPEAU, J., concurs.

DORAN, Justice.

I dissent.

In my opinion the zoning ordinance, in the light of the record, is not only unreasonable but is arbitrary, unjust and unlawful. Manifestly, in certain circumstances, such ordinances are upheld as a proper exercise of the police power on the theory that the public welfare is involved. But, the "public welfare" can be and frequently is a much abused phrase. The courts are the only defense against abuse of power; indeed the people created the courts for just such a purpose for the tendency for those in authority to abuse it is proverbial. Whether such action is the result of an ulterior motive or just a lack of judgment is beside the issue. The sole question is whether the ordinance is reasonable, lawfully adopted and does not invade vested rights.

The property involved are lots in a subdivision sold to the public years ago. The deeds contained restrictions. The buyers bought the lots subject to such restrictions. Such restrictive covenants amount to a contract among all of the buyers in the tract. Years later, as homes were built and when the population justified it, a municipal corporation was established which included all or part of the original subdivision. The city council then proceeded to adopt a "zoning ordinance". The ordinance definitely deprives appellant of a vested right to use the property for purposes that all of the purchases of lots in the tract agreed it could be used for. The

city council is without power to thus invade the constitutional right of contract and as a result divest appellant of a vested right.

The cases cited do not involve this issue, nor is it raised on appeal, nevertheless in my opinion it is controlling in the circumstances.

Haring denied; CARTER and SCHAUER, JJ., dissenting.



96 Cal.App.2d 688

HASKINS v. CERTIFIED ESCROW & MORTGAGE CO. et al.

CONWAY v. CERTIFIED ESCROW & MORTGAGE CO. et al.
Civ. 17120.

District Court of Appeal, Second District,
Division 3, California.

March 28, 1950.

Olivia N. Haskins brought action against Certified Escrow & Mortgage Company and others, to impress a trust upon certain property. The action against Miss Haskins not having been tried, Edwin S. Conway filed a complaint in intervention against Certified Escrow & Mortgage Company, Olivia N. Haskins, and others, alleging that corporation had conveyed the property to Miss Haskins with purpose of hindering, delaying and defrauding creditors of corporation and that at time of conveyance corporation was insolvent. The Superior Court of Los Angeles County, George Francis, J., entered judgment quieting title in Olivia N. Haskins, and Conway appealed. The District Court of Appeal, Shinn, P. J., held that a transfer in fraud of creditors may be attacked only by one injured by transfer, and a creditor does not sustain injury unless transfer puts beyond his reach property which he otherwise would be able to subject to payment of his debt.

Judgment affirmed.

1. Corporations $\Leftrightarrow$ 548(9)

In proceeding by judgment creditor of corporation to set aside allegedly fraudulent

conveyance of realty, evidence sustained finding that no actual fraud existed. Civ.Code, §§ 3439.04, 3439.07.

2. Appeal and error $\Leftrightarrow$ 882(3)

Where plaintiff pleaded and tried case upon theory of actual fraud, on appeal he could not claim that he made out a case of constructive fraud. Civ.Code, §§ 3439.04, 3439.07.

3. Corporations $\Leftrightarrow$ 548(8)

In proceeding by judgment creditor of corporation to set aside allegedly fraudulent conveyance of realty, evidence that board of directors authorized conveyance by resolution reciting that it had been purchased by corporation with funds of plaintiff and another and that title was held by corporation for their use and benefit was admissible upon issue of actual fraud of corporation in making such conveyance. Civ.Code, §§ 3439.04, 3439.07.

4. Appeal and error $\Leftrightarrow$ 173(6)

In proceeding by judgment creditor to set aside allegedly fraudulent conveyance of realty made by corporation, failure of judgment creditor to plead that deed was given without consideration or to request finding as to consideration at conclusion of trial or on motion for new trial would preclude his urging such point on appeal. Civ. Code, §§ 3439.04, 3439.07.

5. Fraudulent conveyances $\Leftrightarrow$ 205

A transfer in fraud of creditors may be attacked only by one injured by transfer, and a creditor does not sustain injury unless transfer puts beyond his reach property which he otherwise would be able to subject to the payment of his debt.

6. Judgment $\Leftrightarrow$ 800(5)

Even if judgment had been recorded so as to constitute lien on property, such lien would have ceased upon execution sale of debtor's property to judgment creditor, and the deficiency would not be a lien on property during period of redemption. Code Civ.Proc. §§ 700-703.

7. Execution $\Leftrightarrow$ 293

The judgment debtor, his successor in interest, or creditors holding judgment or mortgage liens subsequent to that on which

property was sold on execution may redeem. Code Civ.Proc. §§ 700-703.

8. Execution ⇨296

In effecting a redemption from execution sale, neither debtor nor redemptioner is required to pay, in addition to amount of such sale, any unpaid amount of judgment under which sale was had. Code Civ.Proc. §§ 700-703.

9. Execution ⇨264, 293

Where judgment creditor of corporation purchased realty of corporation for \$100 at execution sale, leaving deficiency of \$750, he acquired all interest of corporation in realty except right of redemption, which remained in corporation and was subject to sale and transfer. Code Civ.Proc. §§ 700-703.

10. Execution ⇨296

Where judgment creditor of corporation purchased realty of corporation for \$100 at execution sale, leaving deficiency of \$750, the assignee of corporation's right of redemption was invested with right to redeem from execution sale without payment of deficiency judgment. Code Civ.Proc. §§ 700-703.

11. Judgment ⇨800(5)

Purchase by judgment creditor of corporation of realty of corporation at execution sale for less than amount of judgment released his lien upon the property as to remainder. Code Civ.Proc. §§ 700-703.

12. Judgment ⇨800(5)

Where judgment creditor of corporation purchased realty of corporation for \$100 at execution sale, leaving deficiency of \$750, his purchase of property was an irrevocable abandonment of his right to receive payment of deficiency judgment from such property in the event the corporation should transfer its right of redemption to a third party. Code Civ.Proc. §§ 700-703.

13. Execution ⇨296

Where judgment creditor of corporation purchased realty of corporation at execution sale for \$100, leaving deficiency of \$750, assignee of corporation's right of redemption, even if such assignment was

without consideration, had right to redeem from execution sale without payment of deficiency to judgment creditor. Code Civ. Proc. §§ 700-703.

William E. Empey, North Hollywood, and Andrew R. Bratter, Los Angeles, for appellant.

Bates S. Himes, Los Angeles, for respondents Certified Escrow & Mortgage Co., Olivia N. Haskins and John E. Haskins.

SHINN, Presiding Justice.

In October, 1944, Certified Escrow and Mortgage Company, a corporation, acquired title to Lot 1, Block E, of Tract 5956, as per map recorded in Book 83, page 55 of Maps, records of Los Angeles County. In August, 1945, Olivia N. Haskins brought suit against the corporation alleging that the property had been purchased with the funds of plaintiff and J. E. Haskins; that J. E. Haskins had assigned all his interest in the property to plaintiff, and seeking a decree impressing a trust upon the property in favor of the plaintiff. Certain other relief was sought against individual defendants who filed their answer. The corporation did not defend. In September, 1945, Edwin S. Conway brought suit against the corporation and on October 9, 1945, recovered a judgment in the amount of \$2,368.61, upon which he collected, through execution sales, all but \$850. On February 3, 1947, Conway purchased the real property at execution sale, under his judgment, for the sum of \$100, leaving a deficiency of \$750. On July 14, 1947, the property was conveyed by the Escrow Company to Olivia N. Haskins. The action brought by Miss Haskins not having been tried, Conway filed a complaint in intervention in February, 1948. He alleged that he had an unsatisfied judgment against the corporation, that the corporation had conveyed the property to Olivia N. Haskins, with the purpose on the part of the grantor and grantee to hinder, delay and defraud creditors of the corporation, and that at the time of the conveyance the corporation was insolvent. It was not alleged that the conveyance was made with-

out consideration. The answer of the corporation and others to the complaint in intervention denied the charges of fraud, alleged that Conway had purchased the property at execution sale for \$108, that Olivia N. Haskins had acquired from the corporation a right of redemption and had redeemed the property by the payment to Conway through the sheriff of \$108 which Conway still retained. The court found that the corporation was insolvent when the deed was given, but also found that it was not made with intent to hinder, delay or defraud creditors of the corporation. There was no finding as to whether a fair or any consideration was paid for the deed. The judgment quieted title in Olivia N. Haskins against the claims of Conway. Conway appeals.

[1-4] In his briefs appellant takes the position that it was shown by undisputed evidence that the deed was given without consideration and that the corporation was insolvent, and he contends that the conveyance was fraudulent under section 3439.04 of the Civil Code, without regard to the actual intent of the grantor. Under this section, the conveyance by an insolvent without a fair consideration is fraudulent as to creditors, even though there be no actual intent to defraud. Under section 3439.07, a conveyance made with actual intent to defraud creditors is fraudulent. Appellant charged actual fraud and not constructive fraud. There was no insufficiency of the evidence to support the finding that no actual fraud existed. Having pleaded and tried his case upon the theory of actual fraud, appellant cannot be heard to say now that he made out a case of constructive fraud. It was proved that the grantor's board of directors authorized the conveyance of the property by resolution which recited that it had been purchased by the corporation with the funds of J. E. Haskins and Olivia N. Haskins, and that title was held for their use and benefit. This evidence was admissible upon the issue of actual fraud. Although J. E. Haskins testified that all the consideration had passed before the deed was given, he was not questioned as to the nature or value of the

consideration. It can scarcely be doubted that the matter would have been gone into fully if appellant had pleaded that the deed was given without consideration. On the appeal he must be held to the theory upon which he relied in the trial court. *Munfrey v. Cleary*, 75 Cal.App.2d 779, 785, 171 P.2d 750; *Williams v. Reich*, 123 Cal.App. 128, 132, 10 P.2d 1030. If appellant believed at the conclusion of the trial that he was entitled to a finding as to consideration, on the theory that the issue had been actually tried, he should have requested one before the findings were signed, or on motion for a new trial. It does not appear that he did so and he cannot now urge the point. *Tooke v. Allen*, 85 Cal.App.2d 230, 238-239, 192 P.2d 804; *Estate of Wacholder*, 76 Cal. App.2d 452, 173 P.2d 359; *Kaiser v. Dalto*, 140 Cal. 167, 170, 73 P.2d 828.

The principal question discussed in the briefs is whether appellant is in a position to attack the validity of the deed of the corporation to Olivia N. Haskins. We think we should decide this question and not rest our decision solely upon the failure of appellant to establish fraud. Although it has been decided in cases to be cited that a creditor in the position of appellant may not attack a conveyance of real property as fraudulent, the question has not been passed upon since the adoption of the Uniform Fraudulent Conveyance Act and the repeal of section 3441 of the Civil Code hereinafter discussed.

[5] A transfer in fraud of creditors may be attacked only by one who is injured by the transfer. A creditor does not sustain injury unless the transfer puts beyond his reach property which he otherwise would be able to subject to the payment of his debt. Original Civil Code section 3441 so stated the law. See *Costa v. Neves*, 12 Cal. 2d 121, 125, 82 P.2d 600; *Bennett v. Paulson*, 7 Cal.App.2d 120, 45 P.2d 369. The section was repealed in 1939 at the time of the adoption of the Uniform Fraudulent Conveyance Act. We think the repeal of the section is not significant since it was merely declaratory of an established principle of equity. See 24 Am.Jur., sec. 173, p. 305; 37 C.J.S., *Fraudulent Conveyances*, § 62,

page 908. Cases decided under the Uniform Act have consistently held that prejudice to the plaintiff is essential to relief. *Marsh v. Galbraith*, Tenn.App., 216 S.W.2d 968; *Kopf v. Engelke*, 240 Wis. 10, 1 N.W. 2d 760, 2 N.W.2d 846; *Stokes Coal Co. v. Garguilo*, 255 App.Div. 281, 7 N.Y.S.2d 414; *Kummet v. Thielen*, 210 Minn. 302, 298 N.W. 245.

[6-13] The record does not show that Conway's judgment constituted a lien upon the property by reason of its having been recorded, but if it be assumed that it had been recorded, it ceased to be a lien on the property upon the sale to Conway for the sum of \$100. Conway then held only a certificate of sale and, although a deficiency remained, it was not a lien upon the property during the period of redemption. *Simpson v. Castle*, 52 Cal. 644. Under sections 701, 702 and 703, Code of Civil Procedure, the judgment debtor, his successor in interest, or creditors holding judgment or mortgage liens subsequent to that on which the property was sold, may redeem, such creditors being deemed redemptioners. Neither the debtor nor the redemptioner, in effecting a redemption, is required to pay, in addition to the amount of the sale, any unpaid amount of the judgment under which the sale was had. Upon the execution sale Conway acquired all interest of the corporation in the property, Code Civ.Proc. sec. 700, except, of course, the right of redemption which remained in the debtor and which was subject to sale and transfer. The assignment of the right of redemption by the corporation to plaintiff invested the latter with the right to redeem from the execution sale without payment to Conway of the deficiency judgment. Conway voluntarily placed himself in the position of being required to accept the amount for which the

sale had been made, since the effect of his purchase for less than the entire amount of his judgment was to release his lien upon the property as to the remainder. The corporation transferred to plaintiff nothing except the right of redemption, since it had no other interest. The right of redemption was an interest in the property which Conway could not reach by legal means in order to satisfy his deficiency judgment. His purchase of the property therefore was an irrevocable abandonment of his right to receive payment of the deficiency judgment in the event the corporation should transfer its right of redemption to a third party. If the property had been sold for a fair price, and in good faith, it would have been removed from Conway's reach insofar as his deficiency judgment was concerned. It is immaterial whether the deed was given for a fair consideration or no consideration, since Conway had already exhausted his rights to subject the property to the payment of his judgment. This identical situation was considered by the court in *Siegel v. Farrar*, 120 Cal.App. 193, 7 P.2d 319. There the creditor, after purchasing real property at execution sale for less than the full amount of his judgment, attempted to subject the property to a second levy after it had been conveyed to the debtor's children without consideration. Although the trial court had held upon sufficient evidence that the transfer was not fraudulent, as an alternative ground of decision the District Court of Appeal held that the creditor had lost his right to enforce his judgment against the grantees. The reasoning of the court, 120 Cal.App. on pages 196 and 197, 7 P.2d 319, expresses our views and is adopted as a part of our opinion.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.

**CALIFORNIA MILL SUPPLY CORPORATION
v. BANK OF AMERICA NAT.
TRUST & SAVINGS ASS'N.**

Civ. 17182.

District Court of Appeal, Second District,
Division 1, California.

March 24, 1950.

Hearing Granted May 22, 1950.*

The California Mill Supply Corporation sued Bank of America National Trust & Savings Association, a national banking association, to recover the amount of checks drawn by plaintiff upon Security-First National Bank of Los Angeles. The Superior Court of Los Angeles County, Clarence L. Kincaid, J., rendered a judgment adverse to plaintiff, and plaintiff appealed. The District Court of Appeal, White, P. J., held that plaintiff had a cause of action against defendant as collecting bank for losses on checks, the indorsements on which were allegedly forged by plaintiff's purchasing agent, but not for loss on check resulting when name of payee was allegedly altered by purchasing agent and payee whose name was added negotiated the check to defendant for collection.

Judgment reversed and cause remanded with directions.

1. Banks and banking ⇨148(2)

Bills and notes ⇨201

Where plaintiff's purchasing agent, who was in charge of preparation of checks issued by plaintiff in payment of cash purchases, allegedly prepared checks payable to real persons with whom plaintiff did business, and submitted checks to an officer of plaintiff whose signature was required on checks, and allegedly falsely represented that payments to designated payees were proper, and submitted required documentary evidence, and purchasing agent then allegedly forged indorsements of payees and negotiated checks through defendant bank for collection, the checks were not "bearer" paper under statute as it existed when transactions were made, and plaintiff had cause of action against drawee bank for amount of plaintiff's losses. Civ.Code, § 3090(3).

* Subsequent opinion 223 P.2d 849.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Bearer"

2. Bills and notes ⇨201

When the drawer of check or his signer is victim of fraud of bookkeeper who is charged with examining drawer's accounts and informing him of his liabilities, person buying or paying check is not entitled to a release at expense of innocent drawer from the responsibility of determining the authenticity of the indorsements.

3. Banks and banking ⇨174

Where plaintiff's purchasing agent, who was in charge of preparation of checks issued by plaintiff in payment of cash purchases, allegedly prepared checks payable to real persons with whom plaintiff did business, and submitted checks to officer of plaintiff whose signature was required on checks, and allegedly falsely represented that payments to designated payees were proper, and submitted required documentary evidence, and purchasing agent then allegedly forged indorsements of payees and negotiated checks through defendant bank for collection, and defendant presented checks to drawee bank for payment and guaranteed indorsements, plaintiff had cause of action for loss against defendant.

4. Banks and banking ⇨174

Where plaintiff's purchasing agent, who was in charge of preparation of checks issued by plaintiff in payment of cash purchases, prepared a check payable to an existing payee which did business with plaintiff, and submitted check to officer of plaintiff whose signature was required on checks, and allegedly falsely represented that payment was proper, and submitted required documentary evidence, and check was then allegedly altered so as to be payable to an existing person, in care of payee, and such person allegedly negotiated check to defendant bank for collection, and defendant presented check to drawee bank for payment and guaranteed indorsement, plaintiff did not have a cause of action against defendant for loss.

E. Briggs Howorth, Los Angeles, for appellant.

Hugo A. Steinmeyer, G. L. Berrey, George L. Beckwith, Los Angeles, for respondent.

WHITE, Presiding Justice.

Plaintiff, California Mill Supply Corporation, sought to recover from defendant, Bank of America, the amount of eight checks drawn by plaintiff upon Security-First National Bank of Los Angeles. The checks, bearing forged indorsements, were deposited with Bank of America, which in turn presented them to the drawee bank for payment. The checks were duly paid, and the forgeries were not discovered for approximately a year. After trial before the court without a jury, findings were made adverse to the plaintiff and judgment entered that it take nothing. From such judgment this appeal is prosecuted.

During the period from July 5, 1944, to May 12, 1945, appellant was engaged in the business of processing waste paper, rags and miscellaneous junk material in the City of Los Angeles. Appellant purchased waste material from individual junk dealers and collectors. Most of the dealers and collectors were paid for their materials at the time of delivery. But appellant also maintained a debtor-creditor relationship with some of the dealers. Cash advances would be made to them upon request, the amounts thereof being charged to their accounts, and when such dealers made deliveries of material to appellant their accounts would be credited with the amount paid for the material.

Appellant maintained two commercial accounts in a branch of the Security-First National Bank of Los Angeles, one account being designated the "General Fund" account and the other the "Revolving Fund" account. Checks drawn on these accounts required the signature of one of three designated officers of appellant, S. F. Berg, Ben Berg, or M. F. Berg. Practically all purchases of waste material were consummated through appellant's purchasing department, then in charge of one Wendell G. Thompson. As appellant's purchasing agent, he was responsible for the pricing

of cash payment purchases, supervision of cash advances to so-called credit dealers, preparation of invoices and receipt tickets and of checks issued by appellant in payment of cash purchases and cash advances.

During the period between July 5, 1944, and May 12, 1945, Thompson caused eight checks to be prepared in his department and presented to one of appellant's signing officers for execution. In each instance Thompson represented to the signing officer that the payment to the designated payee was proper and submitted documentary evidence required by the officer in support of the representation. In each instance the signing officer placed his signature upon the check in the belief that appellant was indebted to the named payee in the amount of such check or that the payment to such payee as a credit advance was warranted and proper, and in the belief that the check would be delivered to the designated payee and that he would receive the proceeds thereof. None of the checks was delivered to the named payee. As to seven of the checks, the indorsements of the named payees were forged and the check negotiated. The eighth check was made payable to "Benicia Arsenal." The check was then altered to read "S. Oster, % Benicia Arsenal." This check was then indorsed by S. Oster, an existing person, and negotiated. It should be noted that the names of the payees placed upon the checks were the names of real persons with whom appellant had business dealings, and although the payments represented by the checks were not due or owing to the named payees, it was the belief of appellant, through its signing officers, that such payments were properly due the named payees and it intended that the checks should be delivered to them. The employee Thompson, however, after forging the indorsements of the named payees, deposited two of the checks in an account maintained by him under a false name in a branch of respondent bank, negotiated four checks through S. Oster and a check exchange, and negotiated the remaining two through one Canary Poladian.

As to each check involved, plaintiff alleged in its complaint:

"That, after the endorsement of the payee named in said check had been forged thereon and negotiated, as aforesaid, said check was deposited with and accepted by the defendant Bank of America, and by said bank was endorsed: 'Pay to any bank or banker, all prior endorsements guaranteed,' and thereupon was presented by the defendant to the drawee bank, the said Security-First National Bank of Los Angeles, for honor and payment; that said drawee bank thereupon honored said check, paid the amount thereof to the defendant, and charged the same against plaintiff's commercial account as aforesaid, and, thereafter, returned the said check to the plaintiff with its regular monthly statement showing that the amount of said check had been charged against said account, and that the plaintiff thereupon accepted the said monthly statement of its account and approved the charge of the amount of said check against said account.

"That, by its presentation of said check, with the aforesaid endorsement thereon, for honor and payment, the defendant represented that all prior endorsements on said check were genuine; that plaintiff was entitled to rely on said representation in accepting said check from the drawee bank and approving the charge made against its account therein as aforesaid, and that at the time said representation was made, defendant well knew, or should have known, that plaintiff would rely thereon for said purposes; that said representation was false; that plaintiff believed said representation of defendant, did rely thereon and, by reason thereof, approved the charge made by the drawee bank against its account to cover said check and agreed to an account stated with said drawee bank whereby said check was charged against and deducted from plaintiff's account as aforesaid.

"That plaintiff did not know or discover that the endorsement of the said payee thereon was not genuine until long after said check had been paid by the drawee bank and charged against plaintiff's account, nor until long after the payment of said check and the charge of the amount thereof had been made against its account

therein by the drawee bank, had been approved by plaintiff as aforesaid and an account stated had been reached between plaintiff and the drawee bank as aforesaid."

For a second cause of action as to each check it was alleged "that defendant thereupon converted said sum to its own use and benefit and that at all of the times herein mentioned plaintiff was lawfully entitled to said check and to the sum collected thereon by defendant, as aforesaid."

As a third cause of action on each check, it was alleged that the defendant received the amount thereof for the use and benefit of plaintiff.

In addition to certain denials in its answer, defendant bank pleaded, as a second, separate defense, that the checks were payable to fictitious persons and were never delivered to any payee thereof; that each check was negotiated to the defendant for value and defendant received the same without notice or knowledge of any forgery or defect in the title of the persons negotiating the check, and without notice of any defense to any of the instruments. These allegations the trial court found to be true.

As a third, separate defense, it was alleged that Thompson prepared the checks within the scope of his employment and with knowledge that the named payees were not entitled to receive any payment, and with intent to forge the names of the payees; that each check was negotiated to the defendant by a person to whom the same had been negotiated by Thompson and was received by defendant for value and without knowledge of any defect or defense, and without negligence. These allegations were also found to be true. It was further alleged in the third affirmative defense, upon information and belief, that plaintiff was protected by a fidelity bond issued by a surety company which indemnified plaintiff against loss, and that this action, although in the name of the plaintiff, was actually for the benefit of the surety company, and that plaintiff had no loss by reason of any of the matters set forth in the complaint. These allegations the trial court found to be untrue.

The court further found that all allegations of the first amended complaint inconsistent with the portions of the affirmative defenses found to be true were untrue, but that all other allegations of the first amended complaint were true.

Appellant states the principal question of law involved on this appeal to be as follows: "Does the drawer of a check payable to an existing payee have a direct cause of action against a collecting bank for recovery of the amount collected from the drawee bank by negotiation of the check with a forged endorsement of the payee, the drawee bank having accepted the check when presented by the collecting bank bearing the forged endorsement and charged the amount thereof to drawer's account?"

Respondent conceives the questions involved to be as follows:

"May the drawer of a check stolen from the drawer's possession before delivery and negotiated to a defendant collecting bank upon a forged signature of the name of the payee maintain an action against such collecting bank?"

"Assuming the same facts and the additional fact that the payee was a fictitious person, may such action be maintained against a collecting bank?"

"Where the name of the payee in a check does not purport to be the name of any person, may the drawer of such check maintain an action against the collecting bank for collecting the check from the drawee?" (This last question involves only the check originally drawn in favor of Benicia Arsenal and changed by the forger to "S. Oster, c/o Benicia Arsenal.")

[1] Preliminarily, it is to be noted that under the holding in *Security-First National Bank of Los Angeles v. Bank of America*, 22 Cal.2d 154, 137 P.2d 452, the checks here involved were not "bearer" paper. In the cited case, as here, a faithless employee was authorized to prepare checks, but not to sign them. He presented checks payable to an actual person who knew nothing of the transaction, with debit slips showing that the payment was authorized. Under section 3090 of the Civil

Code, as it stood at the time of the decision, an instrument was payable to bearer "* * *". When it is payable to the order of a fictitious or nonexistent person, and such fact was known to the person making it so payable * * *." While recognizing the settled rule that although the name of the payee may be that of an actual person the instrument may nevertheless be deemed payable to a fictitious payee if the drawer does not intend the named payee to have any interest in it, the court nevertheless held (two justices dissenting) that since the officer who signed the checks was without knowledge that the payee was not to receive them, the checks could not be deemed payable to a fictitious payee—in other words, that the knowledge must be that of the person authorized to sign, and not that of the employee who is merely authorized to prepare. It rejected the argument that the officer signing was a mere automaton acting upon the assurances of the employee. It also distinguished the cases of *Union Bank & Trust Co. of Los Angeles v. Security-First National Bank*, 8 Cal.2d 303, 65 P.2d 355; *Goodyear Tire & Rubber Co. of California v. Wells Fargo Bank*, 1 Cal.App.2d 694, 37 P.2d 483, and *Rancho San Carlos v. Bank of Italy*, 123 Cal.App. 291, 11 P.2d 424.

In 1945 the Legislature amended subdivision (3) of section 3090 of the Civil Code to provide that an instrument is payable to bearer "When it is payable to the order of a fictitious or nonexistent or living person not intended to have any interest in it and such fact was known to the person making it so payable or known to his employee or other agent who supplies the name of such payee." (Emphasis added.) However, the transactions here involved took place prior to such amendment, and it must therefore be held, under the authority of *Security-First Nat. Bank of Los Angeles v. Bank of America*, supra, that the instruments in question were not bearer paper. It follows, therefore, that the plaintiff herein had a cause of action against the drawee bank for the amount of its loss. Apparently no suit was brought against the drawee bank. The present suit was brought a little over a year after the

date of the latest forgery committed by the employee. Plaintiff alleged in its complaint that it relied upon defendant bank's guarantee of prior indorsements and as a result an account was stated between plaintiff and the drawee bank.

[2] The fact that plaintiff's loss is directly attributable to the fraud of its own trusted employee constitutes no defense to an action against the drawee bank, under the rule applicable at the time these transactions occurred, and as stated in *Security-First Nat. Bank of Los Angeles v. Bank of America*, supra, 22 Cal.2d at page 158, 137 P.2d at page 454, "When the drawer or his signer is the victim of the fraud of the bookkeeper who is charged with examining the drawer's accounts and informing him of his liabilities, the person buying or paying the check has no right to a release at the expense of the innocent drawer from the responsibility of determining the authenticity of the indorsements. See *Brannan's Negotiable Instruments* (Beutel's Sixth Ed. 1938) p. 223, 224."

It follows from the foregoing that the instruments herein were not, as found by the trial court, drawn in favor of fictitious payees, and the fact that respondent bank accepted the checks in good faith, for value, and without notice of any infirmity, is no defense to this action, assuming that plaintiff may maintain it.

We are thus met squarely with the question heretofore propounded by appellant: "Does the drawer of a check payable to an existing payee have a direct cause of action against a collecting bank for recovery of the amount collected from the drawee bank by negotiation of the check with a forged endorsement of the payee, the drawee bank having accepted the check when presented by the collecting bank bearing the forged endorsement and charged the amount thereof to drawer's account?"

It appears that a majority of courts have held that an action such as this is maintainable. "Although agreeing uniformly in the reasons given for their decisions, most courts hold as a general rule that in intermediary bank which receives a check

on a forged indorsement and collects it from the drawee bank is liable to the drawer of the check for his loss, the bank's acceptance of the check for collection being at its peril as to a possible forged indorsement. Rather, the theory upon which recovery has been allowed by some well-considered cases has been that of the implied obligation to pay to the true owner the money received by the collecting bank and erroneously paid by it to the wrongdoer on the strength of the forged indorsement; such an action, whether denominated an action in assumpsit for money had and received or an action in trover, is upon the implied contract growing out of the circumstances. * * *." 7 Am.Jur. 431. See also 9 C.J.S., Banks and Banking, § 356, page 738. This was the view of the court in *Railroad Bldg., Loan & Sav. Ass'n v. Bankers' Mortgage Co.*, 142 Kan. 564, 51 P.2d 61, reported in 102 A.L.R. 140. To the same effect are the following decisions: *U. S. Fidelity & Guaranty Co. v. First National Bank of El Paso*, Tex.Civ.App., 93 S.W.2d 562; *Washington Mechanics Sav. Bank v. District Title Ins. Co.*, 62 App.D.C. 194, 65 F.2d 827.

The following decisions favor the theory that the collecting bank has obtained no rights in or to the forged instrument and that its act of presenting the check to the drawee for collection, receiving the amount thereof from the drawee, and paying it to the forger or to a party claiming through the forger, amounts to a conversion of the check and its proceeds, for which it is liable to the rightful owner of the instrument—the drawer: *Home Indemnity Co. of New York v. State Bank of Fort Dodge*, 233 Iowa 103, 8 N.W.2d 757; *Sidles Co. v. Pioneer Valley Savings Bank*, 233 Iowa 1057, 8 N.W.2d 794; *Gustin-Bacon Mfg. Co. v. First National Bank*, 306 Ill. 179, 137 N.E. 793.

Respondent urges the adoption of the so-called minority rule as exemplified by the following authorities: *General Fire Assurance Co. of Paris, France, v. State Bank*, 177 App.Div. 745, 164 N.Y.S. 871; *Land Title & Trust Co. v. Northwestern National Bank*, 196 Pa. 230, 46 A. 420, 50 L.R.A. 75, 79 Am.St.Rep. 717; *Lavanier*

v. Cosmopolitan Bank & Trust Co., 36 Ohio App. 285, 173 N.E. 216. See also Vol. 6, Zollman Banks and Banking, Perm.Ed., § 4263. The reasoning of these cases is illustrated by the following quotation from the Land Title case, supra [196 Pa. 230, 46 A. 422]: "Between the bank and the trust company, as the drawer of the check, no relation, contractual or otherwise, existed. The drawer of a check cannot maintain an action against one who collects it on a forged indorsement from the bank on which it was drawn, although the bank paying the check may. The remedy of the drawer is against the bank which pays his check, and the bank's remedy is against the person to whom it paid. The liability of the party collecting the check arises from his implied warranty of the indorsement. This liability is founded on contract, and not on negligence, and it exists, if at all, whether there was negligence or not."

The rule is thus stated by Zollman:

"Since the drawee's act in paying a check on a forged indorsement is a nullity, the drawer's right to his deposit remains unaffected, and he hence cannot recover against the bank through whose hands the check has passed.

"The payment by the drawee to the presenting bank is not money received for his use.

"Though the drawee bank may have a cause of action against the presenting bank, the drawer has no cause of action against such presenting bank because he is not damaged by the payment by the drawee. His right of action, if any, is against the drawee."

The decision upon which respondent most strongly relies is Metropolitan Life Insurance Co. v. San Francisco Bank, 58 Cal.App.2d 528, 136 P.2d 853, 854 (hearing denied by Supreme Court July 1, 1943). The appeal arose upon the sustaining of a demurrer of the collecting bank to the amended complaint of the drawer. The allegations of the complaint were that plaintiff was induced, through the fraud of an employee who had no authority to issue checks, to draw and issue checks payable to various "fictitious persons not

known to plaintiff to be fictitious persons and having no interest whatsoever in or to any part of the proceeds of said checks"; that the employee fraudulently secured possession of the checks and indorsed the name of the fictitious payee; that the San Francisco bank received the checks, guaranteed prior indorsements and presented them to the plaintiff's bank, which paid them. It was urged on appeal that plaintiff was entitled to recover from the collecting bank upon either a contractual or a conversion theory. The District Court of Appeal in its opinion noted that it could find no authority for permitting such a direct recovery upon any theory, contractual or otherwise, and that there was respectable authority from other jurisdictions (see cases hereinabove cited) holding that such recovery could not be had. The court then, however, narrowed the scope of its decision by the following language:

"But we are not called upon here to determine the rights and remedies of the parties in a case where a check is made payable to an existing payee. Suffice it to state that we are of the opinion that where, as here, a check is made payable to a fictitious and nonexistent person, no contractual obligation arises in favor of the drawer upon the guarantee of the collecting bank of the validity of the forged endorsement of the signature of the fictitious payee for the reason that the very act of the drawer, in signing a check made payable to a fictitious payee under the circumstances alleged, makes impossible any valid endorsement of such check."

The case at bar, as heretofore noted, does not involve checks payable to fictitious payees, but forged indorsements of the names of actual payees. Appellant argues, therefore, that the Metropolitan case is distinguishable. Respondent urges that the reasoning of the case is applicable to the case at bar. Analysis of the opinion, however, discloses that the court held: (1) That no *contractual* obligation arises in favor of the drawer upon the guarantee of the collecting bank of the validity of the forged indorsement of the signature of the *fictitious* payee. (2) "The allegations of the amended complaint were in-

sufficient to show that the checks, as such, had any value whatever. On the contrary, the allegations showed that said checks were not payable to anyone and that they were not negotiable instruments. They therefore were not and could not become of any value to any one." Consequently, no action could be maintained on the theory of conversion of the checks. (3) There could be no action for conversion of plaintiff's money, because the relationship between him and his bank was that of debtor and creditor; title to funds deposited by him passed to the bank, which paid out its own money on the checks and not that of the plaintiff.

[3] We are of the view that the reasoning of the Metropolitan case, *supra*, is not applicable where the collecting bank has presented and guaranteed the indorsement of a check which is not payable to a fictitious person. Disregarding any negligence of the drawer, as no such issue is present in this case, it cannot be denied that the drawer has suffered a loss through the act of the collecting bank in accepting, presenting and securing payment of the check on a forged indorsement. True, had the drawer discovered the forgeries in time, he could have recovered from his bank, which in turn would have recovered from the collecting bank. But the very failure to discover the forgery in time is due to the act of the collecting bank. As said in *Home Indemnity Co. of New York v. State Bank of Fort Dodge*, *supra* [233 Iowa 103, 8 N.W.2d 779], "As between all parties interested herein, the [defendant] is the one ultimately liable for the loss, and the [plaintiff] is the one to be reimbursed. So long as the [defendant] has no rights against anyone who is by-passed, the logical and sensible action is a direct one by the [plaintiff] (drawer) against the [defendant] (collecting bank)."

Included in the language used by some decisions in denying such liability is the statement that the drawer has suffered no damage, in that he has lost no funds—the action of the drawee bank in paying its own funds having no effect upon the debt-

or-creditor relation between the drawee bank and its depositor. This is true only so long as the depositor retains a right of action against his own bank. When, however, it is impossible for the depositor to recover from his own bank—as where an account has been stated, the statute of limitations has run, or the bank becomes insolvent, he has suffered a loss directly traceable to the act of the collecting bank. It would seem, then, that in such circumstances, simple justice requires that the liability of the collecting bank to the drawer be upheld on the theory of money had and received.

[4] In the case of the check made payable to "Benicia Arsenal" and then altered to read "S. Oster, c/o Benicia Arsenal", a different situation is presented. In this instance, admittedly the collecting bank, in guaranteeing previous indorsements, guaranteed the actual indorsement of an existing named payee. In such circumstances, it cannot be said that there is any causal connection between the conduct of the collecting bank and the depositor's loss. Its loss in this instance was occasioned solely by the perfidy of its own employee. When a check bears the name of an existing payee and such payee actually indorses the same, no liability can attach to the collecting bank, because its guarantee simply extends to the fact that the indorsement was written by the person to whom the check was made payable. So far as the collecting bank is concerned, any loss sustained by the plaintiff herein through the faithlessness of the employee must be borne by the plaintiff.

The judgment as rendered is reversed and the cause remanded with directions to the court below to enter judgment in favor of defendant upon the aforesaid check indorsed by S. Oster referred to in the 24th and 25th causes of action, and as to the remaining seven checks to enter judgment in favor of plaintiff. Each party to bear its respective costs on appeal.

DORAN and DRAPEAU, JJ., concur.

PIKE v. RHINEHART et al.**Civ. 17126.**

District Court of Appeal, Second District,
Division 3, California.

March 27, 1950.

Rehearing Denied April 20, 1950.

Action by Dulcie Pike against Patricia Rhinehart, also known as Patricia Reinhart, and the Seaboard Finance Company, a Delaware corporation, to determine ownership of an automobile purchased by plaintiff from individual defendant and for damages. A cross-complaint for damages was filed by Patricia Rhinehart, which was not prosecuted. The Superior Court, Los Angeles County, Thurlow T. Taft, Judge Assigned, entered judgment declaring that individual defendant had no interest in the automobile and awarding plaintiff damages in the sum of \$1,000 and declaring plaintiff entitled to possession on payment to defendant corporation of a stated sum and awarding plaintiff an additional sum for loss of use of the automobile. Plaintiff and the defendant corporation appealed. The District Court of Appeal, Shinn, P. J., held that if the defendant corporation had a valid lien it was not guilty of conversion or liable in damages and that it was necessary for the trial court to determine exactly what knowledge or information was possessed by the defendant corporation with respect to plaintiff's rights or claims and also to make a finding as to whether such knowledge or information was sufficient to put the defendant corporation on inquiry.

Judgment reversed with directions.

1. Evidence ☞215(1)

In action by automobile buyer against seller and finance company to determine ownership of automobile and for damages for alleged conversion, exclusion as to finance company of all evidence as to agreement between buyer and seller for payment by seller of outstanding chattel mortgage, as hearsay, was error, since evidence was a necessary part of buyer's case against finance company.

2. Appeal and error ☞1178(1)**Chattel mortgages ☞157(3)**

In action by automobile buyer against seller and finance company to determine ownership of automobile and for damages from finance company for alleged conver-

sion, whether company had knowledge of buyer's rights and claims to automobile and whether such information was sufficient to put it on inquiry at time company obtained its chattel mortgage on vehicle from seller were questions of fact for court, and in absence of findings on such questions action would be remanded.

William K. Young, Los Angeles, for appellant and respondent Dulcie Pike.

Bromley, Ritter & Lindersmith, Los Angeles, for appellant and respondent Seaboard Finance Co.

SHINN, Presiding Judge.

On September 15, 1945, plaintiff Dulcie Pike traded her 1940 Ford car to defendant Patricia Rhinehart, for the latter's 1941 Buick car which was then in a garage in Los Angeles awaiting repairs after it had been wrecked in an accident. The Ford was duly delivered and transferred to Mrs. Rhinehart. The Buick, however, was subject to a chattel mortgage in favor of American Trust Company of San Francisco upon which there was unpaid approximately \$1,085. The Buick was registered with the Department of Motor Vehicles in the name of American Trust Company as legal owner and Patricia Rhinehart as registered owner. The ownership certificate was in the possession of the trust company and Mrs. Rhinehart either delivered the registered owner's certificate to Mrs. Pike or left it in the car. Mrs. Rhinehart agreed with Mrs. Pike that she would pay off the mortgage within five months and then deliver the certificate of ownership. On December 15, 1945, Mrs. Rhinehart and her husband borrowed \$5,000 from Seaboard Finance Company, executing a note and chattel mortgage on a Lincoln automobile, the Buick car in question and other personal property. From the loan Seaboard paid off American Trust Company and received the ownership certificate bearing the trust company's release of its interest in the car but did not acquire American's note or mortgage. Seaboard caused a copy of its mortgage to be registered with the Motor Vehicle Department and sent on an applica-

tion for transfer of the ownership to itself and for registration of the car in the name of Mrs. Rhinehart as registered owner. New certificates were issued to Seaboard and Mrs. Rhinehart. In June, 1946, the Seaboard loan was rearranged. Mrs. Rhinehart gave her note for some twenty four hundred dollars and a chattel mortgage on the Buick and some household furniture; Mr. Rhinehart gave a separate note for the balance to Seaboard, secured by a mortgage on the Lincoln automobile and other property. Seaboard's original mortgage was cancelled and a copy of the new mortgages filed with the Motor Vehicle Department. Mrs. Rhinehart defaulted in her payments to Seaboard and owed a balance of \$1,125.51 in December, 1947, when Seaboard took possession of the car pursuant to the terms of the mortgage. Mrs. Pike brought the present action against Mrs. Rhinehart and Seaboard to determine ownership of the car and for damages, alleging that Seaboard took its mortgage with knowledge of plaintiff's rights, that the car was converted by Seaboard and asserting also a claim for loss of use of the car from the time it was seized by Seaboard. She also sought damages from Mrs. Rhinehart. A cross complaint for damages was filed by Mrs. Rhinehart but it appears not to have been prosecuted. The judgment went against her declaring that she had no interest in the car and awarding Mrs. Pike damages in the sum of \$1,000. Mrs. Rhinehart has not appealed.

The judgment declares Mrs. Pike to be the owner of the car and entitled to possession of it with evidence of title upon payment to Seaboard of the sum of \$1,085 with interest from the time Seaboard paid off American Trust Company; it provides that if Seaboard fails to deliver the car and title upon payment of \$1,085 within 30 days after the judgment becomes final, plaintiff shall have judgment against Seaboard for the sum of \$500. An additional \$500 was awarded plaintiff against Seaboard for loss of use of the car. Both Seaboard and plaintiff appeal.

It is obvious that as between plaintiff and Seaboard the determinative question was whether Seaboard acquired its mortgage

lien December 15, 1945, for value, and without knowledge, actual or constructive, of plaintiff's claim of ownership.

The court made findings as follows:

"It is true that on or about December 28, 1945 defendant Rhinehart and her husband applied to the San Francisco office of defendant Seaboard Finance Company for a loan in the sum of Five Thousand Dollars (\$5000.00) upon security consisting of personal property including said Buick automobile; it is true that at said time defendant Rhinehart disclosed to defendant Seaboard Finance Company the fact of the existence of an agreement respecting said Buick automobile with plaintiff and that plaintiff had the possession or right of possession thereof and that said Buick automobile was then in a wrecked condition and situated in Los Angeles, California; it is true that defendant Seaboard Finance Company did not make any visual examination of said Buick automobile on or about December 28, 1945, or at any other time, and that it did not make any inquiry into the right of plaintiff in said Buick automobile, nor did it obtain from anyone the registration card hereinbefore referred to covering said Buick automobile * * *.

"It is true that at all times on and after December 28, 1945, that an interest in and to said Buick automobile existed on said date and prior thereto in favor of plaintiff, and that plaintiff had possession of said Buick automobile by virtue of said interest; it is true that such interest as defendant Seaboard Finance Company acquired in said Buick automobile is subject to the interest therein held by plaintiff on December 28, 1945.

"It is true that the reasonable market value of said Buick automobile on December 15, 1947 was Fifteen Hundred Eighty Five Dollars (\$1585.00), and that the reasonable rental value thereof on said date was Ten Dollars (\$10.00) per day. It is true that on or about December 15, 1947 defendant Seaboard Finance Company, without previous demand on or notice to plaintiff seized said Buick automobile while the same was in the possession of plaintiff and thereafter forcibly held possession of the

same, and has continuously since that time had the possession thereof against the will and without the consent of plaintiff, during which period of time it has converted the same to its own use. That by reason of said conversion and deprivation of possession plaintiff has been damaged in the sum of Five Hundred Dollars (\$500.00)."

The conclusions of law contain the following:

"That on December 15, 1947 defendant Seaboard Finance Company wrongfully converted to its own use said Buick automobile, and that plaintiff is entitled to recover damaged in the further sum of Five Hundred Dollars (\$500.00) from defendant Seaboard Finance Company representing the reasonable value of the loss of use of said Buick automobile arising by reason of said conversion.

"That plaintiff is entitled to recover damages against defendant Rhinehart in the sum of One Thousand Dollars (\$1000.00) arising by reason of the failure of defendant Rhinehart to discharge the encumbrance on said Buick automobile."

The declaration in the findings that the interest of Seaboard is subject to the interest of plaintiff is a conclusion of law. The declaration in the conclusions of law that "Seaboard wrongfully converted to its own use said automobile" is a finding of fact.

According to the findings, plaintiff exchanged her Ford car for the Buick and Mrs. Rhinehart agreed to deliver the legal ownership certificate within five months. If Seaboard had actual or constructive knowledge of this agreement at the time it took the \$5,000 chattel mortgage on the Buick, the mortgage would not constitute a valid lien as against plaintiff. If Seaboard acquired its mortgage on the car in good faith and for value without actual or constructive knowledge of plaintiff's rights, the mortgage was valid as to plaintiff. In the first case, seizure of the car by Seaboard would have been a conversion entitling plaintiff to recover the full value of the car. In the second case, the seizure would have been lawful if it was authorized

by the mortgage, would not have amounted to a conversion, and plaintiff would have had no right to recover the value of the car, in whole or in part, or damages for loss of use.

[1] There is an obvious insufficiency of the special finding that Seaboard had knowledge of some agreement between plaintiff and Mrs. Rhinehart to support the general finding that the seizure of the car by Seaboard amounted to a conversion, and the latter is in conflict with the requirement of the judgment that gives Seaboard a lien on the car. We notice that the first finding as originally drawn stated that Mrs. Rhinehart disclosed to Seaboard the fact of the existence of *her* agreement with plaintiff, and that the trial judge crossed out the word "her" and inserted the word "an." Apparently the court believed that Mrs. Rhinehart disclosed to Seaboard the existence of some sort of an agreement with plaintiff. The court did not find, however, that she informed Seaboard that she had traded the Buick to plaintiff for a Ford. The ambiguity of this finding is significant. The only evidence in the record respecting information given to Seaboard at the time the \$5,000 loan was negotiated consists of the testimony of Mr. Larsen, Seaboard's agent, and Mrs. Rhinehart. Larsen's testimony, given by deposition, was that he had no recollection of receiving information that plaintiff had any claim upon the car. Mrs. Rhinehart testified that she stated to Larsen that her husband had promised to give the car to plaintiff's son, Bob Southern, when the chattel mortgage to American Trust Company had been paid off and the ownership certificate surrendered to Mrs. Rhinehart. Nothing was mentioned in the conversations with respect to any claim plaintiff might have, nor was Larsen informed that Mrs. Rhinehart had received the Ford from plaintiff in exchange for the Buick. All the evidence as to the agreement between plaintiff and Mrs. Rhinehart was excluded as to Seaboard upon the ground that it was hearsay. This was error. The evidence was a necessary part of plaintiff's case against Seaboard. In connection with this issue, the court found

that Mrs. Rhinehart disclosed to Seaboard "that plaintiff had the possession or right of possession thereof," but it is impossible to determine from this finding what information was conveyed to Seaboard since the court declined to find that she told Seaboard of her agreement with plaintiff. The findings and conclusions as a whole are to the effect that plaintiff's rights are superior to those of Seaboard, and Seaboard's rights are superior to those of plaintiff. By the judgment each of these parties seems to have won the lawsuit and also lost it. If plaintiff's rights were superior she should not have been required to pay Seaboard \$1,085 to satisfy its lien. If Seaboard had a valid lien it was not guilty of conversion or liable in damages. It was necessary for the trial court to determine exactly what knowledge or information was possessed by Seaboard with respect to plaintiff's rights or claims, and also to make a finding as to whether such knowledge or information was sufficient to put Seaboard on inquiry. These are questions of fact for the trial court. *Bliss v. Martin*, 74 Cal.App.2d 500, 506, 169 P.2d 61; *Shapiro v. Equitable Life Assur. Soc.*, 76 Cal.App.2d 75, 88, 172 P.2d 725; *West v. The Great Western Power Co.*, 36 Cal.App.2d 403, 97 P.2d 1014.

[2] The finding that Seaboard was informed that Mrs. Rhinehart had made some agreement with plaintiff with respect to the Buick and that plaintiff had possession or a right of possession is manifestly ambiguous and insufficient. It is not for this court to weigh the testimony of Mrs. Rhinehart and Larsen in order to make a finding as to the information conveyed to Seaboard by Mrs. Rhinehart and a further finding as to whether such information was sufficient to put Seaboard on notice. The action must be retried in order that the trial court may make specific findings upon these issues. The court found that Seaboard was estopped to assert its lien as against plaintiff, but as this finding depended upon the inadequate finding as to notice, the two must fall together.

The judgment is reversed for further proceedings in accordance with the views herein expressed and without costs to either party.

WOOD and VALLÉE, JJ., concur.



96 Cal.App.2d 589

WILSON v. WILSON et al.

Civ. 14102.

District Court of Appeal, First District,
Division 2, California.

March 23, 1950.

Action by Harold S. Wilson against Joseph F. Wilson and another, individually and as copartners doing business under the firm name and style of Oakland Printing & Supply Company, for an accounting after the wrongful dissolution of an oral agreement of partnership, and for other relief. From judgment of the Superior Court for Alameda County, James G. Quinn, J., in favor of defendants on second and third counts, the plaintiff appealed. The Court of Appeal, Nourse, P. J. held that interlocutory judgment on first count, ordering an accounting, was not appealable, and that no final judgment on any count should have been entered until the first count was also finally disposed of.

Appeal dismissed.

1. Contracts ⇐9(1)

The law does not favor, but leans against, the destruction of contracts because of uncertainty and it will, if feasible, so construe agreements as to carry into effect the reasonable intention of the parties if that can be ascertained. Civ.Code, §§ 1643, 3541.

2. Partnership ⇐225

Agreement for substitution of son for father in partnership in event of father's retirement or demise was not void for uncertainty as an agreement to make an

agreement because of provision that a new partnership agreement would be executed at time son was taken into copartnership. Civ.Code, §§ 1643, 3541.

3. Contracts ⇨39

Contracts in which matters left for future agreement are unessential are valid, and in such case, each party will be forced to agree to a reasonable determination of the unsettled point or, if possible, the unsettled point may be left unperformed and the remainder of the contract enforced.

4. Partnership ⇨9(1)

A salary or drawing account for a partner is not an essential term of a partnership contract. Corporations Code, § 15018(f).

5. Partnership ⇨225

Agreement for substitution of son for father in partnership in event of father's retirement or demise was not void for uncertainty because of provision therein that salary which son was to receive as an employee and later as a copartner, and the amount of his monthly drawing account were left for determination by mutual consent of the parties or the survivors of them. Civ.Code, §§ 1643, 3541; Corporations Code, § 15018(f).

6. Partnership ⇨225

Agreement for substitution of son for father in partnership in event of father's retirement or demise contained implied term that father should not dispose of his interest in partnership to another than his son, at least not so long as other partner was willing to continue the partnership business.

7. Contracts ⇨168

Every contract contains implied covenant of good faith and fair dealing that neither party will do anything which injures right of other to receive benefits of agreement. Civ.Code, § 1655.

8. Partnership ⇨225

Agreement between father and partner for dissolution of partnership constituted a breach of implied term of earlier agreement for substitution of son in lieu of father upon his retirement or demise, that father

should not dispose of his interest in partnership to another than his son. Civ.Code, § 1655.

9. Judgment ⇨210

Generally, no final judgment can be given until final disposition of entire cause including all its counts.

10. Appeal and error ⇨80(1)

Interlocutory judgment on first of three counts, ordering an accounting, was not a "final disposition" and was not appealable, and no final judgment on any count should have been entered until final disposition was also made of first count.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Final Disposition".

11. Appeal and error ⇨792

Court of Appeal has duty on its own motion to dismiss appeal when it finds that appeal is taken from a nonappealable judgment.

12. Parties ⇨59(3)

Personal representative of deceased partner should have been substituted as party defendant. Code Civ.Proc. § 385; Rules on Appeal, rule 48.

Joseph A. Murphy, John Charles Houlihan, Oakland, for appellants.

Fitzgerald, Abbott & Beardsley, Oakland, for respondents.

NOURSE, Presiding Justice.

This is an action in three counts: one for an accounting after the wrongful dissolution of an oral agreement of partnership, the second for damages for the breach of a written agreement for substitution of copartners and the third for damages for fraud. On the first count the court found for plaintiff and in an interlocutory judgment ordered an accounting to the court. On the second and third counts judgment was for defendants. Plaintiff, Harold S. Wilson, appeals from the judgment rendered against him in said action and from the whole thereof, but assigns errors with respect to the decision on the second count only.

The second cause of action, the only one discussed by the parties, is in substance based on the following undisputed facts:

On or about February 15, 1938, plaintiff Harold S. Wilson and the defendants Joseph F. Wilson and Edwin E. Nicolai executed the following agreement:

"Agreement for Substitution of
Copartners:

"This agreement made and entered into this 15th day of February, 1938, by and between Joseph F. Wilson and Edwin E. Nicolai, copartners doing business under the firm name and style of Oakland Printing and Supply Co. at No. 306-12th Street, Oakland, California, hereinafter called the parties of the first part and Harold S. Wilson, the son of said Joseph F. Wilson, hereinafter called the party of the second part,

"Witnesseth:

"That where as the said parties of the first part are desirous that the aforesaid business be continued in the event of the retirement or demise of said Joseph F. Wilson, and

"Whereas, said Joseph F. Wilson has already by Will provided that in the event of his demise that his interest in and to said business shall go to his son, Harold S. Wilson, the said second party, and

"Whereas, it is the desire of said Edwin E. Nicolai, that the said second party, in the event of the retirement or demise of said Joseph F. Wilson, be accepted into the copartnership in the place and stead of his father, and

"Whereas, the said second party is desirous of at once entering into the employment of the said firm with the purpose and intent to prepare himself to take over his father's responsibility at the time either of the aforesaid contingencies happen.

"Now, Therefore, this agreement Witness,

"That for and in consideration of the said Harold S. Wilson, the said second party, giving up his present employment and entering into the service of the said copartnership and applying himself in the acquiring a knowledge of said business with a

view of preparing himself to assume the aforesaid responsibility, the said parties of the first part hereby agree with said second party that he is to be accepted and/or taken into the said copartnership at the happening of either of the aforesaid events, and is to have all the right, title, and interest in and to said business held by his father, the said Joseph F. Wilson, at the time of his retirement or demise, with the understanding, however, that the salary that said second party is now to receive as an employee of said firm and later as a co-partner and/or monthly drawing account are to be determined by mutual consent of the parties hereto or the survivors of them and further it is agreed by and between said first party, Edwin E. Nicolai and the said second party that a new partnership agreement will be executed by them to supersede the one heretofore entered into between the said first parties under date of May 29th, 1943 [1934], by the terms of which the said business is being conducted, at the time the second party, Harold S. Wilson, is taken into the said copartnership as hereinabove set forth and provided, with the view of continuing said business as a going concern."

Contemporaneously the following rider was executed by plaintiff Harold S. Wilson and the defendant Joseph F. Wilson:

"February 15th, 1938.

"It is hereby understood and agreed to by Joseph F. Wilson, one of the first parties named in the attached agreement and Harold S. Wilson, the second party in said agreement, that the word retirement is to mean an assignment in writing of the said interest of said Joseph F. Wilson in said business and any vacation or absence from said business, either for a long or short duration, is not to be considered a retirement."

Around the time of the signing of these agreements plaintiff began to work for the partnership chiefly as a sales manager, a short time on a commission basis only, then on a salary that was gradually increased and since April, 1941, with a share in the profits. The share of plaintiff was deducted from the profit share of his father so that defendant Nicolai retained his half of the profits. Wilson, Sr., was not active in the

business since the summer of 1938. This whole arrangement was still in force when in August, 1943, plaintiff went into the Navy. During and partly because of plaintiff's activity in the partnership the gross business done and the profits made had increased greatly. After plaintiff's departure for the Navy he did not receive any salary from the partnership but in the beginning his share of the profits was continued. In the autumn of 1943 the relation between father and son became strained when the father wished to diminish the profit payments to the son, and at the end of January, 1944, all payments to plaintiff ceased. On April 19, 1944, the defendants Wilson, Sr., and Nicolai, without the knowledge of plaintiff, entered into a written agreement in which they dissolved the partnership, Nicolai retaining the business with all assets and liabilities, Wilson, Sr., to receive an amount of money payable in installments. This agreement was kept secret from plaintiff and when he found out and demanded that he be admitted into the business as a partner in the place of his father and that an accounting be made of the partnership property and profits such was refused. Defendant Nicolai continued to operate the business profitably.

The judgment for defendants is based on a conclusion of law: "That the instrument dated February 15, 1938, designated 'Agreement for Substitution of Copartners' is not a valid agreement at all because of uncertainty and invalidity in its terms, being in legal effect an agreement to make an agreement in the future, the terms of which future agreement were not presently, or at any time, decided upon." There is also a finding that Joseph F. Wilson did not retire from the partnership on or about April 19, 1944 (the date of the dissolution agreement).

[1,2] Appellant's main contention, that the agreement of February 15, 1938, is not invalid for uncertainty seems meritorious. "The law does not favor, but leans against, the destruction of contracts because of uncertainty; and it will, if feasible, so construe agreements as to carry into effect the reasonable intentions of the parties if that can be ascertained." *McIllmoil v. Frawley*

Motor Co., 190 Cal. 546, 549, 213 P. 971, 972; *Roy v. Salisbury*, 21 Cal.2d 176, 184, 130 P.2d 706; Civil Code, §§ 1643, 3541. Here the agreement was intended to protect plaintiff in his position and in his succession to his father's interest in the partnership. All three parties to it testified at the trial that such was plaintiff's desire and that defendants wished to comply. It is therefore clear that the agreement was considered by the parties as a final agreement the binding character of which was not dependent on the signing of a new partnership agreement at the time that plaintiff would become a partner. The signing of such a new agreement was logical when the parties bound by it changed, even if otherwise no changes in the terms were intended. The substitution agreement of February 15, 1938, does not show any intention to change the partnership terms except for the reservation made with respect to a salary and/or monthly drawing account of plaintiff. To uphold its validity the agreement must be construed as calling otherwise for terms identical with those of the old partnership agreement insofar as the parties would not voluntarily agree to changes. There is no extrinsic evidence whatever in the record that points to another intent. So understood the provision with respect to the making of a new partnership agreement does not destroy the certainty of the substitution agreement.

[3-5] Neither need the fact that plaintiff's salary and/or drawing account as partner is expressly left to future agreement have that effect. "[A]t the making of a contract for a right, it may sometimes be impossible to determine details, or the changing situation of affairs may indicate that details also must be subject to modification and, therefore, should not be definitely prescribed and should be left to settlement by an agreement or decree at the time the right is insisted upon. In such cases if the right is absolutely contracted for and the details are of a nature which courts may properly fix and settle, the courts should not hold the contract incomplete, but determine the right and also prescribe and settle the details." 12 Am.Jur. 521, 522; *Central Trust Co. v. Wabash, St.*

L. & P. Ry. Co., 29 F. 546, 558 affirmed Joy v. St. Louis, 138 U.S. 1, 43, 11 S.Ct. 243, 34 L.Ed. 843; United States v. Swift & Co., 270 U.S. 124, 140, 46 S.Ct. 308, 70 L.Ed. 497; Slade v. Lexington, 141 Ky. 214, 132 S.W. 404, 32 L.R.A.,N.S., 201, 205; Young v. Nelson, 121 Wash. 285, 209 P. 515, 30 A. L.R. 568; Morris v. Ballard, 56 App.D.C. 383, 16 F.2d 175, 49 A.L.R. 1461; Hall v. Weatherford, 32 Ariz. 370, 259 P. 282, 56 A.L.R. 903; Edwards v. Tobin, 132 Or. 38, 284 P. 562, 68 A.L.R. 152; Rainwater v. Hobeika, 208 S.C. 433, 38 S.E.2d 495, 166 A.L.R. 1228. The preceding cases, although of high authority, represent a minority view in that they hold valid contracts in which essential terms have expressly been left to future agreement. There is no such split of authority as to the validity of contracts where the matters left for future agreement are unessential, in which case each party will be forced to agree to a reasonable determination of the unsettled point or if possible the unsettled point may be left unperformed and the remainder of the contract be enforced. I Williston on Contracts Rev.Ed. sec. 48; Palmer v. Aeolian Co., 8 Cir., 46 F.2d 746, 753, citing Williston; Goldsmith v. Sachs, C.C.Cal., 17 F. 726, 729; T. H. Flood & Co. v. Bates, 7 Cir., 283 F. 364, 366; Weed v. Lyons Petroleum Co., D.C., 294 F. 725, 731; Spiritusfabriek Astra of Amsterdam, Holland, v. Sugar Products Co., 176 App.Div. 829, 163 N.Y.S. 516, 518; Page v. Cook, 164 Mass. 116, 41 N.E. 115, 28 L.R.A. 759, 49 Am.St. Rep. 449. A salary or a drawing account for a partner is concededly not an essential term of a partnership contract, Corporations Code, sec. 15018(f). Neither the text of the substitution agreement nor any extrinsic evidence indicates that agreement as to this point was considered a condition precedent to the effectiveness of the right of plaintiff to substitution as a partner. It is a point that may be reasonably left open to modification under changing business conditions. Its indefiniteness should under the preceding authorities not invalidate the contract. As defendants prevented any necessity of agreement concerning the salary or drawing account it is irrelevant whether if difficulties in that respect had developed

there should have been a reasonable determination by the court or only an equal division of profits without salary or drawing account. Either solution is preferable to the destruction of a contract in reliance on which plaintiff helped for years to build up the partnership business.

[6-8] The question whether or not the dissolution agreement of April 19, 1944, should be considered a retirement of defendant Wilson, Sr., entitling plaintiff under the substitution contract and its rider to succeed his father seems not decisive. If that agreement does not come directly under these provisions then it constitutes at any rate a breach of the clearly implied term of the substitution agreement that the father should not dispose of his interest in the partnership to another than his son at least not so long as defendant Nicolai was willing to continue the business. The implication is necessary as without it the agreement contrary to the intention of the parties would provide no security whatever for plaintiff and would be meaningless. "In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement." Brown v. Superior Court, 34 Cal.2d 559, 564, 212 P.2d 878, 881; Nelson v. Abraham, 29 Cal.2d 745, 750-751, 177 P.2d 931; Universal Sales Corp. v. California Press Mfg. Co., 20 Cal.2d 751, 771, 128 P.2d 665; Mervyn Investment Co. v. Biber, 184 Cal. 637, 641-642, 194 P. 1037; Orton v. Embassy Realty Associates, 91 Cal.App.2d 434, 438-439, 205 P.2d 427; Brawley v. Crosby Research Foundation Inc., 73 Cal. App.2d 103, 112, 166 P.2d 392; Andersen v. La Rinconada Country Club, 4 Cal.App.2d 197, 200-201, 40 P.2d 571; 17 C.J.S., Contracts, § 328, page 779 and compare sec. 1655, Civil Code.

[9, 10] However all these considerations are premature because the judgment appealed from was itself premature. As a general rule no final judgment can be given until the final disposition of the entire cause including all its counts. De Vally v. Kendall de Vally Operalogue Co., Ltd., 220 Cal. 742, 745, 32 P.2d 638; Mather v. Mather, 5 Cal.2d 617, 55 P.2d 1174; Greenfield v.

Mather, 14 Cal.2d 228, 231, 93 P.2d 100; Bank of America Nat. Trust and Savings Ass'n v. Superior Court, 20 Cal.2d 697, 701, 128 P.2d 357; Sjoberg v. Hastorf, 33 Cal. 2d 116, 118, 199 P.2d 668; Provident Land Corp. v. Bartlett, 53 Cal.App.2d 383, 127 P. 2d 928. In this case there was as to the first count only an interlocutory judgment ordering an accounting, which, since the leading case of Gunder v. Gunder, 208 Cal. 559, 282 P. 794, has been uniformly held in this state not to constitute a final disposition and not to be appealable. Therefore no final judgment on any count should have been entered until the first count also was finally disposed of. There are certain exceptions to the rule that there can be but one final judgment in an action, *Nicholson v. Henderson*, 25 Cal.2d 375, 379, 153 P.2d 945; 14 Cal.Jur. 951, Judgments, sec. 52, but in this jurisdiction we know of no exception which could be applicable to this case. It is true that the purported final judgment appealed from finally disposed of the second and third count and that the claims for relief stated in these counts differed and were based on a different factual basis from the one in the first count which was still pending. In some jurisdictions a separate final and appealable judgment may be entered, which finally disposes of one separate claim for relief, although more than one such claim is presented in the action, see *Reeves v. Beardall*, 316 U.S. 283, 62 S.Ct. 1085, 86 L.Ed. 1478, for civil procedure under Federal Rules, 28 U.S.C.A. In no California decision, however, has such exception been recognized. In *Mather v. Mather*, supra, and *Provident Land Corp. v. Bartlett*, supra, there are statements to the effect that the several counts contained only a single unseverable object, which statements might conceivably be considered to give some recognition to the rule later declared in *Reeves v. Beardall*, supra, 31 Cal. L.R. 90, 95. However, in *De Vally v. Kendall de Vally O. Co., Ltd.*, supra, the leading case on this specific subject, the difference in subject matter between the several counts is equal to that in the present case and the sweeping expression of the rule in *Bank of America Nat. Trust and Savings Ass'n v. Superior Court*, supra, does not seem consistent with the acceptance of

this rather extensive exception. Although *Nicholson v. Henderson*, supra, 25 Cal.2d at page 380, 153 P.2d at page 947, mentions the possibility that there may be other exceptions to the general rule in addition to the two discussed in that case, which are not applicable here, we find here no unusual situation in which postponement of the appeal until a final judgment as to all causes of action would cause so serious hardship or inconvenience as to require us to augment the number of existing exceptions.

[11] Although the matter of appealability is not mentioned by counsel for either side it is our duty on our own motion to dismiss the appeal when we find that it is taken from a nonappealable judgment. *Collins v. Corse*, 8 Cal.2d 123, 64 P.2d 137; *David v. Goodman*, 89 Cal.App.2d 162, 165, 200 P.2d 568.

[12] Finally we call the attention of the parties to the fact that according to an affidavit of the defendant Nicolai contained in the transcript the defendant Joseph F. Wilson died on August 21, 1947, and that the record does not show that his personal representative has been substituted. See sec. 385, Code of Civil Procedure; Rule 48, Rules on Appeal; 1 Cal.Jur. Abatement and Revival, secs. 35 and 36.

Appeal dismissed without prejudice. The parties to bear their own costs.

GOODELL and DOOLING, JJ., concur.



96 Cal.App.2d 634

WARREN v. WARREN.

Civ. 17291.

District Court of Appeal, Second District,
Division 1, California.

March 27, 1950.

Action by Olive H. Warren against John C. Warren for divorce, wherein defendant applied for modification of the judgment. The Superior Court for Los Angeles County, Kenneth C. Newell, J., made an order modifying the judgment, and the plaintiff appealed.

The District Court of Appeal, Doran, J., held that the court could not modify a property settlement agreement made part of the judgment before the date stated therein.

Order reversed.

Divorce ⚡245(1)

Where parties to divorce action made property settlement agreement which provided that there should be no modification of monthly payments to wife prior to a stated date, and settlement was duly incorporated in the judgment, and there was no fraud, duress or other inequitable circumstance, court was without authority thereafter on application of husband to change payment provisions prior to stated date.

Roland Maxwell, Paul H. Marston, Pasadena, for appellant.

John M. Sherman, Pasadena, for respondent.

DORAN, Justice.

On October 17, 1945 appellant wife and respondent husband entered into a property settlement agreement which provided that "The husband shall pay to the wife for her support and maintenance \$150 a month * * * during her lifetime or until she remarries, or until the death of the husband, provided however that subsequent to September 1, 1955, such payments may be modified by the proper court, upon showing of sufficient cause." The agreement further obligated the husband to pay \$100 for the support and maintenance of the minor child.

It was also agreed that "The husband shall pay to the wife the sum of \$1,000.00 in cash, the same to be forthwith deposited in escrow for payments in accordance with escrow instructions approved concurrently herewith"; and that "The husband does hereby sell, assign, transfer and convey to the wife as her separate property", a certain vacant lot therein described, and "the residence real property"; also "The 1940 Ford Sedan Automobile and the 1935 Dodge Coupe Automobile", and "All household furniture and furnishings * * * except the husband's personal effects, his

clothing, his books, his fishing tackle, and his shot gun". The husband also agreed to pay \$500 to the wife's attorney.

In Paragraph VII of the agreement "Each of the parties in consideration of the agreements of the other herein expressed hereby waives, releases and relinquishes to the other all claims each now may have, or might hereafter otherwise acquire against the other, as husband or wife, or otherwise, arising out of the marital relation." And again in Paragraph VIII each party releases, relinquishes and waives "all claims he or she may now have, or hereafter may acquire against the other for support and maintenance, or otherwise, and * * * all rights to administer upon the estate of the other, and * * * any right or claim for family allowance, homestead, support or maintenance, or otherwise * * * and agrees not to claim any interest in the other's property". The agreement is signed and acknowledged by both parties and is also signed by their respective attorneys.

An interlocutory judgment of divorce in favor of the wife was entered on February 18, 1946; the husband, represented by an attorney, having consented that the cause be heard as a default. This judgment recites that "a property settlement agreement between the parties hereto presented to the court for approval, which said agreement is in the following words and figures, to-wit", thereafter setting out in haec verba the agreement hereinbefore referred to. "Pursuant to the terms of the property settlement agreement above set forth, which is hereby approved and made a part of this decree in all its terms, provisions and conditions", the judgment orders the husband to make the payment of \$150 per month to the wife as specified, with the proviso contained in the agreement, "that subsequent to September 1, 1955, such payments may be modified by the proper court upon the showing of sufficient cause".

A final judgment of divorce was duly entered on March 5, 1947, which judgment contained the usual provision "that wherein said interlocutory judgment makes any provision for alimony or the custody and support of children, said provision be and the

same is hereby made binding on the parties affected thereby the same as if herein set forth in full".

On February 16, 1949 an order to show cause was taken out by the respondent husband seeking a modification of the provisions relating to the support of the appellant wife and the minor child. The alleged grounds for the modification, as stated in the husband's affidavit were that the order in question "was based upon a property settlement Agreement * * * dated October 17, 1945. At that time the wife had no independent income whatsoever and the husband's income was approximately \$500.00 per month. At the present time Olive H. Warren is regularly employed as a school teacher * * * at a salary of \$300.00 per month. At the present time John C. Warren's income has been substantially reduced and at the present time is in the gross amount of \$350.00 per month." The affidavit also set up the fact that the husband was "delinquent in payments for the support of * * * (the son) in the amount of \$500.00", and delinquent in payment for support of the wife in the sum of \$4,800. The court was requested to modify the order to provide payment of only \$75 for support of the child; \$1 per month for support of the wife, and to require the husband to pay \$25 per month for the purpose of reducing "the amount now delinquent for alimony and support".

At the hearing on the order to show cause, the appellant's attorney "objected to the consideration of any evidence on the ground that the order could not be modified until after September 1, 1955, pursuant to the provisions of the interlocutory judgment and the property settlement agreement". The trial court nevertheless permitted introduction of the husband's testimony, took the matter under submission, and on March 28, 1949, ordered modification.

The minute order in respect to modification was as follows: "Defendant will pay to the plaintiff for the support of the minor child \$100.00 per month and will pay as alimony to the plaintiff, the sum of \$1.00 per month; payments to be made on the same days as heretofore ordered. Defendant

is found in contempt of court and is sentenced to five days in the county jail. Sentence is suspended on the condition that the defendant pay to plaintiff \$50.00 per month on the sum now delinquent until said arrearage is paid in full, payable on the 1st day of each month, commencing April 1, 1949."

As set forth in appellant's brief, the contention is that "Where provision in the interlocutory divorce decree awarding the wife money for her support and maintenance as a part of the division of the community property was predicated on a written property settlement of the parties, which had been approved by the trial court, the agreement is binding on the court in the absence of fraud, duress, undue influence, violation of the confidential relation or other circumstances showing the agreement to be inequitable and such provision for the support and maintenance of the wife cannot be modified by the court without the consent of the parties".

The quoted language above is taken verbatim from the case of *Holloway v. Holloway*, 79 Cal.App.2d 44, 179 P.2d 22. In that case the appeal was from the trial court's refusal to modify the provisions of an interlocutory judgment ordering the defendant husband to pay \$35 per month to the wife for her support until her death or remarriage. The appellate court, citing *Hough v. Hough*, 26 Cal.2d 605, 160 P.2d 15, and *Adams v. Adams*, 29 Cal.2d 621, 177 P.2d 265, affirmed the order refusing modification and held that the trial court was without jurisdiction to modify such provisions of an interlocutory judgment predicated on a written property settlement approved by the court.

The *Holloway* decision, factually similar to the present situation, constitutes direct authority in support of appellant's contention that the trial court was without jurisdiction to modify the judgment previously rendered. In executing the written property settlement agreement, husband and wife were each represented by competent attorneys. The results of the contractual negotiations as merged in the written agreement were thereafter, with full acquiescence of the parties and approval of the trial court,

incorporated in an interlocutory judgment of divorce. These provisions were in turn incorporated by reference in the final judgment. The husband and wife held, among other things, agreed that there should be no modification of the monthly payments to the wife prior to September 1, 1955, and this like the other provisions, was duly incorporated in the judgment.

The record fails to show any fraud, duress or other inequitable circumstances. In this situation, and under authority of the cases cited, a reversal is called for. The sanction of judicial interference with a property settlement agreement approved by the court, so as to reduce the amount of the wife's payments, would alike undermine the obligations of contract and of judgment.

The order appealed from is reversed.

WHITE, P. J., and DRAPEAU, J., concur.



96 Cal.App.2d 668

PEOPLE v. CHAPMAN.

Cr. 2192.

District Court of Appeal, Third District,
California.

March 27, 1950.

Jack Chapman was convicted in the Superior Court of Tuolumne County, J. T. B. Warne, J., of robbery while armed with a deadly weapon and of assault by means of force likely to produce great bodily harm, and defendant filed a petition for writ of error coram nobis. The District Court of Appeal, Adams, P. J., held that grounds on which defendant depended in his application for the writ were outside the scope of the writ, and that he was not entitled to the writ.

Appeal dismissed.

1. Criminal law ☞997

The purpose of a writ of error coram nobis is to secure relief from a judgment rendered while there existed some fact

which would have prevented rendition of judgment if the trial court had known such fact, and which, through no negligence or fault of defendant, was not then known to the court.

2. Criminal law ☞997

An application for a writ of error coram nobis must show that the facts on which defendant relies were not known to him, and could not, in exercise of due diligence, have been discovered by him at any time substantially earlier than time of his motion for the writ.

3. Criminal law ☞997

A writ of error coram nobis may not be availed of to review alleged errors that were either considered on a prior appeal or, though not raised on such appeal, could have been so raised.

4. Criminal law ☞997

Where grounds on which petitioner depended in his application for writ of error coram nobis were known to him during criminal trial and they pertained to alleged errors committed during the trial, and they were available to him for presentation to trial court on motion for new trial and to District Court of Appeal on appeal, petitioner was not entitled to the writ.

5. Criminal law ☞997, 1144(17)

Neither District Court of Appeal nor Superior Court was bound to accept at face value the allegations of petition for writ of error coram nobis, especially since strong presumptions of regularity favored judgment of conviction.

Jack Chapman, in pro per.

Fred N. Howser, Attorney General, by
Gail A. Strader, Deputy, for respondent.

ADAMS, Presiding Justice.

Appellant Chapman was convicted by a jury in the Superior Court of Tuolumne County on two counts, robbery while armed with a deadly weapon, and assault by means of force likely to produce great bodily harm. He appealed from the judgment and same was affirmed by this court. People

v. Chapman, 91 Cal.App.2d 854, 206 P.2d 4. A hearing was denied by the Supreme Court.

In September, 1949, Chapman filed in the Superior Court of Tuolumne County what he designated as a motion to annul, vacate and set aside the aforesaid judgment "and/or petition for writ of coram nobis or writ of error," alleging, as grounds therefor: (1) that his prosecution on the two counts had placed him in double jeopardy; (2) that the testimony of Donald Larios, his co-defendant, charges against whom had been dismissed during the trial so he could testify against Chapman, was inadmissible for the reason that he had been promised immunity in return for said testimony; (3) that the trial court committed error in allowing the jury to separate during the trial; (4) that it was prejudicial misconduct to assign as bailiffs in charge of the jury two officers who had taken part in the investigation of the crime; (5) that defendant was denied the right to trial by an impartial jury when he was prosecuted by a district attorney who practices civil law in addition to his duties as district attorney; (6) that the trial was not conducted according to law or due process in that defendant was not personally present during the entire trial proceedings; (7) that the district attorney was guilty of prejudicial misconduct in commenting, during his argument to the jury, on the failure of defendant to testify in his own behalf; (8) that the district attorney was further guilty of prejudicial misconduct in charging the jury as to matters of fact; (9) that the verdict and judgment are void for uncertainty; and (10) that the verdict is contrary to the evidence. In a supplement to the motion, which he filed October 26, 1949, it was alleged that the court erred in giving a certain instruction; and in an additional supplement filed November 14, 1949, he set up: (11) that one member of the jury voted not guilty, though he admits that the jury was polled, and that the verdict should have been failure to agree; (12) that the court erred in refusing to inquire into whether or not the jury received evidence out of court; and (13) that the testimony of Audrey

Larios (defendant's daughter) was inadmissible under section 1322 of the Penal Code.

The trial court, on November 18, 1949, denied defendant's petition and an appeal was taken. After the filing of the record here respondent served and filed a notice of motion to dismiss the appeal, on the ground that it is irregular, frivolous, sham and without merit; and the matter is before us on that motion.

[1-3] We think that the trial court properly denied the petition, and that the appeal should be dismissed upon the grounds stated in respondent's motion. The Supreme Court, in several recent decisions, has definitely adjudicated that the scope of review on such a petition is limited; that its purpose is to secure relief from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it, and which, through no negligence or fault of defendant, was not then known to the court; and that an applicant for the writ must show that the facts upon which he relies were not known to him, and could not, in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ. *People v. Adamson*, 34 Cal.2d 320, 210 P.2d 13, and cases there cited. Such a writ may not be availed of to review alleged errors that were either considered on a prior appeal, or, though not raised on such appeal, could have been so raised. Such errors are not even reviewable in a habeas corpus proceeding. See *In re Connor*, 16 Cal.2d 701, 705, 108 P.2d 10, in which the court said that in this state a defendant is not permitted to try out his contentions piecemeal by successive proceedings attacking the validity of the judgment against him. In *Re Lindley*, 29 Cal.2d 709, 726, 177 P.2d 918, in referring to the restricted scope of the writ of coram nobis, the court adopted the view that all matters reviewable by appeal or upon motion for a new trial must be so presented, and cannot be made the grounds of an application for the writ coram nobis.

[4,5] It is obvious that the alleged grounds upon which petitioner depends in

his application for the writ are outside the scope of the writ. They refer to facts that were known to petitioner during the trial as they pertain to alleged errors committed during such trial, and they were available to defendant for presentation to the trial court on motion for a new trial, and to this court on defendant's appeal. Appellant here does not deny this, but asserts that he did not, at such times, know the law. However, he was represented by counsel of his own choice, both at the trial and on his appeal; and that he, himself, has since acquired what he may refer to as subsequent knowledge of the law does not permit him to try out his contentions piecemeal, nor authorize a review of the alleged errors in coram nobis proceedings. Furthermore, as the court said in *People v. Adamson*, supra, 34 Cal.2d at page 330, 210 P.2d at page 17, this court has a right, as had the trial court, after the judgment has become final, to scrutinize appellant's claims with a critical eye, in the light of our familiarity with the facts of the crime as they appear in the record on appeal which we reviewed; and we are not bound, nor was the trial court, to accept at face value the allegations of the petition for the writ, especially since strong presumptions of regularity favor the judgment against petitioner.

The motion to dismiss this appeal is granted and the appeal is dismissed.

PEEK and VAN DYKE, JJ., concur.



96 Cal.App.2d 629

PEOPLE v. WARD.

Cr. 2631.

District Court of Appeal, First District,
Division 1, California.

March 27, 1950.

John E. Ward was convicted of a kidnapping in which jury found that victim had suffered bodily harm and was sentenced to life imprisonment without possibility of

parole. Four years later he filed motion in trial court to annul and vacate that portion of judgment denying possibility of parole. The Superior Court of Alameda County, Charles Wade Snook, J., denied the motion, and defendant appealed. The District Court of Appeal, Peters, P. J., held that review of question of whether jury's finding that kidnap victim suffered bodily harm was supported by the evidence could not be secured by writ of error coram nobis or by motion to vacate judgment since such point should have been raised on appeal.

Order affirmed.

1. Criminal law ⚡997

In legal effect a petition for writ of error coram nobis is nothing more than a motion to vacate a judgment.

2. Criminal law ⚡997

A writ of error coram nobis will not issue to correct errors of law or to redress irregularities at trial except where there has been extrinsic fraud that deprived petitioner of a trial upon the merits and is issued only to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it and which, through no negligence or fault of defendant, was not then known to the court.

3. Criminal law ⚡997

A writ of error coram nobis cannot be used to serve the purpose of an appeal or other statutory remedy, and even if the claimed error could be reviewed in such a proceeding, if the point had been seasonably made, the petitioner must show due diligence and must show why the error was not sooner discovered.

4. Criminal law ⚡997, 998

Under some circumstances a writ of error coram nobis can be granted although the judgment is regular on its face, but a motion to vacate must be denied where the judgment is regular on its face.

5. Criminal law ⚡998, 1131(4)

Where question could have been raised on appeal the trial court has no jurisdiction to grant a motion to vacate after the time for appeal has expired, and an appeal from

the denial of such a motion can be dismissed by the appellate court.

6. Criminal law ⚡998

Where defendant failed to appeal from judgment sentencing him to life imprisonment without possibility of parole or from order denying his motion for a new trial, his motion filed four years later, to vacate that portion of judgment denying possibility of parole on ground that jury's finding that victim suffered bodily harm was contrary to evidence, was properly denied, since such point should have been raised on appeal. Pen. Code, § 209.

John E. Ward, Represa, in pro. per.

Fred N. Howser, Attorney General, David K. Lener, Deputy Attorney General, attorneys for respondent.

PETERS, Presiding Justice.

On March 19, 1945, defendant was sentenced to life imprisonment without possibility of parole after being convicted of a kidnapping in which the jury found that the victim suffered bodily harm. Section 209, Penal Code. Four years later, in May of 1949, he moved the trial court to annul, vacate and set aside that portion of the judgment denying him the possibility of parole. That motion was denied on the grounds that it was "groundless and without merit." Defendant appeals.

From the clerk's transcript the following facts can be ascertained: On November 18, 1944, the defendant was charged by information with a prior conviction and with eight felonies. The eight counts were as follows:

Count 1—kidnapping of Harold Bass on July 25, 1944;

Count 2—robbery of Harold Bass on July 25, 1944;

Count 3—robbery of Ralph Herget on July 28, 1944;

Count 4—rape of Sally Gilbert on July 29, 1944;

Count 5—kidnapping of Sally Gilbert on July 29, 1944;

Count 6—robbery of Sally Gilbert on July 29, 1944;

Count 7—assault with intent to commit rape on Martha Escher on August 24, 1944; and

Count 8—robbery of Martha Escher on August 24, 1944.

Defendant admitted the prior, but pleaded not guilty to the eight felony counts. On his first trial the jury disagreed as to six of the counts, but found him guilty of second degree robbery on counts 3 and 8. On the second trial defendant was found guilty of the other six counts. As to counts 2 and 6, the crimes were determined to be of the first degree. As to count 1, the jury found that the victim had suffered bodily harm, and fixed the sentence at life imprisonment without possibility of parole, and defendant was so sentenced. A motion for a new trial was denied. All during these proceedings the defendant was represented by the public defender of the county.

No appeal was taken from the judgment or from the order denying the motion for a new trial. Since March of 1945, defendant has been incarcerated, first at San Quentin and later at Folsom. Since his incarceration he has taken various legal steps *in propria persona* to attack the judgment. In May of 1947, he sought by motion to compel the preparation of records in his case. The motion was denied. No appeal was taken. On October 1, 1947, his petition for *coram nobis* was denied, and no appeal taken. On January 6, 1948, the Third Appellate District denied his petition for habeas corpus. On September 20, 1948, his motions for records in his case, and to be brought before the trial court, were denied. No appeal was taken. Then, on May 16, 1949, this present motion was denied and this appeal taken.

The basic contention of defendant is that the trial court, on the present motion, abused its powers by its failure to modify the judgment by striking the provision denying him the possibility of parole because, so defendant claims, the jury verdict so providing was contrary to the evidence in that the evidence on his main trial show-

ed that no bodily harm was suffered by the victim. To support this contention, defendant purports to quote a portion of the re-direct examination of the victim Harold Bass in which Bass is claimed to have testified that defendant locked him into the luggage compartment of an automobile, where he was compelled to lie doubled up for forty-five minutes; that he did not suffer any "extreme discomfort"; that he suffered no physical injuries and no bodily harm.

Defendant, some four years after his conviction, is trying to use this motion, entitled a "motion to annul, vacate and set aside" the challenged portion of the judgment, for the purpose of having it determined that the challenged portion of the judgment is unsupported by the evidence—i. e., he is seeking to have this motion serve the same purpose as an appeal would have done. Such a remedy is not now available to defendant.

The parties differ as to the nature of the proceedings. Defendant contends that he is objecting to an error of law, and not to an error of fact. It is not a proceeding in *coram nobis*, says defendant, but a motion to annul and vacate a portion of a judgment, and he claims that the sought for relief is available to him on such a motion. The Attorney General claims that the motion is a petition for a writ of error *coram nobis*, and that such a petition will not lie on grounds urged by defendant.

[1] Whether there are any legal distinctions between a petition for a writ of error *coram nobis* and a motion to vacate a judgment need not be decided in this case. The rule has been frequently stated that "in legal effect in the practice in this state a petition for a writ of error, *coram nobis*, is nothing more nor less than a motion to vacate a judgment". People v. Vernon, 9 Cal.App.2d 138, 143, 49 P.2d 326, 328; see, also, People v. Harincar, 49 Cal. App.2d 594, 596, 121 P.2d 751; People v. Superior Court, 28 Cal.App.2d 442, 444, 82 P.2d 718; People v. Martinez, 88 Cal.App. 2d 767, 769, 199 P.2d 375; to the same general effect see People v. Kelly, 35 Cal. App.2d 571, 573, 96 P.2d 372; People v. McVicker, 37 Cal.App.2d 470, 473, 99 P.2d

1110; People v. Mooney, 178 Cal. 525, 528, 174 P. 325; People v. Butterfield, 37 Cal. App.2d 140, 142, 99 P.2d 310; People v. Egan, 73 Cal.App.2d 894, 899, 167 P.2d 76; 4 Cal. Jur. 10, Yr. Supp. 891.

[2,3] The defendant is clearly not entitled to a writ of error *coram nobis*. It is now too well settled to require extended discussion that such writ will not issue to correct errors of law or to redress irregularities at the trial except where there has been extrinsic fraud that deprived the petitioner of a trial upon the merits. People v. Darcy, 79 Cal.App.2d 683, 686, 689, 180 P.2d 752; People v. Reid, 195 Cal. 249, 258, 232 P. 457, 36 A.L.R. 1435; People v. Weatherford, 87 Cal.App.2d 275, 277, 196 P.2d 832. The writ is issued only "to secure relief, where no other remedy exists, from a judgment rendered while there existed some *fact* which would have prevented its rendition if the trial court had known it and which, through no negligence or fault of the defendant, was not then known to the court." (*Italics added.*) People v. Adamson, 34 Cal.2d 320, 210 P. 2d 13, 15, citing many cases. The defendant has made no such showing. It is also elementary that the writ cannot be used to serve the purpose of an appeal, or other statutory remedy. If the claimed error could have been reviewed on an appeal, or by other statutory means, the writ will not lie. People v. Coyle, 88 Cal.App.2d 967, 971, 200 P.2d 546; People v. Pryor, 87 Cal.App.2d 352, 353, 196 P.2d 948; People v. Knight, 73 Cal.App.2d 532, 535, 166 P.2d 899; People v. Egan, 73 Cal.App.2d 894, 900, 167 P.2d 766; 27 Cal.L.Rev. 228.

Moreover, even if the claimed error, if the point had been seasonably made, could be reviewed in such a proceeding, the petitioner must show due diligence, and particularly must show why the error was not sooner discovered. People v. Adamson, 34 Cal.2d 320, 210 P.2d 13, where there was a delay of 3 years and 7 months; People v. Lumbley, 8 Cal.2d 752, 68 P.2d 354; where there was a delay of 6 years and 8 months; People v. Harincar, 49 Cal. App.2d 594, 121 P.2d 751, where there was a 5-year delay, and People v. Vernon, 9 Cal.App.2d 138, 49 P.2d 326, where there

STEIN et al. v. SIMPSON et al.

Civ. 17598.

District Court of Appeal, Second District,
Division 1, California.

March 27, 1950.

was a delay of 4½ years. In all of these cases it was held, as a matter of law, that the required due diligence had not been shown.

[4, 5] If there is any difference between a petition for a writ of error *coram nobis* and a motion to vacate, it is that the former is broader than the latter. Under some circumstance a writ of error *coram nobis* can be granted although the judgment is regular on its face (People v. Butterfield, 37 Cal. App.2d 140, 99 P.2d 310), but a motion to vacate must be denied where, as here, the judgment is regular on its face. People v. Russell, 139 Cal.App. 417, 420, 34 P.2d 203; People v. Ramirez, 139 Cal.App. 380, 33 P.2d 848; People v. Clark, 24 Cal.App.2d 302, 307, 74 P.2d 1070. Moreover, just as the writ of error *coram nobis* cannot be used to review matters that could be passed upon on an appeal, a motion to vacate cannot be used to serve the purposes of an appeal. Where the question raised could have been raised by an appeal, after the time for appeal has expired, the trial court has no jurisdiction to grant such a motion. People v. Chavez, 11 Cal.App.2d 388, 53 P.2d 1020; People v. Marr, 46 Cal.App.2d 39, 115 P.2d 214; Id., 46 Cal.App.2d 42, 115 P.2d 206; People v. Howard, 7 Cal.App. 2d 283, 286, 46 P.2d 268; People v. Russell, 139 Cal.App. 417, 420, 34 P.2d 203; People v. Lawyer, 9 Cal.App.2d 69, 70, 48 P.2d 722. An appeal from the denial of such a motion to vacate can be dismissed by the appellate court. People v. Carkeek, 35 Cal. App.2d 499, 96 P.2d 132; People v. Simpson, 41 Cal.App.2d 526, 107 P.2d 262; People v. Erickson, 74 Cal.App.2d 339, 168 P.2d 417.

[6] The point here sought to be reviewed is that a finding of the jury—that a kidnap victim suffered bodily harm—is not supported by the evidence. Obviously, such a point could and should have been raised on an appeal. Neither a writ of error *coram nobis* nor a motion to vacate can be properly used to secure a review of such a point at this late date.

The order appealed from is affirmed.

BRAY, J., and SCHOTTKY, Justice pro tem., concur.

Jack R. Stein and another brought an action against Russell Brown Simpson and others to quiet title to realty. The Superior Court, Los Angeles County, Arnold Praeger, J., entered judgment for plaintiffs, and after judgment made an order directing clerk to secure a satisfaction of judgment from defendant Simpson. Defendant Simpson moved to amend the order directing clerk to secure satisfaction of judgment and filed a notice of appeal from order denying such motion and from the judgment. The District Court of Appeal, Drapeau, J., upon a motion of plaintiffs to dismiss the appeal, held that the judgment in the Superior Court was a final judgment within statute providing that special orders after final judgment are appealable, notwithstanding that defendant had subsequently filed a notice of appeal from judgment.

Motion to dismiss the appeal was denied

1. Appeal and error ⇐82(1)

Although defendant appealed from superior court judgment, the judgment in superior court was a "final judgment" within statute providing that special orders after final judgment are appealable. Code Civ. Proc. § 963, subd. 2.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Final Judgment".

2. Appeal and error ⇐82(1)

Where superior court after judgment made a special order, which was not appealed from, directing clerk to secure a satisfaction of judgment from defendant, denial of a later motion by defendant to amend such order was appealable within statute providing that "special orders after final judgment" are appealable. Code Civ. Proc. § 963, subd. 2.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Special Order After Final Judgment".

Joseph D. Taylor, Los Angeles, for appellant.

Cobb & Utley, Los Angeles, for respondents.

DRAPEAU, Justice.

Motion to dismiss appeal from an order made after judgment. The proceedings necessary to understand the situation are as follows:

August 16, 1949—Judgment for plaintiffs, quieting title to the real property involved in the action, on condition that plaintiffs pay defendant \$11,531.02.

October 13, 1949—Motions for new trial and for entry of new and different judgment denied.

October 24, 1949—Order directing the Clerk to accept \$11,531.02 and to deliver said sum to defendant Simpson upon securing a satisfaction of judgment from defendant Simpson without prejudice to the rights of plaintiffs to petition the Court for withdrawal of said funds on or after November 15, 1949. This money was tendered to defendant on condition that he execute and deliver a satisfaction of judgment, which tender was refused.

November 9, 1949—Defendant's motion to amend the order of October 24th denied. The amendment sought was to strike out the direction for a satisfaction of judgment in the order of October 24th.

November 10, 1949—notices of appeal filed: (1) from the order of November 9, 1949; (2) from the judgment of August 16, 1949.

Admittedly the appeal from the judgment is good—and will be heard in due time—at least good so far.

The practical situation is that plaintiffs have their money tied up in the Clerk's office. The action being to quiet title, they neither get clear title to the property involved nor the use of their money. This situation may be taken care of by this Court after a hearing.

Subsection 2 of Section 963, Code of Civil Procedure, provides that special orders after final judgment are appealable. *Lande*

v. *Southern Cal. Freight Lines*, 78 Cal.App. 2d 417, 177 P.2d 936.

But the moving party asserts:

(a) That the judgment is not final, within the meaning of the code section, because it was made while there still was a right of appeal, which right of appeal was subsequently exercised, and

(b) There is still no final judgment because the appeal was perfected November 10, 1949, and that automatically stayed all proceedings, so that there can be no final judgment until the appeal is finally decided or dismissed.

(c) That, anyhow, the order did not affect the judgment; it was simply a denial of a motion to amend an order already made and not appealed from.

The words "final judgment" in Subsection 2 of Section 963, Code of Civil Procedure, have been construed to mean final judgment in the Superior Court, and not after termination of an appeal. *Fairbanks v. Lampkin*, 99 Cal. 429, 34 P. 101; *Southern California Ry. Co. v. Superior Ct.*, 127 Cal. 417, 59 P. 789; *Hughes v. Chung Sun Tung Co.*, 28 Cal.App. 371, 154 P. 299, 301; *Lande v. Southern Cal. Freight Lines*, *supra*; *Cuneo v. Cuneo*, 40 Cal.App. 564, 181 P. 229.

[1] It is therefore clear that the words "final judgment" as used in the code section mean judgment in the Superior Court. This conclusion disposes of all but the final contention of the moving party.

[2] That is that the order was only a denial of a motion to amend an order theretofore made and not appealed from and therefore is not an appealable order. This contention is also untenable, for the reason that it is the evident purpose of the code section to afford a review of such orders as may be made after judgment.

The motion to dismiss the appeal is denied and the motion for an order directing the return of deposit in Court to respondents is set for hearing for the next calendar date, notice to be given to the opposite side.

WHITE, P. J., and DORAN, J., concur.

GIBSON v. GARCIA et al.

Civ. 17045.

District Court of Appeal, Second District.
Division 3, California.

March 28, 1950.

Hearing Denied May 25, 1950.

Action by Ada Gibson against Paul Garcia, C. M. Garcia and the Los Angeles Transit Lines, for injuries sustained when automobile driven by Paul Garcia collided with pole maintained by the transit lines near a street corner. From a judgment of the Superior Court of Los Angeles County, Clarence M. Hanson, J., in favor of the Los Angeles Transit Lines, the plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that complaint which alleged that pole was rotten, that the Transit Lines by exercise of reasonable care should have known of its condition, and in exercise of reasonable care should have anticipated accidents, was sufficient to state cause of action against the Transit Lines.

Judgment reversed with directions.

1. Street railroads ⇨86(1)

Where corporation maintained wooden poles adjacent to curbing on boulevard as a part of its street railway system, corporation had duty to select and maintain poles sufficiently strong to withstand ordinary strain of weather conditions and other tests of strength likely to be encountered along a busy highway.

2. Street railroads ⇨86(1)

Where corporation maintained wooden poles adjacent to curbing on boulevard as a part of its street railway system, corporation was bound to exercise ordinary care to keep its poles in safe condition, so as not to expose passers-by to unreasonable risk of harm, the extent of its duty being measured by standard of foreseeability of injury by a reasonably prudent man having regard for the accompanying circumstances.

3. Street railroads ⇨110(1)

Complaint alleging that pole maintained on curbing as part of street railway system was rotten, that in exercise of ordinary care the transit corporation should have known of such condition and that negligence of corporation with negligence of

motorist who collided with pole and caused it to fall on pedestrian contributed to injuries, was broad enough to permit proof that pole was in such state of deterioration that it could be caused to fall by a relatively light force, that corporation should have known of such condition, and that reasonable precautions were not taken.

4. Street railroads ⇨117(3)

Whether transit corporation had exercised ordinary care in the maintenance as a part of street railway system of pole which was knocked down by motorist, to the injury of pedestrian, was an issue for the trier of fact.

5. Negligence ⇨61(1)

Proximate causation is not always arrested by intervention of independent force, and if original negligence continues to time of injury and contributes substantially thereto in conjunction with intervening act, each may be a proximate concurring cause for which full liability may be imposed.

6. Negligence ⇨56(1.9)

If conduct of actor exposes persons in the class to which accident victim belongs to foreseeable risk of injury, and his act or omission contributes substantially to injury of nature actually occurring, he may be held liable, notwithstanding that an unforeseeable independent intervening act is a concurring cause.

7. Negligence ⇨136(25)

Whether an intervening act is a concurrent cause or a superseding cause of injury is normally a question of fact.

8. Street railroads ⇨102(1)

Where pole was maintained on curbing of boulevard by corporation as part of street railway system, if a pole carefully maintained in sound condition would have broken under impact of automobile, and if injuries of pedestrian who was struck by pole would thus have been sustained even though corporation had not been negligent, breach of duty by corporation in failing to maintain pole in sound condition would not have been a substantial cause of the injuries, whereas if a sound pole would not have broken and harm to pedestrian could

thus have been prevented by careful maintenance, any omission of corporation could be considered as a substantial concurring cause.

9. Street railroads $\S$ 86(1)

Corporation maintaining pole on curb as part of street railway system and failing to act as reasonably prudent person to protect pedestrian and others from hazard of defective pole could be held liable for injuries resulting.

10. Street railroads $\S$ 110(1)

Complaint alleging that corporation maintained wooden poles adjacent to curbing on heavily traveled highway as part of street railway system, that negligently driven automobile collided with pole, that pole fell on plaintiff causing severe injuries, that pole was rotten, that corporation in exercise of reasonable care should have known of its condition and should have anticipated that accidents would occur and that negligence of corporation and of motorist contributed concurrently to cause injuries to plaintiff, stated cause of action against corporation.

DeForrest Home, Los Angeles, for appellant.

Melvin L. R. Harris, Los Angeles, for respondent.

SHINN, Presiding Justice.

Appeal from a judgment in favor of defendant Los Angeles Transit Lines, following an order sustaining its demurrer to plaintiff's complaint for personal injuries without leave to amend. Appellant recovered judgment by default against defendants Paul and C. M. Garcia in the sum of \$25,000, which remains wholly unsatisfied.

Respondent corporation operates a general street railway system in Los Angeles, and maintains wooden poles adjacent to the curbing on Whittier Boulevard near the corner of Spence Street, as part of its system. Appellant was standing on the sidewalk near one of these poles when a 1938 Plymouth automobile, negligently

driven by Paul Garcia, collided with the pole. It broke a short distance above the ground and fell on appellant, causing severe injuries. Paragraph IV of the complaint alleges: "That at the time of the aforesaid accident, defendant, Los Angeles Transit Lines, carelessly and negligently maintained the aforesaid wooden pole in that said pole was rotten and its strength had become badly impaired by rot or termites; that said pole had been in a rotten condition for a long period of time which condition was known to defendant, Los Angeles Transit Lines, or by the exercise of reasonable care, should have been known to said defendant; that said Whittier Boulevard is a main and heavily traveled highway used by thousands of automobiles daily and said defendant, Los Angeles Transit Lines, in the exercise of reasonable care, should have anticipated that accidents would occur upon said highway and that automobiles would be likely to come over the curbing and strike said pole and that if said pole was permitted to remain in a weakened condition as aforesaid that it would constitute a hazard to persons on the sidewalk and that the same was likely to be caused to fall upon or against said persons, and in particular, upon plaintiff; that the negligence of the defendant, Los Angeles Transit Lines, as aforesaid in maintaining said wooden pole in the condition above described together with the negligence of defendant Paul Garcia, in the operation of his said automobile contributed concurrently to cause the injuries to plaintiff hereinafter complained of."

[1-4] It was the duty of respondent to select and maintain poles sufficiently strong to withstand the ordinary strain of weather conditions and other tests of strength likely to be encountered along a busy highway. *Keller v. Pacific Tel. & Tel. Co.*, 2 Cal.App. 2d 513, 519, 38 P.2d 182. It was bound to exercise ordinary care to keep its poles in a safe condition, so as not to expose passersby to an unreasonable risk of harm. The extent of this duty is measured by the standard of foreseeability of injury to the eyes of a reasonably prudent man having regard for the accompanying circum-

stances. *Mosley v. Arden Farms Co.*, 26 Cal.2d 213, 216, 157 P.2d 372, 158 A.L.R. 872; 1 *Shearman & Redfield on Negligence*, sec. 24; *Rest., Torts*, secs. 284, 289, 290. Of course, "[d]efendant is not bound to build its line so strong that it cannot be blown or broken down. It does not insure the safety of travelers on the highway from injuries if its poles and wires are properly and lawfully placed, but it is bound to use reasonable care * * *. Its poles, wires and equipment must be strong enough to withstand any violence which reasonably may be anticipated." *Ray v. New York Telephone Co.*, 260 App.Div. 405, 23 N.Y. S.2d 508, 509, paraphrasing *Ward v. Atlantic & Pacific Telegraph Co.*, 71 N.Y. 81, 27 Am.Rep. 10; see also *Stewart v. San Joaquin L. & P. Co.*, 44 Cal.App. 202, 207, 186 P. 160; *Royal Indemnity Co. v. Public Service Corp.*, 42 Cal.App. 628, 632-633, 183 P. 960. Under the allegations of the complaint, plaintiff would be entitled to prove that respondent's pole was in such an advanced state of deterioration that it could be caused to fall by a relatively light force, such as an ordinary rain or wind storm might produce, or that it might even be upon the verge of falling of its own weight; that respondent knew, or should have known of such condition; and that reasonable precautions were not taken. Such proof would justify a conclusion that respondent was negligent. Whether the test of ordinary care was met was an issue for the trier of fact. 19 Cal.Jur., sec. 134, p. 723.

It is respondent's contention that, as a matter of law, any negligence of which it may have been guilty could not have been the proximate cause of plaintiff's injuries. The termite-weakened pole, it is argued, furnished only the condition upon which the unforeseeable intervening act of Paul Garcia operated independently to cause the harm. In the cases upon which respondent relies in support of this proposition, *Sweet v. Los Angeles Railway Co.*, 79 Cal.App.2d 195, 201, 179 P.2d 824; *Hayden v. Paramount Productions, Inc.*, 33 Cal. App.2d 287, 91 P.2d 231; and *Klarquist v. Chamberlain*, 124 Cal.App. 398, 12 P.2d 664, it was determined, either as a mat-

ter of law or as a matter of fact, that the condition created by defendant was not, of itself, likely to result in the injury which occurred, and the sole proximate cause of the injury was the intervening act. We must take the facts as they are alleged in the complaint, and as will be developed, they presented questions of fact on the issues of negligence and of proximate cause.

[5] It is well-settled that proximate causation is not always arrested by the intervention of an independent force. If the original negligence continues to the time of the injury and contributes substantially thereto in conjunction with the intervening act, each may be a proximate concurring cause for which full liability may be imposed. *Gerberich v. Southern California Edison Co.*, 5 Cal.2d 46, 53 P. 2d 948; *Lacy v. Pacific Gas & Electric Co.*, 220 Cal. 97, 29 P.2d 781; *De Corsey v. Purex Corporation*, 92 Cal.App.2d 669, 675, 207 P.2d 616.

[6] Respondent appears to contend that it is absolved from liability since it was not foreseeable that a motorist would negligently collide with its pole with such force as to cause it to fall upon plaintiff. However, in order to prevent an intervening act from being a superseding cause which will relieve the defendant of responsibility for his negligence, the law does not inevitably require that the precise act be foreseeable. Numerous cases have declared that if the defendant's conduct exposes persons in the class to which plaintiff belongs to a foreseeable risk of injury, and his act or omission contributes substantially to injury of that nature actually occurring, he may be held liable notwithstanding the fact that an unforeseeable independent intervening act is a concurring cause. *Prosser on Torts*, pp. 369-372, and cases cited; *Sandel v. State*, 115 S.C. 168, 104 S.E. 567, 569, 13 A.L.R. 1268. As the Supreme Court stated in *Taylor v. Oakland Scavenger Co.*, 17 Cal.2d 594, 602, 110 P. 2d 1044, 1049, "the fact that neither party could reasonably anticipate the occurrence of the other concurrent cause will not shield him from liability so long as his own negligence was one of the causes of the injury. *Herron v. Smith Bros., Inc.*, 116

Cal.App. 518 [2 P.2d 1012]; *Sawdey v. Producers' Milk Co. et al.*, 107 Cal.App. 467 [290 Pac. 684]." See also, *Rodriguez v. Savage Transportation Co.*, 77 Cal.App. 2d 162, 168-169, 175 P.2d 37. . .

The principle is recognized in section 435 of the Restatement of Torts: "If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm *or the manner in which it occurred* does not prevent him from being liable." (Emphasis added.) Thus, in *Carroll v. Central Counties Gas Co.*, 74 Cal.App. 303, 240 P. 53, which also arose on demurrer, it appeared that the car in which plaintiff was riding went through the railing of a bridge and in falling struck and broke defendant's gas pipeline which was suspended near the bridge, resulting in a fire from which plaintiff's injuries were sustained. Deciding that the complaint presented a question of fact whether defendant had been negligent in the maintenance of its pipeline, the court rejected defendant's contention that since the chain of events leading up to the accident was not foreseeable, it was not liable. It was held that if defendant could reasonably have foreseen that its conduct involved the likelihood of some danger to users of the highway, it would be liable, since its negligence was continuous to the time of the accident, and the type of injury which occurred was foreseeable and hence a natural and probable consequence of its wrongful act. Additional authorities applying the same rule include *Johnson v. Kosmos Portland Cement Co.*, 6 Cir., 64 F.2d 193, explosive gases in empty oil barge exploded by a bolt of lightning; *Mummaw v. Southwestern Telegraph & Telephone Co.*, Mo.App., 208 S.W. 476, rotten pole caused to fall by unforeseeable fire; *Higgins v. Dewey*, 107 Mass. 494, 9 Am.Rep. 63, negligently guarded fire caused to spread in unforeseeable manner; *Munsey v. Webb*, 231 U.S. 150, 34 S.Ct. 44, 58 L. Ed. 162, passenger unforeseeably collapses with head protruding from unguarded open elevator door; *Dalton v. Great Atlantic & Pacific Tea Co.*, 241 Mass. 400, 135 N.E. 318, plaintiff injured by awning negli-

gently left over street and thereafter pulled down by unforeseeable third party; *Moore v. Townsend*, 76 Minn. 64, 78 N.W. 880, ladder blown down by unusually strong wind; *Derosier v. New England T. & T. Co.*, 81 N.H. 451, 130 A. 145, electrocution due to negligent maintenance of pole by defendant together with unforeseeable failure of traction company, which jointly occupied the pole, to insulate its equipment; *McDowell v. Village of Preston*, 104 Minn. 263, 116 N.W. 470, 18 L.R.A.,N.S., 190, horse, frightened by unforeseeable raising of umbrella, running into structure negligently permitted in street by defendant; *Washington & G. R. Co. v. Hickey*, 166 U.S. 521, 17 S.Ct. 661, 41 L.Ed. 1101, unforeseeable closing of gates while defendant's horsecar is negligently crossing railroad tracks; *Elder v. Lykens Val. Coal Co.*, 157 Pa. 490, 27 A. 545, 37 Am.St.Rep. 742, refuse negligently thrown into stream carried on to plaintiff's land by extraordinary flood; *Salisbury v. Herchenroder*, 106 Mass. 458, 8 Am.Rep. 354, sign negligently maintained over street in violation of ordinance blown down by gale of unforeseeable proportions; and *Virginian Ry. Co. v. Staton*, 4 Cir., 84 F.2d 133, injury occurring in unforeseeable manner from negligently protruding railroad spike. It must be conceded, of course, that if the intervening act is reasonably foreseeable, its occurrence will not shield the defendant from liability, for under such circumstances his negligence consists of a failure to guard against the very hazard that the act will occur. Rest., Torts, sec. 449, and comment a. On the other hand, as we have seen, it may not be safely assumed that the unforeseeability of the intervening agency is always a reliable criterion of nonliability.

Although language found in some of the California cases which discuss concurrent causes may not be entirely reconcilable with the views here expressed, we are satisfied that the decisions themselves are not in conflict with the principles we have stated. Without unduly extending this opinion we may say that the facts alleged in the present case distinguish it from cases where the intervening act was committed

either deliberately or with knowledge of the existing danger, *Polloni v. Ryland*, 28 Cal.App. 51, 151 P. 296; *Loftus v. Dehail*, 133 Cal. 214, 65 P. 379; *Stultz v. Benson Lumber Co.*, 6 Cal.2d 688, 59 P.2d 100; *Catlin v. Union Oil Co.*, 31 Cal.App. 597, 161 P. 29; *Newman v. Steuernagel*, 132 Cal.App. 417, 22 P.2d 780; *Hale v. Pacific Tel. & Tel. Co.*, 42 Cal.App. 55, 183 P. 280. Cf. *Katz v. Helbing*, 205 Cal. 629, 636, 271 P. 1062, 62 A.L.R. 825, and from cases where the defendant was simply not negligent, and the subsequent act was thus the sole proximate cause of the injury. *Camp v. Peel*, 33 Cal.App.2d 612, 92 P.2d 428; *McMillan v. Thompson*, 140 Cal.App. 437, 35 P.2d 419.

[7,8] Whether an intervening act is a concurrent cause or a superseding cause of the injury normally presents a question of fact. *Stockwell v. Board of Trustees*, 64 Cal.App.2d 197, 205, 148 P.2d 405, and cases cited. If the trier of fact in the present case were to find that a pole carefully maintained in sound condition would have broken under the impact of the collision, and that plaintiff's injuries would thus have been sustained even though respondent had not been negligent, the latter's breach of duty could not be regarded as a substantial cause. Rest., Torts, sec. 432, subd. (1). On the other hand, if it were found that a sound pole would not have broken, and that harm to plaintiff would thus have been prevented by careful maintenance, respondent's omission could be considered a substantial concurring cause. *Carpenter*, 20 Calif.L.Rev. 396-397; 38 Am.Jur., sec. 54, p. 701, sec. 64, p. 716. As said in *Keller v. Pacific Tel. & Tel. Co.*, supra, 2 Cal.App.2d 513, 519, 38 P.2d 184, which involved a strikingly similar factual situation, "it is a proper question to submit to the jury as to whether the pole would have broken as a result of the blow received from the automobile under the circumstances of this case, if it had been reasonably sound throughout."

[9,10] As we have seen, the allegations of the complaint were broad enough to admit of proof from which it could be

found that respondent should have reasonably anticipated that its defective pole would be caused to fall and injure passing individuals such as plaintiff, either of its own weight, or by the forces of nature, or by the operation of any one of a number of other possible extraneous forces. If defendant failed to act as a reasonably prudent person to protect plaintiff and others from this hazard, it could be held liable for the injuries resulting from its occurrence. See *Mars v. Meadville Tel. Co.*, 344 Pa. 29, 23 A.2d 856, rotten pole caused to fall by cow bumping it.

The judgment is reversed with directions to the trial court to overrule the demurrer.

WOOD and VALLÉE, JJ., concur.



96 Cal.App.2d 693

Ex parte DONOVAN.
Cr. 4434.

District Court of Appeal, Second District,
Division 3, California.
March 28, 1950.

Proceeding in the matter of the application of John F. Donovan for a writ of habeas corpus to secure petitioner's release from custody. The District Court of Appeal, Shinn, P. J., held that conviction of defendant of contempt of court for violating injunction by failing to reconstruct a building into a single family dwelling pursuant to injunction was justified under the evidence.

Writ discharged and petitioner remanded.

1. Habeas corpus ☞92(3)

In habeas corpus proceeding for release from imprisonment for contempt of court, the only question to be determined is whether the court has jurisdiction to render judgment and impose sentence.

2. Contempt ☞54(4)

In cases of constructive contempt of court the affidavit which forms the basis of

the prosecution must state facts sufficient to show commission of the contempt.

3. Contempt $\S$ 61(6)

Court must determine whether person proceeded against for contempt of court is guilty of the contempt charged, and his conviction of contempt of court should not be allowed to stand unless record shows beyond question that trial court found all facts to exist which constituted the contempt. Code Civ.Proc. $\S$ 1218.

4. Contempt $\S$ 64

A commitment for contempt of court should not only clearly state the terms and conditions of imprisonment, but should also identify the offense to which the punishment relates.

5. Contempt $\S$ 64

Where written order which constituted judgment of court, stated that petitioner was found guilty of contempt of court, but commitment for contempt did not state therein that petitioner had been found guilty of contempt of court, court was not required to issue an amended commitment stating therein that petitioner had been found guilty.

6. Contempt $\S$ 64

Where commitment for contempt of court contained clerical error as to date of judgment finding petitioner guilty of contempt of court, trial court properly corrected error by issuing a new commitment correctly stating the date of judgment finding the petitioner guilty.

7. Injunction $\S$ 225

Petitioner could not be convicted of contempt of court in failing to reconstruct a building into a single family dwelling pursuant to injunction, if petitioner did not have the financial ability to comply with such requirement of injunction.

8. Injunction $\S$ 230(3)

Evidence justified conviction of petitioner for contempt of court on ground that petitioner continued to rent and re-rent apartments in violation of injunction requiring petitioner to reconstruct building into a single family dwelling.

John F. Donovan in pro. per.

W. E. Simpson, District Attorney of Los Angeles County, Robert Wheeler, Deputy District Attorney, Los Angeles, for respondent, Sheriff of Los Angeles County.

SHINN, Presiding Justice.

John F. Donovan and Jeanette G. Donovan were accused of violating a prohibitory and mandatory injunction, were found guilty, and John F. Donovan was sentenced to imprisonment for a period of five days and to pay a fine of \$500, the unpaid portion of which was to be satisfied by imprisonment at the rate of \$2.00 per day. He filed a petition for a Writ of Habeas Corpus alleging "That the order of Court for the violation of which the petitioner was adjudged in contempt required said petitioner to remove certain household dwelling units which had been erected upon a lot in the City of Santa Monica, which said units had all been erected prior to 1938. That at all times from the original order of said Court down to and including the present time, said units had been and are now occupied by tenants. That your petitioner is not the owner and has no interest in or control over said premises." He also alleged that he had applied to the Housing Expediter under the United States Rent Control Act, 50 U.S.C.A. Appendix, $\S$ 1881, et seq., for a certificate of eviction which would allow him to evict tenants who were occupying the rental units; that his petition was denied by the Housing Expediter; that he had filed actions of unlawful detainer against said tenants but had been advised that he could not prosecute said actions to successful conclusion without a certificate of eviction. The petition also alleged "That petitioner is not held by virtue of any complaint, indictment, presentment, warrant, or quarantine law, rule, regulation, arrest or order except as above specifically set out." A Writ of Habeas Corpus was issued on the petition. The sheriff has filed a return and petitioner has filed a traverse to the return. The only questions of fact raised by the petition and traverse relate to the claim of petitioner that he does not own or control the

property and that neither he nor Jeanette G. Donovan, the owner, has the ability to comply with the judgment by the tearing down of the structures or converting them into a single family dwelling; also that the tenants cannot be evicted without the issuance of a certificate of eviction by the Housing Expediter.

It appears from the sheriff's return that petitioner is held under a commitment and amended commitment based upon an adjudication of contempt rendered by the superior court. Filed with the return are copies of the order to show cause, the affidavit upon which it was issued, the order adjudging petitioner guilty and imposing sentence, the commitment and the amended commitment.

The affidavit of Leslie S. Storrs for an order to show cause in re contempt avers that a judgment was rendered in an action brought by Jeanette G. Donovan and John F. Donovan against the City of Santa Monica in which the City of Santa Monica filed a cross-complaint, which judgment was entered November 26, 1945, and was affirmed on appeal, as evidenced by remittitur filed January 12, 1949; that the judgment permanently enjoined and restrained Jeanette G. Donovan and John F. Donovan as follows: "A. From using, occupying or maintaining the premises described in the complaint and the cross-complaint herein, viz.: 'Lot 2 of Block I, the Palisades Tract, together with all improvements thereon and appurtenances thereunto belonging in The City of Santa Monica as per map recorded in Book 8 at Page 32 thereof of Maps of the official records in the Office of the County Recorder of said County and State,' for any purpose other than a single-family dwelling as defined by Ordinance No. 656 (Commissioners' Series) viz.: 'a building containing only one kitchen, designed for or used to house not more than one family, including all necessary employees of such family,' together with use of the garage building for the sole purpose of providing shelter or storage of vehicles owned or operated by the plaintiffs or members of their family or their employees, and the use of the tool shed on said premises for the purpose of storing

tools, equipment and other materials." The judgment also restrained the Donovans from using, occupying or maintaining said premises for any purpose not enumerated in the preceding subparagraph A and from violating any provisions of any zoning ordinance of the City of Santa Monica relating to said real property, and from maintaining said premises in violation of the building ordinances of the City of Santa Monica or building code of the State of California. There are other provisions of the judgment which require the Donovans to remove 13 apartments or units and to reconstruct the main structure into a single family dwelling containing not more than 15 rooms and not more than one kitchen and designed for and to be used for the sole purpose of housing not more than one family including all necessary employees of such family, etc.; to remove seven other apartments from a garage structure on the premises so that it would contain no housing accommodations; to remove a cottage on the premises known as apartment No. 5 and to allow no structures to remain except as reconverted into a single family dwelling.

There are averments in the affidavit to the effect that "continuously since July 22, 1949, the said Jeanette G. Donovan and John F. Donovan have caused, permitted and solicited and now are causing, permitting and soliciting persons other than members of their family to occupy said premises and portions thereof for hire as tenants thereof so that said premises during all of said time have been used, occupied and maintained and now are being used, occupied and maintained other than as a single-family dwelling as defined by said Ordinance No. 656 (Commissioners' Series) and other than a one-family dwelling as defined by said Section 9102m and that said Jeanette G. Donovan and John F. Donovan have used, occupied and maintained and caused to be used, occupied and maintained and now are using, occupying and maintaining and causing to be used, occupied and maintained said premises for purposes not enumerated in sub-paragraph A of said judgment" and it is also alleged that certain of the apartments have been

vacated since July 22, 1949, and have been rerented for hire by said Jeanette G. Donovan and John F. Donovan. It is also alleged that the buildings have not been removed or altered as required by the judgment and that the Donovans have had ability to comply with the judgment but have refused to do so; also that they have had at all times actual knowledge of the facts stated in the affidavit. The order adjudging the Donovans in contempt followed generally the allegations of the affidavit as recited herein, excepting the allegation that they had ability to remodel the building, but also specifically found that apartments 11, 18, 5 and 17 had been vacated by the tenants and had been relet by the Donovans to other tenants at a monthly rental, and that new tenants had been occupying the premises and paying rent therefor to the Donovans, and that in so doing the latter have had knowledge at all times of the terms of said judgment and that their acts have been in wilful disobedience of the judgment. It was also found that the Donovans have made no effort to comply with the terms of the judgment in any respect; that they have had the ability to comply with the judgment with respect to the use, occupancy and maintenance of the premises and have made no effort to comply therewith. The order as stated does not contain a finding that the Donovans have had or have the ability to remodel or reconstruct the apartment building into a single-family rental unit.

The adjudication of contempt is not founded upon the failure and refusal of the Donovans to remove, alter or reconstruct the building so as to bring it into conformity with the zoning ordinances. It is founded upon the wilful use, maintenance and operation of the building and buildings, and the apartments of which they consist, other than as a single-family dwelling. That such uses are being made of the premises is admitted by the petition, is alleged in the affidavit, found to be a fact in the adjudication of contempt, and established by the evidence taken at the hearing.

The petitioner's principal contention is that the affidavit upon which the order to

show cause was issued is fatally defective because it does not plead the ordinance or ordinances alleged to have been violated. This criticism is sound, but only with respect to those portions of the affidavit which allege that the Donovans have violated the provisions of certain ordinances, without stating the particular acts constituting violations, or the terms of the ordinances. Although these general allegations were found to be true they are mere conclusions and we shall disregard them, as well as the findings thereon.

Jeanette G. Donovan and John F. Donovan were found guilty of violating the terms of a prohibitory and mandatory injunction. The injunction, although based upon violations of certain city ordinances stated with particularity the conduct that was prohibited. The only provision of the judgment we are concerned with is the one which relates to the violation of Ordinance No. 656 which defines a single-family dwelling. We have heretofore quoted the definition of a single-family dwelling which is contained in the judgment, namely "a building containing only one kitchen designed for or used to house not more than one family including all necessary employees of such family" etc. It is unnecessary to look beyond the judgment in order to determine what constitutes a single-family dwelling. It is the judgment, rather than the ordinance, which measures the duties of petitioner and Jeanette G. Donovan. For the purpose of this proceeding the judgment conclusively establishes what constitutes a single-family dwelling and it was unnecessary to plead or prove the ordinance with respect to that matter.

The order adjudged the Donovans to be in contempt with respect to the several matters above discussed and it sentenced John F. Donovan as above stated. The original commitment, dated December 1, 1949, contained a statement of the proceedings had in the contempt matter, with the direction that John F. Donovan be confined in jail for five days and pay a fine of \$500 as stated. The commitment misstated the date of the judgment as the 25th day of November, 1949, and although it stated that the Donovans had failed to show cause why they

should not be punished for contempt, it omitted to state that they had been found guilty. On December 9th an order was made amending the commitment, and a new commitment was issued to correct the date of the judgment to the 26th of November, 1945, and there was added to the amended commitment a provision that the court "does hereby order, adjudge and decree that the said John F. Donovan is guilty of contempt of the authority of said court" in disobeying the mandates of the judgment. The provision for commitment to jail followed the terms of the original commitment.

[1-6] Where release is sought from imprisonment for contempt the only question to be determined is whether the court had jurisdiction to render judgment and impose sentence. In *re Wilson*, 123 Cal.App. 601, 11 P.2d 652; In *re Carpenter*, 36 Cal.App. 2d 274, 97 P.2d 476. In cases of constructive contempt the affidavit which forms the basis of the prosecution must state facts sufficient to show the commission of the contempt. Code Civ.Proc. sec. 1211; *Ex parte Von Gerzabek*, 63 Cal.App. 657, 219 P. 479; *Frowley v. Superior Court*, 158 Cal. 220, 110 P. 817; *Hutton v. Superior Court*, 147 Cal. 156, 81 P. 409. The court must determine whether the person proceeded against is guilty of the contempt charged, Code Civ.Proc. sec. 1218, and a conviction of contempt should not be allowed to stand unless it appears from the record beyond question that the trial court found all the facts to exist which constituted the offense. *Groves v. Superior Court*, 62 Cal.App.2d 559, 569, 145 P.2d 355. These requirements were fully met in the instant proceeding and furnished a sufficient basis for the conviction and imprisonment of petitioner. The commitment as originally issued was a sufficient warrant for petitioner's detention for the term and upon the conditions stated therein. A commitment for contempt should not only clearly state the terms and conditions of imprisonment, but should also identify the offense to which the punishment relates. The commitment was sufficient for this purpose. It clearly related the sentence to the violations of the injunction. It was

not necessary for the court to issue an amended commitment for the purpose of stating therein that petitioner had been found guilty, since that fact was stated in the written order which constituted the judgment of the court. Both the order and the commitment identified the judgment as the one that had been rendered in *Donovan v. City of Santa Monica*, notwithstanding the clerical error in the commitment as to the date of the judgment. This error was properly corrected. *People v. Fry*, 137 Cal.App. 525, 530, 31 P.2d 204.

[7,8] As an excuse for the failure to convert the apartment building into a single-family dwelling petitioner produced evidence that the cost of the conversion would be great and that neither he nor Jeanette G. Donovan had the ability to comply with this requirement of the judgment. We understand from the order that this defense was established to the satisfaction of the court. Petitioner also produced evidence that he had applied to the Housing Expediter for a certificate which would enable him to take steps to eject the tenants from the apartments, without which he would have been powerless to prevail in suits to recover possession. His application was denied. In *re Donovan*, 94 Cal.App.2d 399, 210 P.2d 860. The court found that after the judgment became final petitioner and Jeanette G. Donovan have had the ability to cause the apartments to be vacated. If this finding means that they have had the ability to procure a certificate of eviction from the Housing Expediter it is not supported by the evidence. The court also found that at no time since the judgment became final have the Donovans "made any attempt to comply with the terms of said judgment nor are they now making any attempts to comply with the terms of said judgment." This general language is insufficient as a finding that the Donovans have not made a bona fide attempt to secure a certificate of eviction, since the finding relates to the lack of effort to comply with the entire judgment. It was established by the evidence that they have not had the ability to cause the building to be remodeled, and they were not required to attempt the impossible. The

conviction, however, does not rest upon these findings. It is sustained only by the court's finding upon sufficient evidence that petitioner has continued to rent and rerent apartments and in so doing has used and maintained the buildings in disobedience of the injunction. His imprisonment is legal.

The writ is discharged and petitioner is remanded.

WOOD and VALLÉE, JJ., concur.



96 Cal.App.2d 766

HUE v. PICKFORD.

Civ. 3794.

District Court of Appeal, Fourth District,
California.

March 30, 1950.

Gladys B. Hue, formerly Gladys B. Pickford, sued Rollin Pickford, Jr., for the parties' two minor children's custody. From a judgment of the Superior Court of Fresno County, Arthur C. Shepard, J., awarding the children's custody to defendant, plaintiff appealed. The District Court of Appeal, Mussell, J., held that the evidence supported the trial court's finding that the children's interest would be best subserved by awarding their custody to defendant.

Judgment affirmed.

1. Divorce ⚡298(1)

In awarding custody of divorced parents' minor children, court must be guided by children's best interests respecting their temporal, mental, and moral welfare. Civ. Code, § 138.

2. Divorce ⚡298(6)

Neither of divorced parents is entitled to their minor children's custody as a right, but other things being equal, custody of child of tender years should be given mother, while custody of child of age to require education and preparation for labor and

business should be given father. Civ.Code, § 138.

3. Divorce ⚡296

In dealing with questions relating to divorced parents' minor children's care, custody and education, trial court has very extensive discretion in adapting its orders to varying circumstances and conditions with view to serving children's highest and best interests. Civ.Code, § 138.

4. Divorce ⚡312.6(5)

A reviewing court has no power to interfere with trial court's exercise of discretion in dealing with questions of divorced parents' minor children's care, custody and education, except in clearest instances of manifest abuse thereof. Civ.Code, § 138.

5. Divorce ⚡301

In determining custody of divorced parents' minor children, trial court should have as complete picture as possible of children's whole background, parents' financial condition, interests, morals and dispositions, and any other factors which may aid court in determining probabilities of either parent furnishing happy, harmonious home for children. Civ.Code, § 138.

6. Divorce ⚡296

In determining whether other things are equal within statute requiring that custody of child of tender years be given mother, rather than father, in such case, trial court is allowed wide latitude in exercise of its discretion and must determine in first instance, after considering all evidence, how child's best interests will be preserved. Civ.Code, § 138.

7. Divorce ⚡298(1)

The question of divorced parents' minor children's custody must be determined solely from children's standpoint, and contesting parties' feelings and desires may not be considered except so far as they effect children's best interests. Civ.Code, § 138.

8. Divorce ⚡301

Evidence supported trial court's finding that interests of divorced parents' six

and one-half and three and one-half year old sons would be best subserved by award of their custody to their father rather than mother. Civ.Code, § 138.

Matt Goldstein, Fresno, for appellant.

Aynsworth & Hayhurst, Fresno, for respondent.

MUSSELL, Justice.

This is an appeal from a judgment for defendant in an action brought by plaintiff to obtain the custody of the two minor children of the parties. The sole question involved is whether the trial court abused its discretion in awarding the custody of the two children to the defendant, with the right of plaintiff to have them visit her from 9:00 o'clock a. m. to 6:00 o'clock p. m. on the first and third Saturdays of each month.

Plaintiff and defendant were married in the City of Fresno on June 30, 1940, and lived together until on or about April 9, 1947. Two sons were born the issue of the marriage: Jeffrey Otis Pickford and James Ladd Pickford, who were respectively six and one-half and three and one-half years old at the time of the trial of the action on October 14, 1948.

The marital difficulties between the plaintiff and defendant apparently commenced in the fall of 1946 when plaintiff absented herself from the family home frequently at night and on week ends. She was emotionally upset and consulted a psychiatrist concerning her family troubles. Shortly thereafter she told defendant that she had "an affair" with a man and was going to continue her conduct. In this connection, Marie Howard, plaintiff's aunt, testified that the plaintiff stated to her that she was having "an affair" with one Ed Hue (the present husband of plaintiff) but that she did not want the Pickfords to hear about it; that she had been going to a psychiatrist to try to work out her problems. The witness further testified that plaintiff was insisting on a divorce and that some time during the first part of February, 1947, plaintiff stated that she

was going to leave and upon being asked what arrangements she had made to have the children taken care of, stated "that she had made none; that it was not her obligation; that it was Rollin's responsibility to have the children taken care of."

In spite of the efforts of defendant to prevent plaintiff from leaving and breaking up the home, plaintiff stated to the defendant that she was leaving and she did in fact leave on or about April 9, 1947.

Two days later a property settlement agreement was entered into between the parties wherein it was agreed that the defendant be given the custody and control of the minor children for a period of one year, with reasonable rights of visitation allowed to the plaintiff and it was agreed that plaintiff have the right to apply to the court for custody during school vacation periods. Under these conditions, the children were left with their father, and plaintiff, on or about April 29, 1947, went to Reno, Nevada, and there instituted an action for divorce. Mental cruelty was alleged as a cause of action and in the decree obtained on June 11, 1947, there was no adjudication as to the rights of the parties to the custody of the children.

On June 12, 1947, plaintiff returned to Fresno and on June 21, 1947, went to the Pickford home to see the children and an altercation there occurred between the plaintiff and Mrs. Pickford, mother of the defendant. Mrs. Pickford called Marie Howard and she, with plaintiff's mother, went to the Pickford home where a stormy scene occurred, which was participated in by plaintiff, plaintiff's mother and plaintiff's aunt and during which the plaintiff took the youngest child and started out the door. Plaintiff's mother took the child from her and the plaintiff left.

On September 15, 1947, the plaintiff married H. Edwin Hue, and purchased a home with the funds which she had received as part of her settlement with her husband. On September 24th plaintiff sent a letter to defendant asking that he give her the custody of the children. Her request was refused and this action was filed.

On or about April 14, 1948, plaintiff and defendant and their respective counsel, in

lieu of a judgment of the superior court, submitted the determination of the temporary custody of the children to an arbitration by Mr. John Gregg, a mutual friend of the family, who awarded the custody of the children to the defendant. Thereafter the matter came on regularly for hearing before the trial judge, whose judgment is here under attack, and after hearing, a temporary order was made awarding the custody of the children to the defendant.

At the trial of the instant action plaintiff produced a number of witnesses, who testified to the fitness of plaintiff as a mother and to the fitness of her home as a proper place in which to rear the children. All of these witnesses were well acquainted with the parties and stated, in substance, that the plaintiff was a very devoted mother, took excellent care of the children and that her home conditions were of the best.

Witnesses testified on behalf of the defendant that the children were being well cared for in the home of the defendant and in fact, plaintiff, at all times during the hearing, conceded that the home furnished by defendant for his children was physically adequate and that he and the persons occupying it were fine people.

Plaintiff took the witness stand in her own behalf and denied having had any improper relations with H. Edwin Hue prior to their marriage. At the conclusion of the trial, in response to a question put to her as to a conversation had with her husband, plaintiff made a lengthy statement, characterized in defendant's brief as a dramatic attempt to turn the tide of battle in her favor. The statement thus given was directed to her attorney and defendant, and in it, among other things, plaintiff admitted that she told her husband that she left the children with him for the reason that she did not want to have them until she could prove herself to be a stable, normal, even tempered woman. She stated that the defendant had hounded and pounded her and literally driven her crazy during the last two months that she was at the home; that the defendant stood in her room at night when she was asleep and stood there until she

awakened; that he "grabbed her arms in the bed and twisted them and literally drove her with his accusations that she was an evil woman."

That this statement had some influence on the court's decision was apparent from the remarks of the court to the effect that he was undecided what to do with the case until the plaintiff took the witness stand. The trial court found, among other things, that prior to the execution of the agreement as to the custody of the children the plaintiff had left her home and left the children with the defendant, stating it was defendant's responsibility to look after them and provide a home for them and that she wasn't going to bind the children to her and it was the defendant's duty to take care of them; that thereupon, the defendant, with plaintiff's knowledge and approval, took the children with him to reside and live with the children's grandparents in the city of Fresno; that in said home the children were kept and maintained and are being kept and maintained in excellent conditions for their normal development and growth and moral, secular and religious education; that said home is a fit and proper home for said children; that for at least two years last past the plaintiff has been emotionally unstable and unbalanced and is not and would not be as competent and desirable to care for, maintain, lead, train, educate and develop said children as the defendant and the other persons with whom he is keeping said children; that her emotional instability was still apparent during the court hearing; that plaintiff, about two years ago, through her emotional instability, sought to and did obtain outside companionship with H. Edwin Hue; that their relationship was of a clandestine nature and unfitted her to continue to have the custody and control of the said children; that her relationships with said H. Edwin Hue were such that immediately after she obtained her divorce in Nevada she met the said H. Edwin Hue and they were soon thereafter married and continued to live together since said date.

The judgment entered is attacked as an abuse of the trial court's discretion.

[1,2] The policy of the State of California with respect to the custody of children has been determined by section 138 of the Civil Code, which provides generally that in actions for divorce during the minority of any of the children of the marriage, the court may make such order for the custody, care, education and support of such minor children as may seem necessary or proper and may at any time modify or vacate the same. The court is to be guided by what appears to be for the best interests of the children in respect to their temporal and their mental and moral welfare * * * and as between parents adversely claiming the custody, neither parent is entitled to it as a right; but other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor and business, then to the father.

In the instant action the trial court has found that the best interests of the children in respect to their temporal and mental and normal welfare call for the award of their custody to the defendant. The findings of the court and the award of custody find substantial support in the record. The trial court had an opportunity to observe the character and qualities of the respective parties on the witness stand and to determine the fitness of each to have the custody of and to pass upon the other matters relating to the welfare of the children.

[3,4] This court has heretofore held, in *Di Giorgio v. Di Giorgio*, 87 Cal.App.2d 576, 580, 197 P.2d 213, that in dealing with questions relating to the care, custody and education of minor children of divorced parents, there is confided to the trial court a very extensive discretion in adapting its orders to varying circumstances and conditions with the view to always serve the highest and best interests of the children and to retain jurisdiction over its orders in this respect. A reviewing court does not have the power to interfere with the exercise of discretion except in the clearest instance of its manifest abuse. (Citing cases.) To the same effect is the decision in *Prouty v. Prouty*, 16 Cal.2d 190, 191, 105 P.2d 295.

[5] In *Foster v. Foster*, 8 Cal.2d 719, 732, 68 P.2d 719, 725, it was stated: "In deciding a matter so vital to the parents and to the welfare of the child, it is important that the trial court in order to make as wise a decision as possible, should have as complete a picture of the whole background of the child as possible—the financial condition of the parents, their interests, their morals, and their dispositions, as well as any other factor which might aid the court in determining the probabilities of either parent furnishing a happy, harmonious home for the child."

[6] As was said in *Munson v. Munson*, 27 Cal.2d 659, 666, 166 P.2d 268, 272, where plaintiff relied on the proposition that as between parents adversely claiming custody, "other things being equal, if the child is of tender years, it should be given to the mother", the court said: "In determining whether other things are equal within the meaning of the above Code section, the trial court is necessarily allowed a wide latitude in the exercise of its discretion. In the first instance it is for the trial court to determine, after considering all the evidence, how the best interests of the child will be preserved."

[7] The question is to be determined solely from the standpoint of the child, and the feelings and desires of the contesting parties are not to be considered, except insofar as they affect the best interests of the child. *Taber v. Taber*, 209 Cal. 755, 756, 290 P. 36.

[8] In the instant case the trial court had before it the facts leading up to the separation of the parties, the evident abandonment by plaintiff of her children after her infatuation with H. Edwin Hue; her subsequent trip to Nevada to obtain a divorce, in which she did not ask for the custody of the children and in which she set forth the sole ground of mental cruelty to obtain her decree; the fact that both H. Edwin Hue and the plaintiff denied on the witness stand that there had been any improper relations between them, as opposed to the testimony of one of the witnesses and the defendant, to whom plaintiff had admitted having had "an affair" prior to the separation of the parties;

the fact that plaintiff's own mother kept her from forcibly taking the child from the Pickford home. These facts and the evident emotional outburst of the plaintiff at the conclusion of her case were all facts and circumstances in support of the trial court's finding that the interests of the children would be best subserved by the award of custody to the defendant and we cannot hold, as a matter of law, that the trial court abused its discretion in the order made.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



96 Cal.App.2d 638

PECK v. STATE.

Civ. 17482.

District Court of Appeal, Second District,
Division 1, California.

March 27, 1950.

Hearing Denied May 25, 1950.

Action by William Peck against the State of California to recover a gift tax paid under protest. From a judgment of the Superior Court of Los Angeles County, Clarence M. Hanson, J., in favor of plaintiff, the defendant appealed. The District Court of Appeal, Doran, J., held that where donee wife's aggregate allowable specific exemption on all gifts made to her both before and after her marriage amounted to less than \$24,000, no gift tax was due on 1947 gifts.

Judgment affirmed.

1. Statutes $\Leftrightarrow$ 245

Taxing statutes are to be strictly construed, but not unreasonably, or so as to render exempting language so narrow and restricted as to defeat apparent legislative intent.

2. Statutes $\Leftrightarrow$ 245

The court cannot by interpretation write into the gift tax law something which is not there. Revenue and Taxation Code, § 15203 et seq.

3. Taxation $\Leftrightarrow$ 204(1)

Taxing power should not be extended by limiting effect of exemptions given, particularly where such exemptions have reference to close family relation of husband and wife.

4. Taxation $\Leftrightarrow$ 212

Under provisions of gift tax statute including provision permitting unused portion of specific exemption to be applied to net gifts in subsequent years until maximum allowable has been used, where donee wife's aggregate specific exemption on all gifts made to her, both before and after her marriage to donor, amounted to less than the total \$24,000 exemption allowable, no gift tax was due on 1947 gifts. Revenue and Taxation Code, §§ 15203, 15204 et seq., 15426.

James W. Hickey, Chief Inheritance Tax Attorney, Raymond G. LaNoue, Dep. Inheritance Tax Attorney, Sacramento, for appellant.

Byron G. Hill, Los Angeles, for respondent.

DORAN, Justice.

The action herein is one to recover a gift tax paid under protest pursuant to Section 16251 of the Revenue and Taxation Code. The State's demurrer to the complaint was overruled; the State having failed to answer, judgment was rendered for the plaintiff, from which judgment this appeal is taken.

"During the years 1940 and 1941", quoting from the complaint, "plaintiff made gifts to Helen J. Tharp (who became plaintiff's wife on August 10, 1943) having a net value, in excess of the annual exemption (\$4,000.00), of \$8,795.61. One Specific Exemption of \$50.00 was applied, and a gift tax at the rate of 7% was paid on the balance of \$8,745.61, or a total of \$612.19."

After the marriage of Helen J. Tharp and William Peck in 1943, the husband made further net gifts to the wife of \$8,550.00 in 1945; \$6,000.00 in 1946; and \$6,000.00 in 1947; making total net gifts to Helen J. Tharp, now Helen J. Peck, of \$29,345.61. Plaintiff's position, as expressed in the com-

plaint, it that "In determining the amount of gift tax due from plaintiff on gifts made to plaintiff's wife during the year 1947, the Controller has erroneously included as a part of the wife's specific exemption of \$24,000.00, the sum of \$8,745.61 on which the donor had already paid a gift tax at the rate of 7% for gifts made during the years 1940 and 1941".

The present controversy turns upon the interpretation of Section 15204 et seq. of the Revenue and Taxation Code. After providing in Section 15203 that the gift tax "is computed on the market value of * * * the gift at the date of the gift, but only on that portion in excess of the exemptions allowable, and at the rates which are then in effect", Section 15204 specifies that "The tax for any calendar year on gifts to a donee is computed as follows: (a) Determine the aggregate sum of:

"(1) The net gifts to the donee for the calendar year, and

"(2) The net gifts to the same donee for each of the preceding calendar years.

"(b) From this aggregate sum deduct:

"(1) The net gifts to the donee for the preceding calendar years, and

"(2) The specific exemption, less such portion as may have been used in computing the tax for preceding calendar years.

"(c) Apply to the remainder the same rates that would have been applicable had the deductions not been made."

Section 15426 provides that "The exemption allowed by this article shall be applied to the amount of net gifts as the [net] gifts are made. If the exemption, or any unused

portion of the exemption, exceeds the net gifts in any calendar year, the excess may be applied to the net gifts in subsequent calendar years until the maximum allowable has been used".

According to the appellant's brief, the \$150.37 gift tax assessed on the 1947 gift, was arrived at as follows:

1. Sum of all prior net gifts	\$23,345.61
2. Net gift calendar year 1947	6,000.00
Total net gifts	\$29,345.61
3. Amount of specific exemption consumed by prior gifts	23,345.61
4. Amount of 1947 gift to be applied to equal specific exemption	654.39
Total specific exemption consumed	24,000.00
5. Remainder left to tax	5,345.61
6. Amount above specific exemption up to the first tax bracket of \$25,000, (\$25,000 minus \$24,000)	1,000.00
7. Rate of first bracket 2 percent tax	20.00
8. Amount remaining \$4,345.61	
9. Rate of second bracket 3 percent tax	130.37
Total tax	\$ 150.37

Respondent, however, submits the following tabulation which was apparently adopted by the trial court in overruling the demurrer:

Year of gift	Value of Gift in Excess of Annual Exemption	Allowable Specific Exemption	Balance of Gift Subject to tax	Rate	Amount of tax paid
1940	\$ 3,500.00	\$ 50.00	\$3,450.00	7%	\$241.50
1941	5,295.61	None	5,295.61	7%	370.69
1943	—	Donor and donee were married			
1945	8,550.00	8,550.00			
1946	6,000.00	6,000.00			
1947	6,000.00	6,000.00			
Totals	\$29,345.61	\$20,600.00	\$8,745.61		\$612.19

The respondent's contention is that "Since the donee wife's aggregate allowable specific exemption on all gifts made to her, both before and after her marriage to donor, amounts to less than \$24,000, no gift tax is due on the 1947 gifts". Under this theory, "Not only is no tax due on the gifts made in 1947, but \$3,400.00 of the wife's specific exemption remains to be deducted from her husband's gifts to her in years subsequent to 1947."

Respondent's brief points out that according to appellant's formula "the tax could result in a wife's specific exemption being limited to \$50", since if before marriage the husband gave the wife \$25,000.00 in excess of the annual exemption, the donee's exemption (Class D) would be only \$50, leaving balance of \$24,950.00 subject to 7% tax. "If husband then marries donee and gives her a further gift of \$25,000.00, the entire \$25,000.00 will be taxable as the prior gifts were in excess of her new specific exemption of \$24,000.00. This, we cannot believe, was what the Legislature intended".

It will be observed that the sections of the Gift Tax Law contain no reference whatsoever to change of status of the donee,—the precise matter here involved. Nor has either party been able to cite any decisions directly or indirectly bearing upon this point. Apparently, therefore, the case is one of first impression. Although the amount of tax involved is small,—\$150.37, as appellant's brief suggests, the interpretation of the statute is of no inconsiderable importance.

Basically, appellant's position is that since the Gift Tax Law makes no exception where the position of the donee has undergone a change by reason of marriage or otherwise, such change of status is of no importance and the gift tax should be computed without regard thereto. It is appellant's claim that only thus will the tax law operate to eliminate "all inequality in the tax burden as to all donees similarly situated".

The lower court's decision, squarely against the State's contention, was, says appellants' brief, "no doubt based upon the rule that a statute will not be held to impose a tax unless it is clear and explicit,

that is, that taxing statutes are to be strictly construed". In *re Estate of Childs*, 18 Cal.2d 237, 115 P.2d 432, 136 A.L.R. 333, and other cases cited in support of appellant's position, deal with inheritance taxes, and do not touch upon the matter here involved.

The respondent's brief, agreeing with appellant that under the statute all gifts should be aggregated, submits that "the amounts of the donee wife's specific exemption used in computing the tax for the preceding years * * * must also be aggregated".

Consideration of the language used in the Revenue and Taxation Code as reasonably applied to the circumstances here existing, together with the general rules applicable to tax measures, leads to the conclusion that the trial court properly overruled the demurrer to respondent's complaint, and entered judgment for the return of the tax paid under protest.

[1,2] It is fundamental, and conceded by both parties, that taxing statutes are to be strictly construed. This precept, however, as respondent's brief suggests, "must never be applied to exclude the rule of reasonableness, or to render the exempting language so narrow and restricted as to defeat the apparent legislative intent". To adopt the appellant's interpretation would in effect write into the Gift Tax Law something which is not there,—a function entirely outside the limits of judicial action.

[3,4] Moreover, appellant's interpretation would seem to be reasonable only in the sense that it would increase tax revenues. Under such a theory double taxation could be easily justified. The taxing power, rightly deemed a necessary adjunct to government, should not be extended by limiting the effect of exemptions given, particularly when such exemptions have reference to the close family relation here involved. Since the taxing statute makes no mention of what is to take place upon a change of the donee's status, it affords no assistance to the determination of the present problem. The trial court had therefore to determine what would be a reasonable construction. There is nothing to indicate

that the construction adopted is other than reasonable.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



96 Cal.App.2d 651

PACIFIC ELECTRIC RY. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.
Civ. 17379.

District Court of Appeal, Second District,
Division 3, California.
March 27, 1950.

Workmen's compensation proceeding by Gretta Patterson against Pacific Electric Railway Company, a corporation, to recover self-incurred medical expenses in connection with injuries sustained in course of her employment. The Industrial Accident Commission entered an award in favor of applicant, and employer filed a petition for writ of review. The District Court of Appeal, Wood, J., held that evidence sustained granting of award, and amount thereof.

Award affirmed.

1. Workmen's compensation ☞975

Where employer knew of injury to employee the day after it occurred, and knew that surgery was recommended by an independent medical examiner to correct employee's injury, and a copy of employee's petition for surgery to be performed at expense of employer was served on employer, employer was given notice and a fair opportunity to furnish medical treatment. Labor Code, §§ 5400, 5402.

2. Workmen's compensation ☞976

Where injured employee suffered pain from injury sustained in course of employment for more than four years thereafter, and employer contended for more than a year that operation was not necessary, and resisted employee's petition for surgery, but an emergency operation was ordered by qualified medical doctors in whom employee had confidence, employee was

not required to give employer further opportunity, prior to operation, to furnish medical or surgical treatment, and employer was liable for employee's self-incurred medical expenses in connection with operation. Labor Code, § 4600.

3. Workmen's compensation ☞1001

In compensation proceeding for supplemental award for self-incurred medical expenses, whether surgeon's fee of \$500 for a neurosurgical consultation, for a myelogram, and for operation in which a neurolysis was done of the nerve root in fifth lumbar region, was reasonable, was for Industrial Commission to determine.

4. Workmen's compensation ☞998

Evidence sustained finding of Industrial Commission that \$500 for surgeon's fee for operating on employee's back and performing neurolysis of nerve root in fifth lumbar region, was reasonable.

5. Workmen's compensation ☞990

In compensation proceeding, where, if employee had remained in hospital, expenses for her care would have exceeded expenses claimed for regular nursing care, general housework and cooking for employee's husband and two sons, and salary of woman performing services was \$100 a month, award of \$200 for practical nursing for services rendered for two-month period after employee returned home from hospital, was warranted.

C. W. Cornell, O. O. Collins, John R. Allport, John H. Gordon, Los Angeles, for petitioner.

T. Groezinger, Alfred C. Skaife, San Francisco, for respondent Industrial Accident Commission.

WOOD, Justice.

Review of proceedings of the Industrial Accident Commission. Petitioner, who is the employer, seeks to annul a supplemental award for self-incurred medical expenses. Petitioner argues, among other things, that it was not given notice and a fair opportunity to furnish the medical treatment.

On November 13, 1944, the applicant Gretta Patterson, who was then employed by petitioner as a cashier, sustained a back injury while carrying a box of coins down a stairway. Thereafter she was away from her work about three months and during that time she received medical treatment and disability payments from her employer. She then resumed her employment and worked intermittently until April 1, 1946, when she quit because she had continuous backaches. Thereafter the employer made no disability payments to applicant and furnished no medical treatment. It did, however, offer diathermy if at any time applicant thought it would help her. Applicant then procured medical treatment, but her condition became progressively more painful. On October 24, 1947, she filed her claim with the commission. Medical reports were then filed by the applicant and the employer. A hearing was had on December 5, 1947. Thereafter one of the commission's physicians examined applicant and recommended that she be "referred" to an independent medical examiner in the field of orthopedic surgery. The commission thereupon appointed Dr. Homer C. Pheasant to make an independent medical examination of applicant. After the examination, Dr. Pheasant made a written report to the commission in which he stated his diagnosis as follows: "(1) lumbosacral instability, moderate. (2) possible ruptured lumbosacral intravertebral disc, right." He also stated therein that "It is felt that we are warranted in recommending at this time an interlaminar exploration of the lumbosacral disc and perhaps the disc between L4-L5 on the right to probably be followed by a spinal fusion." That report was filed on April 9, 1948, and on the same day a copy of the report was served on the employer. On May 25, 1948, the commission filed its findings and award. It found that applicant's injury arose out of and occurred in the course of her employment; and that it had caused temporary total disability. It made an award in favor of applicant requiring that disability payment, specified therein, be made during the continuance of the disability. It was also provided in said award

that the applicant receive the medical care "indicated" in the report of Dr. Pheasant. The employer then requested a rehearing, which was granted. On September 1, 1948, the commission filed its decision on rehearing and made an award therein which was substantially the same as the first award, except that the provision relating to medical care indicated in the report of Dr. Pheasant was omitted and it was stated therein that applicant was "in need of and entitled to, at the expense of the defendants herein, further medical treatment." The employer thereafter made disability payments as required by said award, but did not furnish medical treatment for applicant. On November 30, 1948, the employer filed a "request" for termination of liability, which was denied on December 9, 1948.

On January 19, 1949, applicant filed a "Petition for Surgery" in which she requested that the commission order surgery to be performed at the expense of the employer. In the petition she stated: "Notice is hereby given to the * * * Pacific Electric Railway Company, that * * * applicant * * * is still suffering from said occupational injury. * * * That said applicant is in need of surgery, as shown by the letter of Dr. Homer Pheasant, an independent examiner, already on file herein, and by the attached letter of Dr. Marvin H. A. Peterson. That said defendant [employer] refuses to have surgery performed." Dr. Peterson, referred to therein, was her personal physician, and his letter stated that recent blood counts of applicant revealed anemia; that he was attempting "to get her in good enough physical condition to undergo the necessary surgery which she must have to correct her back condition"; that continued delay and resultant anxiety had done her great harm so that she was near a nervous collapse; and that he believed further delay would "seriously endanger the results which may be obtained by surgery." He stated further therein that applicant had great confidence in Dr. C. Hunter Shelden, "an eminent surgeon," and he recommended that applicant be placed in Dr. Shelden's care. On January 29, 1949, the employer

filed a petition for a permanent disability rating. On March 3, 1949, a hearing was had on the petition for surgery and the petition for permanent disability rating. At that hearing the applicant testified that her condition had become worse since the first hearing on December 5, 1947, and she had been confined to her bed nine-tenths of the time since then; that she had continuous pain in her back, legs and arms, and had severe headaches almost every day; that she had been unable to do her housework or to bathe herself; and that her physician had been giving her empirin and codeine tablets, shots and sleeping pills. On said March, 3, 1949, the referee dictated his report on said hearing. In that report he stated that in his opinion the commission should order surgery in accordance with the findings and award made on May 25, 1948 (which were vacated when a rehearing was granted). The findings and award referred to were to the effect that applicant should receive medical care indicated in the report of Dr. Pheasant, namely, that surgery should be performed. The referee recommended in his report that an order issue ordering said surgery and for reimbursement for self-procured medical treatment to date. (The commission did not file its decision until March 29, 1949). About March 23, 1949, Dr. Peterson, applicant's physician, advised her to go to a hospital, and he referred her case to Dr. Shelden, who also told her to go to a hospital. She went to a hospital on March 26th. The operation was performed by Dr. Shelden on March 30th. On March 29, 1949, the commission made a further award in which it granted applicant's request for surgery. The commission found that applicant's condition had not become permanent, and it ordered that compensation payments for temporary total disability be continued. A copy of that award was received by the employer on March 30, 1949. Also on March 30, 1949, the employer was notified by applicant's attorney that the operation had been performed on that day.

On June 4, 1949, the employer filed a letter with the commission in which it stat-

ed that an operation had been performed upon the applicant by a physician selected by her and without any notice to petitioner, and that petitioner was informed of the operation after it had been performed. The employer set forth in said letter a list of expenses, alleged by applicant to have been incurred in connection with the operation, and it requested that the matter be set for hearing "to determine the extent of defendant's [employer's] liability, if any, for said medical expenses." The request was granted and a hearing was had on June 22, 1949. The applicant testified that prior to the operation, at the times when she was "in extreme pain," her physician gave her a "shot" to relieve the pain; that three times during the week prior to the operation her physician called on her and gave her a "demerol shot," to put her "out of pain," but that after the third shot she was paralyzed on the right side; that her physician then refused to take further responsibility and "ordered" her to the hospital; that he "called" Dr. Shelden, who then "called" applicant and told her to come to the hospital "right away"; that she went to the hospital on March 26, 1949, and that her attorney was notified before she went. She testified further that her condition had improved since she left the hospital. Dr. Shelden made a report regarding the operation, dated May 5, 1949, which was admitted in evidence, and in which it was stated: "The fifth lumbar nerve root was very large, reddened and edematous and was firmly fixed to the posterior longitudinal ligament. No actual protrusion of intervertebral disc was visible or palpable, but the size and character of the nerve signified the presence of a local irritative process. The nerve was surrounded by large tortuous, extradural vessels which were dissected from the nerve root and coagulated. A neurolysis was done of the nerve root." It was stated further therein that applicant "appeared to have received substantial improvement from the surgical procedure." At the hearing, statements for various medical expenses incurred by applicant in connection with the operation were admitted in evidence. Testimony was given regard-

ing the reason and necessity for such expenses, and the nature and extent of the services rendered.

On July 12, 1949, the commission filed its supplemental award in which it found the amounts expended by applicant for such medical treatment, surgery, hospitalization, and nursing, in the total sum of \$1264.05, to be reasonable and made an award in favor of applicant for that amount. On August 1, 1949, a petition for rehearing of the supplemental award was filed by petitioner. On August 26, 1949, the commission filed its order denying defendant's petition for rehearing. Thereafter the petition for a writ of review was filed with this court.

[1] Petitioner contends in effect that it was not given notice and a fair opportunity to furnish the medical treatment. This contention is not sustainable. Section 5400 of the Labor Code provides that service of notice of injury is a prerequisite to maintaining a claim for compensation. Section 5402 of the Labor Code provides: "Knowledge of such injury, obtained from any source, on the part of an employer, * * * or knowledge of the assertion of a claim of injury sufficient to afford opportunity to the employer to make an investigation into the facts, is equivalent to service under section 5400." The petitioner herein had knowledge of the injury the day after it occurred, which was approximately four and half years prior to the date of surgery. As above shown, petitioner also had knowledge as early as April 9, 1948, almost a year prior to the surgery, that such surgery had been recommended by an independent medical examiner. Also, a copy of applicant's petition for surgery to be performed at the expense of the employer, was served on the employer on January 19, 1949. The employer had notice that surgery was contemplated.

Section 4600 of the Labor Code provides: "Medical, surgical, and hospital treatment * * * which is reasonably required to cure or relieve from the effects of the injury shall be provided by the employer. In the case of his neglect or refusal seasonably to do so, the employer is liable for the reasonable expense incurred by or on

behalf of the employee in providing treatment." Petitioner did not offer, at any time prior to the operation or at all, to furnish surgical treatment or indicate any intention of doing so. After the employee filed her application for compensation the petitioner did not offer her any medical treatment, and it appears that her condition became worse. Applicant testified that she requested medical treatment on April 25, 1945 (before filing her application), and that the chief surgeon of petitioner's medical department told her she did not need any more treatments. "When the employer has had notice of the fact of an industrial injury and notice of the need for treatment, with attendant opportunity to furnish such medical treatment, but fails to tender such treatment promptly, * * * the employee is entitled to obtain the same from physicians of his own selection at the employer's expense." *Draney v. Industrial Accident Comm.*, 95 Cal.App.2d 64, 212 P.2d 49, 51. In the case just cited the employee had received a back injury in the course of his employment, and he went to a clinic where his employer had instructed the employees to report in case of injury. The clinic was about to terminate business but gave the employee one treatment. Thereafter the employee received a form of report from the employer's insurance carrier and also a request to "contact" it. He received no further instructions from the insurance carrier or from the employer, who knew of the injury, and except for the treatment at the clinic he made no demand upon the employer for medical treatment. About 1½ months later, upon the advice of his own physicians that he have an operation immediately, the employee had an operation performed on his back. In making its award the commission denied recovery for such self-incurred medical expenses. The court, in annulling that portion of the award, held that "the burden" was upon the employer to furnish medical assistance. It stated therein, 95 Cal.App. 2d at page 67, 212 P.2d at page 51: "The employer must, upon the happening of an accident, at once instruct the employee regarding the medical and surgical treatment to be fur-

nished. He must specifically instruct what to do and to whom to report. If the employe is not so instructed, and secures treatment on his own behalf, the employer is liable for the reasonable value of such treatment, even though he was ready and desirous of furnishing medical aid according to his own plans.' "

Petitioner argues, in effect, that surgery was not necessary and therefore that the expenses which applicant incurred in connection therewith were not necessary. In making its award on March 29, 1949, the commission found that the applicant was in need of and entitled to surgery at the expense of the employer. That finding was supported by the evidence. Over the long period between the injury and the surgery applicant repeatedly sought medical advice in an effort to ascertain the nature of her injury and to be relieved from the effects of the injury. She was examined by many physicians and submitted to various treatments. Nevertheless her condition became steadily worse. There was evidence at the hearing on March 3, 1949, that she was unable to do her housework. She was in bed most of the time (after December 5, 1947) and was taking an increased amount of drugs to relieve her pain. Dr. Shelden reported that applicant's condition has improved since the operation. She testified at the hearing on June 22, 1949, that she had been "up and around" about 2 weeks, although she had to take certain rest periods; and that she was doing some of the cooking and helping with the dishes. It appears therefore that the surgery was necessary and beneficial.

[2] Petitioner also contends that no emergency existed at the time of, or prior to, the operation which excused the applicant from giving petitioner an opportunity to offer whatever surgery was necessary. Dr. Pheasant, an independent examiner appointed by the commission, reported on April 9, 1948, that an operation should be performed. Applicant's personal physician reported in January, 1949 that surgery was necessary and that he believed further delay would "seriously endanger the results which may be obtained by surgery." At the hearing on March 3, 1949, there

was evidence that the applicant was confined to her bed nine-tenths of the time after December 5, 1947; that she was in constant pain and that her physician had been giving her empirin, codeine and sleeping pills. The evidence shows that during the week prior to the operation applicant was in extreme pain and was given demerol three times to relieve the pain; that following the third "shot" of demerol the applicant became paralyzed on the right side and her physician recommended an immediate operation and ordered her to go to the hospital. The surgeon, Dr. Shelden, who performed the operation, and with whom the applicant had previously consulted, told her to come to the hospital "right away." The referee, in his report regarding petitioner's request for rehearing on the supplemental award for medical expenses, stated that at the time applicant went to the hospital she "had reached the point of an emergency situation." The evidence amply supports the statement of the referee that an emergency existed when applicant went to the hospital. Under the circumstances here, where the petitioner had been contending for more than a year that an operation was not necessary, and where it had resisted her "Petition for Surgery," and where an emergency operation had been ordered by qualified doctors of medicine in whom applicant had confidence, applicant was not required to give petitioner a further opportunity, prior to the operation, to furnish medical or surgical treatment. Presumably, applicant filed her "Petition for Surgery" in order to have it determined prior to the operation whether the petitioner should pay the expenses of the operation. The petition was filed on January 19, 1949, and was set for hearing on March 3, 1949—about six weeks after it was filed. Three weeks after the hearing, and while applicant was awaiting the commission's ruling upon the referee's recommendations, the emergency arose and at that time it was essential, in view of the advice of qualified physicians, that applicant proceed to incur the expenses of the operation without awaiting further the ruling upon her petition. In the case of Newall Land &

Farming Co. v. Industrial Accident Comm., 57 Cal.App. 115, 206 P. 769, the employee had refused the employer's offer to furnish surgery, but later he notified the employer and the commission that an immediate operation was necessary, and thereafter, while the employer was considering the matter and before the commission had made a ruling, the employee's condition became dangerous and he had the operation performed by a surgeon of his own choice. In that case the commission's award for expenses of the operation was affirmed.

[3-5] Petitioner contends further that the employer is liable only for treatment reasonably required to cure or relieve from the effects of the injury. Petitioner argues principally that the award of \$500 for the surgeon's fee was excessive; and that the award of \$200 for practical nursing was erroneous since the services performed were, according to petitioner, domestic services. Those sums had been paid by the applicant and receipts therefor were filed with the commission. The evidence, on the hearing regarding the services for which such charges were made, showed that the sum paid to the surgeon was for neurosurgical consultation, for a myelogram, and for the operation. The question as to whether the medical fee under the circumstances was reasonable was for the commission to determine. The commission found that the fee was reasonable, and there is nothing before this court which requires a different conclusion. As to the award of \$200 for practical nursing, that amount was paid to a woman for services rendered over a period of two months after the applicant returned home from the hospital. Those services consisted of "regular" nursing care, general housework and cooking. It appears that applicant left the hospital and returned to her home in order to reduce her medical expenses, and that her physician permitted her to return home on the condition that she have someone in her home to care for her. It is true that the services also included housework and cooking for applicant's husband and two sons. The woman's salary was \$100 a month. If the applicant had remained in the hospital the expenses for

her care would have exceeded the expense incurred at home. The commission was warranted in allowing that sum as a reasonable amount for practical nursing. The finding that certain other charges for medical treatment were reasonable is supported by the evidence "In reviewing the findings of the commission, the courts are without power to disturb them unless there is a lack of substantial evidence. The courts are not concerned with conflicts. * * * Where there is substantial evidence to support the findings and order of the commission, the reviewing court may not substitute its views for those of the commission and annul the award. * * * If the findings of the Industrial Accident Commission are supported by inferences which may fairly be drawn from evidence, even though the evidence is susceptible of opposing inferences, the reviewing court will not disturb the award." *Pacific Lumber Co. v. Industrial Accident Comm.*, 22 Cal.2d 410, 422-423, 139 P.2d 892, 899.

The award is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



96 Cal.App.2d 621

PEOPLE v. HICKOK.

Cr. 2537.

District Court of Appeal, First District,
Division 1, California.

March 27, 1950.

Hearing Denied April 24, 1950.

Donald E. Hickok was convicted in the Superior Court of Contra Costa County, Harold Jacoby, J., of violating the statute making it an offense to participate in act of copulating the mouth of one person with the sexual organ of another, and he appealed. The District Court of Appeals, Peters, P. J., held that defendant failed to show that he was deprived of his legal right on preliminary examination to be informed of the right to be represented by counsel, and that evidence was sufficient to sustain conviction.

Affirmed.

1. Constitutional law ⚖️263

The duty to inform an accused that he is entitled to be represented by counsel at a preliminary examination, in some cases, at least, is part of the due process guaranteed by the Fourteenth Amendment to the federal Constitution. Pen.Code, § 858; Const. Cal. art. 1, § 13; U.S.C.A.Const. Amend.14.

2. Criminal law ⚖️1141(2)

An appellant contending that there was error in preliminary examination, must show error by the record, since there is a presumption of the regularity of the proceedings.

3. Criminal law ⚖️245

If accused believed that he had not been legally committed at preliminary examination, he had legal right to attack the proceedings by motion in prosecution in Superior Court. Pen.Code, §§ 995, 996.

4. Criminal law ⚖️1115(1)

Where record of preliminary examination recited that defendant was duly arraigned and informed as to "his rights," and defendant did not by motion in superior court during the prosecution attack the preliminary examination on ground that he had not been informed as to his right to be represented by counsel at preliminary examination, defendant was precluded on appeal from successfully contending that record showed that he was deprived of right to be informed as to right to be represented by counsel at preliminary examination. Pen.Code, §§ 858, 995, 996; Const. art. 1, § 13.

5. Sodomy ⚖️6

In prosecution under statute making it an offense to participate in act of copulating the "mouth" of one person with the sexual organ of another, evidence that showed penetration beyond lips of prosecutrix was sufficient to sustain conviction, though evidence showed that prosecutrix had her teeth tightly clenched, since the lips constitute the entrance to and are part of the "mouth". Pen.Code, § 288a.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Mouth".

Cal.Rep. 215-216 P.2d-31

6. Sodomy ⚖️1

Any penetration of the mouth, no matter how slight, constitutes a violation of statute making it an offense to participate in the act of copulating the mouth of one person with the sexual organ of another. Pen.Code, § 288a.

Todd & Todd, Gordon W. Mallatratt, San Francisco, for appellant.

Fred N. Howser, Attorney General, David K. Lener, Deputy Attorney General, Francis W. Collins, District Attorney, Martinez, Thomas F. McBride, Deputy District Attorney, Martinez, for respondent.

PETERS, Presiding Justice.

By an amended information defendant was charged with a violation of section 288a of the Penal Code, and with a prior conviction of and service of a term for manslaughter. He admitted the prior conviction, but pleaded not guilty to the other charge. At his trial before a jury he offered no evidence on his own behalf. He appeals from the judgment of conviction and from the order denying his motion for a new trial. The appeal was originally dismissed for failure to file briefs, but, upon motion, the remittitur was recalled and appellant allowed to file briefs. *People v. Hickok*, 92 Cal.App. 539, 207 P.2d 620.

The basic facts are not in dispute. On April 17, 1946, the prosecutrix was a high school girl 17 years of age. Appellant was a physiotherapist with an office in Richmond. He was also a Sabbath School teacher and elder in a church attended by the prosecutrix and her family. The prosecutrix was a member of the church class taught by appellant, and her family and that of appellant were well known to each other. Prior to April 17, 1946, the prosecutrix, usually accompanied by a high school girl friend, frequently visited appellant's office for social and professional reasons. On the day in question, the prosecutrix and her girl friend visited the office of appellant on their way home from school. When the girls arrived, only appellant was in the office. The three engaged in general

conversation, and finally began to discuss hypnotism. Appellant offered to try and hypnotize the two girls. By word suggestion he hypnotized them and placed them on a treatment table in his office. Both girls testified that they were aware of what was going on, but were unable to move. Appellant then carried the friend to an adjoining room and placed her on a treatment table there. He returned to where the prosecutrix was lying. He then placed his finger down the girl's throat, but, apparently because of her hypnotized condition, she did not gag. When his finger was removed, her teeth, apparently as the result of reflex action, clamped together. Appellant then tried to place his sexual organ in the mouth of the girl. The girl testified that "It didn't go beyond my teeth because my teeth were clamped together, but it was inside of my lips, in my mouth." Appellant then attempted to pry the jaws of the prosecutrix apart when he was interrupted by the return of the girl friend to the room where these acts occurred. The girl friend did not see appellant exposed, and was not aware of what had occurred. The prosecutrix was aware of what was happening, but kept her eyes closed during the entire occurrence. After the girl friend returned to the room the appellant first told the prosecutrix that she would not remember what had occurred, and then "awakened" her.

The prosecutrix did not tell her family or her girl friend what had occurred, but the next day reported the affair to a woman who was active in the church. The woman immediately reported the charge to the church pastor. A day or two later the woman and the minister confronted appellant with the girl's story. Appellant readily admitted hypnotizing the two girls, but claimed that the balance of the story was an illusion. He agreed to a meeting with the girl and the two adults, and several days later met with them in the study of the church. At this meeting the minister asked the prosecutrix to repeat her charges. She started to do so, but before she came to the act charged, appellant interrupted her with the statement: "Well, let's spare her the details. Let's spare the girl this embarrassment." A general discussion then followed in which

appellant refused to deny or to admit having committed the acts charged by the prosecutrix, even after the minister told him that a failure to deny the charges would be interpreted as an admission of guilt. The appellant asked the minister what he would do if the charges were true, and, when the minister refused to commit himself, then promised to resign from the church and to leave town if all present would agree to say nothing to anyone about the incident. The minister refused to make any such promise, and refused appellant's request that he be permitted to talk to the girl alone.

For a short time after the meeting in the minister's study, appellant remained in Richmond and continued to participate in church affairs, and then he and his family moved away. Nearly two years after April 17, 1946, an information was filed, and on February 14, 1948, defendant appeared before a committing magistrate for preliminary examination. Admittedly, appellant was not then represented by counsel. He voluntarily agreed to testify at the preliminary, and the record of his testimony then given, over objection, was read into the evidence at his trial in the Superior Court. The record shows that at the preliminary defendant admitted that the two girls had visited his office on the day in question, and that he had then hypnotized them. He expressly admitted that he then attempted to commit the act charged against him, but stated that he had been unsuccessful because the prosecutrix had kept her teeth tightly closed. He pleaded not guilty, and was held to answer. He did not testify, nor produce any evidence on his own behalf, at the trial.

On this appeal but two points are made, first, that defendant was not informed of his right to counsel at the preliminary and that this deprived him of due process of law, and second, that there was no violation of section 288a of the Penal Code. Neither contention is sound.

There can be no doubt that there is a constitutional and statutory duty imposed on the magistrate to inform the accused that he is entitled to be represented by counsel at a preliminary examination. Article 1, § 13, of the California Constitution provides

that: "In criminal prosecutions, in any court whatever, the party accused shall have the right * * * to appear and defend, in person and with counsel," while section 858 of the Penal Code provides that: "When the defendant is brought before the magistrate upon an arrest, either with or without warrant, on a charge of having committed a public offense, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings." See, also, *People v. Avilez*, 86 Cal.App.2d 289, 294, 194 P.2d 829.

[1] There can also be little doubt but that the duty to inform the accused of such right, in some cases at least, is part of the due process guaranteed by the Fourteenth Amendment to the United States Constitution. *Gibbs v. Burke*, 337 U.S. 773, 69 S.Ct. 1247; *Townsend v. Burke*, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1762; *Uveges v. Com. of Pennsylvania*, 335 U.S. 437, 69 S.Ct. 184; see, also, *Cherrie v. United States*, 10 Cir., 179 F.2d 94.

The question in the present case is not as to the existence of such right, but whether the record shows that appellant was deprived of the right. The record of the preliminary examination shows the following:

"The Court appointed Gertrude R. Dinsmore to take down the testimony and proceedings in the examination, and thereupon the defendant Donald E. Hickok having been so brought before the said Justice of the Peace for preliminary examination upon the charge of felony, to-wit: Violation of Section 288a of the Penal Code of the State of California, proceedings were had and testimony taken as hereinafter fully set forth.

"(The defendant was duly arraigned and informed as to his rights.)"

Mr. McBride, the Deputy District Attorney, then stated:

"It is my understanding from talking to the defendant this morning and prior to coming here, that it was his wish to take the stand and to testify here this morning for the purpose of the preliminary hearing. Mr. Hickok before you do take the stand, if that is your desire, it is my duty to in-

struct you on the law applicable to this matter. This is a criminal proceeding. You are the defendant. You need not testify unless you so desire. You have a constitutional immunity against testifying in such matters. No one has threatened you that I know of, and no one will threaten you in order to induce you to testify. No one has promised you or can promise you anything for your testifying. If you testify, you must testify voluntarily. You must do so under oath like any other witness. What you testify to will be taken down by the shorthand reporter and in the event you are held to answer to the Superior Court, may be used there. Knowing those things to be true, Mr. Hickok, is it your desire now to take the stand?

"The Defendant: Yes."

[2-4] It will be noted that the record shows that appellant was "duly arraigned and informed as to his rights." While it is true that the reporter did not take down the exact words of the committing magistrate, but merely summarized what had then occurred, it is apparent that if appellant was "informed as to his rights" he must have been informed of his right to counsel, as that is one of his legal "rights." It is incumbent upon an appellant to show error by the record. There is, of course, a presumption of regularity of the proceedings. *People v. O'Neill*, 78 Cal.App.2d 888, 179 P.2d 10. If appellant believed that he had not been legally committed, he had the legal right to attack the proceedings by motion in the Superior Court. § 995 of the Penal Code. Section 996 provides that if such a motion is not made, the accused is precluded from thereafter raising the point. No such motion was here made. While failure to make such a motion would perhaps not cure a failure to afford an accused a constitutional right, if such defect appeared in the record, a failure to make such a motion certainly precludes the appellant on appeal from contending that the record showing that he was informed of his rights is incorrect. In *re Rogers*, 91 Cal.App.2d 394, 205 P.2d 667.

A case very closely in point is *People v. Rebolledo*, 93 Cal.App.2d 261, 209 P.2d 16. *Rebolledo* was arraigned before a magis-

trate on charges of having violated section 288 of the Penal Code. He had an interpreter, but no counsel. The record, as in the instant case, showed that he was informed of his "legal rights." Unlike the present case, Rebollo then moved the Superior Court to set aside the information. He was subsequently convicted, and appealed from the judgment of conviction and from the order denying his motion to set aside the information. One of his main grounds of appeal was that he had not been informed of the charges against him or of his right to counsel. In affirming the judgment and order appealed from, the Court stated, 93 Cal.App.2d at page 263, 209 P. 2d at page 18: "The contention of appellant that he was not advised of charges against him, of his right to counsel and to cross-examine witnesses, is without merit. The record shows that at the arraignment the complaint was read to him through an interpreter and he was informed of his legal rights. It is presumed that when the magistrate advised appellant of his 'legal rights' at the arraignment, that he also advised him of his right to the aid of counsel in every stage of the proceedings (Penal Code, sec. 858); that he was entitled to produce witnesses on his own behalf and to be confronted with the witnesses against him in the presence of the court. Penal Code, sec. 686; Code of Civil Procedure, sec. 1963, sub. 15. It was not necessary that appellant be represented by counsel at the preliminary examination, *People v. Campos*, 10 Cal.App. 2d 310, 320, 52 P. 2d 251; *People v. Greene*, 80 Cal.App. 2d 745, 748, 182 P. 2d 576, however, he had been advised of that right and was given ample opportunity to secure the services of an attorney if he so desired."

Another case quite similar to the instant one is *People v. Greene*, 80 Cal.App. 2d 745, 182 P.2d 576, 80 Cal.App. at page 747, 182 P. 2d at page 577, appears the following:

"Defendant thereafter, on August 20th, was taken before the committing magistrate and arraigned. According to the minutes of that court, which were received in evidence at the trial, the defendant was 'duly informed of the nature of the charge against him and of all his legal rights'. The preliminary hearing was set for August

21st. On that day, defendant came into the magistrate's court, without counsel, and the judge thereof stated to the defendant: 'I understand you want to waive your preliminary hearing.' Answer by defendant: 'That is correct.' The Court: 'In order to do so you must be informed that when you take the stand and testify, anything that you say here in this court may be held against you in this court, or in any other court hereafter. You do not have to testify unless you want to, but you may do so if you want. With that understanding, do you want to testify?' Defendant: 'Yes, sir.' The defendant then testified in more detail about the facts before related. He was held to answer. This evidence was offered against the defendant in the Superior Court and counsel for him objected and moved to strike that evidence on the ground that 'defendant was compelled to be a witness against himself * * * that he was not represented by counsel * * * and that his constitutional rights had been violated.' The motion was denied and on this appeal defendant claims error of the trial court in its ruling.

"The record not only indicates that defendant was informed of his rights according to section 858 of the Penal Code, at the arraignment, but he was later warned that any statement he might give at the preliminary hearing might be used against him. Sec. 1323, Penal Code. Although the question propounded by the committing magistrate might indicate that the magistrate was of the belief that the defendant was *waiving* a preliminary examination, the facts indicate from the testimony taken that a *preliminary examination* was being held, and the evidence produced did show probable cause * * *.

"In *People v. Brooks*, 72 Cal.App.2d 657, 660, 165 P. 2d 51, in construing Penal Code, section 859a and Penal Code, section 860, this court stated that it is not necessary that a defendant be represented by counsel before the committing magistrate, unless he enters a plea of guilty, or unless he waives the preliminary examination. Since the proceeding had was a preliminary examination, the presence of counsel representing the defendant was not mandatory. The record nowhere shows that defendant

desired the services of counsel or sought a continuance for that purpose. After defendant secured counsel, which was before his arraignment in the Superior Court, no motion was made questioning the validity of the proceedings in the committing magistrate's court. In fact, it was not questioned until the proffered evidence relating to his testimony at the preliminary hearing was presented during the trial of the action.

"Section 995 of the Penal Code provides that the information must be set aside, *upon defendant's motion*, when it appears that before the filing thereof defendant had not been legally committed by a magistrate. Section 996 of the Penal Code provides that if the *motion* to set it aside is not made, the defendant is precluded from afterwards taking the objections mentioned. Since counsel for defendant failed to make such a *motion*, and failed to address himself to the discretion of the court in this respect, he is now foreclosed from raising the objection suggested. See, also, *People v. Harris*, 219 Cal. 727, 28 P. 2d 906, and cases there cited. We perceive no error of the trial court in its ruling on the admissibility of the testimony of defendant taken at the preliminary examination."

Under the circumstances here appearing, and under the authority of the above cases, it must be held that appellant has failed to show that he was deprived of any legal right.

[5,6] The second contention of appellant is that the evidence fails to show a violation of section 288a of the Penal Code. That section provides: "Any person participating in the act of copulating the mouth of one person with the sexual organ of another is punishable by imprisonment in the state prison for not exceeding fifteen years." The theory seriously urged by appellant is that, since the evidence admittedly shows that the prosecutrix had her teeth tightly clenched, a violation of the section did not occur. To state the contention is to refute it. The lips constitute the entrance to, and are part of, the mouth. Admittedly, the evidence shows a penetration beyond the lips of the prosecutrix. Cases such as *People v. Angier*, 44 Cal.App.2d 417, 112 P. 2d 659,

and *People v. Coleman*, 53 Cal.App.2d 18, 127 P. 2d 309, are not here applicable. In those cases there was no penetration—here there was an insertion into the mouth beyond the lips. The degree of penetration is a false factor. Any penetration of the mouth, no matter how slight, constitutes a violation of the section. *People v. Milo*, 89 Cal.App.2d 705, 201 P. 2d 556.

The statutes dealing with the crime against nature and rape expressly provide that "Any sexual penetration, however slight" is sufficient to constitute the defined crimes. §§ 287 and 263, Penal Code. These portions of the statutes have been frequently applied by the courts. *People v. Lindley*, 26 Cal. 2d 780, 161 P. 2d 227; *People v. Howard*, 143 Cal. 316, 76 P. 1116; *People v. George*, 91 Cal.App. 2d 537, 205 P. 2d 464; *People v. Stangler*, 18 Cal. 2d 688, 117 P. 2d 321. While section 288a contains no such express admonition, it is obvious that such a provision is necessarily implied by the terms of the section. What is prohibited is the copulation of the mouth of one person with the sexual organ of another. Such prohibited act is accomplished by any prohibited penetration of the mouth, regardless of the degree of that penetration.

The judgment and order appealed from are affirmed.

BRAY, J., and SCHOTTKY, Justice pro tem., concur.

Hearing denied; CARTER, J., dissenting.



96 Cal.App.2d 671

PEOPLE v. PETERS.

Cr. 2611.

District Court of Appeal, First District,
Division I, California.

March 28, 1950.

Hearing Denied April 24, 1950.

Lionel Henry Peters was convicted in the Superior Court, Contra Costa County, Hugh H. Donovan, J., of involuntary manslaughter and he appealed. The District Court of Appeal, Bray, J., held that the cause of death was proved, admission of testimony as to statements made by deceased after he was

knifed was not error since no objection was taken, and other witnesses testified without objection to same statements, and defendant admitted in his own testimony that he had cut deceased, which was deceased's main statement and that instructions as given were not erroneous, and that evidence sustained conviction.

Judgment and order affirmed.

1. Homicide $\S$ 255(2)

Evidence sustained conviction for involuntary manslaughter.

2. Homicide $\S$ 142(1), 234(7)

In a homicide case, fact that deceased met his death through act or agency of defendant must be proved, and it may be proved by circumstantial evidence.

3. Criminal law $\S$ 409

The cause of death need not be proved, even in a criminal case, if admitted or conceded by defendant.

4. Criminal law $\S$ 1137(2)

In a criminal case, defendant is not called upon to make explanation, to deny issues expressly nor is he required to point out to prosecution its failure to make a case against him or to prove any link in the required chain of guilt, but defendant cannot mislead court and jury by seeming to take a position as to issues in case and then on appeal attempt to repudiate that position.

5. Criminal law $\S$ 406(4), 410

An admission of a fact made at trial in open court by prisoner or his counsel may be properly considered by jury.

6. Criminal law $\S$ 410

Where trial proceedings of manslaughter prosecution, including defendant's opening statement and argument to jury showed that at no time was defendant questioning either that knife wound caused named party's death or that fact had not been established and on cross-examination of defendant, no objection was made to district attorney's statement "And you stuck this rather dull knife into him, sufficiently deep to kill him", jury could consider from unequivocal conduct of counsel that cause of death was conceded.

7. Criminal law $\S$ 561(1)

A defendant in a criminal case is entitled to benefit of every reasonable doubt.

8. Criminal law $\S$ 1036(1), 1169(2, 3)

Where defendant's counsel objected to district attorney's examination of witness as to what deceased said after he was knifed and witness was carrying deceased, and question was withdrawn and district attorney stated he was contending that statements were a dying declaration and thereafter examined witness concerning deceased's apprehension that he might die and statements made by deceased to effect that defendant had cut him, but no other objection was made to admission of that testimony and two other witnesses testified without objection to same statements, and defendant admitted in his own testimony main statement made by deceased that defendant had cut him, admission of testimony was not error.

9. Criminal law $\S$ 1036(1)

Where no objection is made in trial court, contention that evidence was erroneously admitted will not be considered on appeal.

10. Homicide $\S$ 304

In manslaughter prosecution, refusal to give portion of instruction to effect that if striking with knife were unintentional and accidental jury should acquit defendant was not error.

11. Homicide $\S$ 300(3), 304

In manslaughter prosecution, instruction on theory that defendant acted reasonably in self-defense, care and circumspection not being involved, and instruction on theory that although not acting in self-defense, injury being caused by accident, defendant exercised due caution and circumspection, were proper.

W. Blair Rixon, Brentwood, for appellant.

Fred N. Howser, Attorney General of the State of California, Clarence A. Linn, Deputy Attorney General, for respondent.

BRAY, Justice.

Under an information charging manslaughter, a jury found defendant guilty of that crime. From the judgment entered thereon and from an order denying a new trial, defendant appealed.

Questions Involved.

1. Was the corpus delicti, that is, was the cause of death, proved? 2. Was certain evidence erroneously admitted? 3. Was there error in the court's instructions?

Facts.

There is very little conflict in the evidence. About 2:30 a. m. on November 7, 1948, one Clemons¹ and his wife were asleep in bed in their home in Pittsburg. They were awakened by a knocking at the door. Receiving no answer to his query as to who it was, Clemons went to the door and saw defendant and Cole (the deceased) standing there. Defendant asked where Millie (defendant's girl friend) was and also asked for his "combination" (a radio and phonograph combination). Clemons told defendant that neither was there and for defendant to go home and go to bed. Clemons testified that defendant was drunk. Defendant denied that he was. Clemons closed the door. This angered defendant, who, with his fist, hit the glass panel, breaking it, cutting his hand so that it bled copiously. Defendant claims that Clemons then said that he would get the "little bastard" and break his neck. Defendant ran around behind the house. According to defendant, Clemons came out on the porch and turned the light on, but could not see defendant because the latter was "crouched down." Clemons went in the house and put on his trousers and started out to look for defendant, picking up a "little piece of concrete about—wasn't big as my hand." Defendant came around to the front of the house and started for home. Defendant was carrying a carbine bayonet which had a blade about 6 inches long.² Apparently he dropped it and Cole picked it up. Clemons came out of the house and called to defendant. Cole and defendant walked back towards the approaching Clemons. De-

fendant weighed only about 135 pounds, while Clemons weighed 243 pounds. Defendant is not sure whether he asked Cole for the knife or Cole handed it to him without asking. Defendant claimed that as Clemons came down the street he had one hand behind him and defendant thought he had a pistol. Cole, defendant and Clemons were standing fairly close together. Defendant insisted that Millie and the combination were in Clemons' house. The latter denied that they were. Clemons testified that the defendant's hand was bleeding considerably and he told defendant to go home and take care of his wound, that he told defendant he would have to pay for the broken glass, and defendant said he would. According to defendant, Clemons acted as though he wanted to fight. Cole stepped between him and Clemons to help defendant. Defendant testified that he thought Clemons was about to attack him and was frightened, and that when Cole stepped between them it blocked defendant's view of Clemons and put defendant in a position where he could not defend himself if Clemons were to attack him, so "I took my hand with a side motion—I pushed Cole back in order to protect myself and Cole. When I did that, I stuck him * * *" Defendant had the knife in his hand at this time and during all the argument with Clemons, although Clemons did not know that defendant was armed. Cole grabbed his stomach and walked away. Defendant and Clemons continued arguing for a short time and Clemons returned to his home. Defendant started toward his hotel, dropping the knife en route. A man named Jenkins came in and told defendant that the latter had cut Cole, who had been taken to a hospital. A man dressed defendant's hand. When told that the police were coming, defendant hid under the bed, where the police found him. Defendant admitted that Clemons had made no attack on him either that night or at any other time. Defendant also stated that when Cole stepped between him and Clemons Cole was not interfering "but he steps up in the way, and so if Fats does anything I can't protect my-

1. Referred to in the testimony as "Fats."

2. Referred to throughout the testimony as a "knife."

self, and Junior [Cole] couldn't protect himself." Defendant then said, "Look out," and with knife in hand pushed Cole "with my right hand on a horizontal motion. This was the time I cut Junior [Cole]." Apparently defendant did not know he had cut Cole until he was back in his hotel and was told that he had by Jenkins.

The testimony of Clemons as to the cutting is substantially similar to that of defendant except that Clemons claimed that Cole was trying to get defendant to go home and defendant would not go, and that Clemons had left the two of them without knowing that Cole had been cut.

[1] Clearly, the evidence justified the finding of the jury that defendant was guilty of involuntary manslaughter, provided, of course, that decedent died from the knife wound. Defendant does not question the sufficiency of the evidence except on the sole question of the cause of death.

1. Was the Corpus Delicti Proved?

After the cutting Cole walked away from defendant and Clemons, and they did not see him any more. The witness Jenkins testified he heard Cole calling him. Jenkins went up to him and Cole said that he had been cut by defendant and that he might die, and to get a doctor. Cole was bleeding "pretty bad." About that time a police car came, and Jenkins helped put Cole into the car. There was no testimony as to the type of wound, its size or depth. Nor was there any testimony as to the cause of Cole's death. A witness testified that Cole was dead, as he had seen his body at the coroner's inquest, the date of which does not appear. There is no evidence as to the date when Cole died. The earliest date appearing in the record after November 7, the day of the cutting, is the date of the information, December 2. Cole died some time between those two dates, a space of almost one month.

Taking the evidence most strongly in favor of the prosecution on this question, it appears that Cole was "stuck" or "cut" by a bayonet, the extent of the cut being unknown. Cole thought he might die from the cutting. A witness said that Cole was bleeding badly, although the witness did

not see the wound. Cole was placed in a police car apparently to be taken to a hospital. Some time between then and a date almost a month later Cole died.

[2,3] It is elementary that in a homicide case the fact that the deceased met his death through the act or agency of the defendant must be proved. It may, of course, be proved by circumstantial evidence. *People v. Spencer*, 58 Cal.App. 197, 208 P. 380. Obviously, here, the cause of death was not proved by evidence. However, the cause of death is a fact, which, like every other fact, need not be proved, even in a criminal case, if admitted or conceded by defendant. While there was no direct proof of the cause of death, the conduct and attitude of defendant at the trial, as disclosed by the record, constituted at least an indirect concession of the fact.

The situation in this case is unique and probably will never occur in another case. It is not a matter of failure of proof (in spite of the fact that the district attorney offered no evidence of the cause or time of death), but of assumption by all concerned in the trial,—judge, jury, prosecution and defense,—that deceased died from the knife wound inflicted by defendant, and that so far as the cause of death was concerned, it really was not an issue in the case. The only issue was whether defendant could be excused from the stabbing of his friend, under the claim of self-defense, or under the claim of accident. The claim of self-defense to a charge of manslaughter necessarily is an admission that the victim died because of an act of the defendant. If he had not so died, the act could not be manslaughter and hence there would be no necessity to show that the act was justified. However, in the usual case the mere use by the defendant of such a claim does not relieve the prosecution of its burden of proving that the death was so caused, as the defendant may sit back and require the prosecution to prove its case and then, and only then, be required to set up his defense, which may be (1) that defendant's act did not cause death, or (2) that if it did, defendant was justifiably acting in self-defense, or (3) that the defendant's act was accidental. Defendant may avail himself

of any or all of these defenses. But here, defendant did not avail himself of the fact that when the prosecution closed its case, it had not proved the cause of death, nor did the defendant avail himself of the defense numbered (1) above. By his conduct he conceded that the death resulted from the knife wound and relied solely and wholly on his claims of self-defense and accident.

[4] In a criminal case a defendant is not called upon to make explanation, to deny issues expressly (his plea of not guilty does that for him), nor is he required to point out to the prosecution its failure to make a case against him or to prove any link in the required chain of guilt. On the other hand, he cannot mislead the court and jury by seeming to take a position as to the issues in the case and then on appeal attempt to repudiate that position. A reading of the proceedings at the trial, including defendant's statement at the opening of his case and his argument to the jury at the end of the case, clearly shows that at no time was he questioning either that the knife wound caused Cole's death, or that that fact had not been established or was an issue to be resolved by the jury. It also shows that defendant was conceding the cause of death.

As evidence of the assumption by all at the trial of the cause of death, appears the following: Defendant, on cross-examination, was asked to show how he was holding the knife and how with knife in hand he pushed Cole. At the end of several questions and answers on this subject and about four demonstrations, defendant said, "I pushed him like that. (Demonstrating) I meant to push him with my hand." Thereupon the district attorney said, "And you stuck this rather dull knife into him, sufficiently deep to kill him." No objection was made by defendant to this statement.

In *Ryan v. United States*, 8 Cir., 99 F.2d 864, page 870, the court said: "In the instant case, as we have already observed, it is admitted by counsel for appellant that the conspiracy alleged in the indictment was established by substantial evidence. That, we take it, established the corpus delicti in this case."

[5] It is well settled that "An admission of a fact made at the trial in open Court by the prisoner or his counsel may be properly considered by the jury." *People v. Garcia*, 25 Cal. 531, 534.

In *People v. Hammond*, 26 Cal.App.2d 145, 78 P.2d 1172, defendant's counsel in open court admitted the details of the crime. It was held: "A defendant is bound by the admission of his counsel made in open court." 26 Cal.App.2d page 150, 78 P. 2d page 1175.

In *State v. Whiteaker*, 118 Or. 656, 247 P. 1077, defendant was convicted of violating Oregon's "Blue Sky Law" in that he sold certain securities without having obtained the necessary permit. On appeal, defendant contended that his lack of permit was not proved. After considering certain testimony on the subject, the court said, 247 P. page 1080: "Furthermore, defendants never contended that any license or permit had been issued to them. In the opening statement to the jury counsel for appellant, in response to the inquiry from the court, 'Do you claim to have had a permit from the Corporation department to sell these (referring to "securities")'? answered, 'No; your Honor, I claim this, that I drew up a receipt which, according to my notions, conformed with the Blue Sky Law, did not conflict with it.' It was not necessary for the prosecution to prove that which was admitted in open court. 16 C.J. 891. Such admissions are conclusive * * *."

[6] While in the above cited cases the admissions of counsel were definite oral statements, the principle laid down applies equally to the unequivocal conduct of counsel from which the jury could properly and reasonably consider that the fact was conceded.

It would be a miscarriage of justice to set aside a verdict found by the jury on all issues which defendant at the trial believed necessary to be submitted to the jury. After all, a criminal case or court proceeding is not a game in which participants may be misled by a defendant's attitude and conduct at the trial, and then the verdict be set aside on appeal, because defendant contends there was no proof of a fact which he had

conceded, not by express word, but by conduct.

In the instructions which defendant requested, no hint is given that he was not conceding the cause of death. He offered several instructions on homicide, using the words "homicide" and "killing," some of which the court gave, and he offered no instruction even remotely indicating that the cause of death was an issue. In defendant's instruction 13, given by the court, defendant used the words "that at the time the knife was wielded which resulted in the death of" Cole. In his instruction 15 he used the language, "The mere fact that an unfortunate and *fatal* accident happened * * *" (Emphasis added.) Defendant closed his argument to the jury in this language: "* * * it is only justice, both for the State and for this defendant, that he be freed, because Mr. Peters' actions, *although resulting in disaster to his friend as we have all admitted*, were in defense of his life and that of his friend." (Emphasis added.)

Even on the argument of the motion for new trial, defendant confined himself to a discussion of the claimed error in an instruction which matter he argued at considerable length.

[7] A defendant in a criminal case, of course, is entitled to the benefit of every reasonable doubt, but the record shows that by the conduct of defendant and all other participants at the trial, no doubt was raised that defendant was conceding the cause of death.

2. Evidence.

[8,9] On the direct examination of the witness Jenkins the following occurred:

"Q. Now when you were carrying Junior [Cole], as you knew him, did he say anything to you?

"Mr. Rixon [for the defendant]: I'll object, if the Court please, to any conversations outside the presence of the defendant.

"The Court: How about it counsel? You're not contending that this is a dying declaration, are you?

"Mr. Walker [for the prosecution]: Yes, I am. I will withdraw that question and phrase it this way, if the witness will wait a moment so that counsel can object if he wishes to, to this question." Thereafter the district attorney examined the witness at considerable length concerning the "apprehension that he might die" and then concerning the statements then made by Cole to the effect that defendant had cut him. Defendant now contends that the statements made by deceased were not dying declarations and hence not admissible. Whether they were or were not dying declarations is not important for three reasons: (1) Defendant at no time other than the single objection given above objected to their admission. The contention that evidence was erroneously admitted will not be considered on appeal where objection was not made in the trial court. *People v. Willis*, 30 Cal.App.2d 419, 86 P.2d 670. It will be noted that the district attorney instructed the witness to wit so counsel could object but counsel did not object. (2) Two other witnesses testified without objection to the same statements. (3) The main statement made by deceased was that defendant had cut him. This the defendant admitted in his own testimony.

3. Instructions.

Defendant contends that in giving its instructions the court mixed instructions on involuntary manslaughter with instructions on self-defense so that the jury would consider that even if acting in self-defense defendant would have to use due care and circumspection, and complains particularly of the court's refusal to give the whole of the following instruction (the italicized portion is that which the court refused to give): "Although the jury may believe from the evidence beyond a reasonable doubt that the defendant Lionel Peters knifed and killed Ronald Cole, yet if you further believe from the evidence that at the time the knife was wielded which resulted in the death of said Ronald Cole, the defendant, in good faith believed and had reasonable grounds to believe that he was in danger of losing his life or suffering great bodily harm at the hands of Vernon

Clemens, and there appeared to the defendant exercising a reasonable judgment at the time and under the circumstances no other reasonable means of averting the impending, or to him apparent, danger, then he had a right to use such force as was to him apparently necessary to protect himself from such impending injury or harm, and if so acting, drew the knife and struck with it at the said Vernon Clemens and missed him and struck the said Ronald Cole and killed the said Ronald Cole, then you will find him not guilty. *Or if the jury believes from the evidence that defendant drew the knife with no intention of striking the said Ronald Cole, or attempting to strike him with it, and defendant accidentally and unintentionally struck the said Ronald Cole while the defendant was not endeavoring to strike the said Ronald Cole or the said Vernon Clemens with it, he should be acquitted."*

[10] The court properly refused to give the omitted portion. It was not a correct statement of the law. The part given was correct as to the right of the defendant to act in self-defense, but the second portion, which was on the subject of accidental striking, left out the very important element that if the defendant drew his knife and accidentally and unintentionally struck Cole he could be guilty of involuntary manslaughter if he did not use due care and circumspection under the circumstances in his conduct toward his friend Cole. While this instruction was approved in *Beatty v. Commonwealth*, 140 Ky. 230, 130 S.W. 1107, it is ambiguous. After referring to action in self-defense, it shifts somewhat and deals with a situation in which defendant was not attempting to strike *either* Cole or Clemens, and states that if the injury were accidental defendant should not be found guilty, without regard to whether the accident was due to lack of care or circumspection on defendant's part. The omitted portion purported to be an instruction to the effect that if the striking with the knife were accidental the jury should not inquire into the circumstances of the accident to determine if it might have been caused by defendant's lack of care.

[11] Defendant's criticism of the instructions as a whole, to the effect that they told the jury that in acting in self-defense a defendant must act with care and circumspection, is not well founded. The court did not so instruct, and defendant has pointed out no instruction in which it did so. The instructions discussed due care only in connection with the statutory definition of involuntary manslaughter. Moreover, one of these instructions was offered by defendant. The court properly and sufficiently instructed upon the two theories: (1) that defendant acted reasonably in self-defense (care and circumspection not involved): (2) although not acting in self-defense (the injury being caused by accident) defendant exercised due caution and circumspection.

The judgment and order are affirmed.

PETERS, P. J., and SCHOTTKY, Justice pro tem., concur.

Hearing denied; CARTER, J., dissenting.



96 Cal.App.2d 717

BANCHERO v. COFFIS.

Civ. 14144.

District Court of Appeal, First District,
Division 2, California.

March 29, 1950.

Lena Banchemo brought action against Tom Coffis, as administrator of the estate of Nicholas Kofinakis, also known as Nick Coffis, also known as Nicholas J. Kofinakis, deceased, to enforce claim against deceased's estate. A judgment for the plaintiff was entered by the Superior Court in and for the City and County of San Francisco, Melvin I. Cronin, J., and the defendant appealed. The District Court of Appeal, Goodell, J., held that defendant's motion to exclude plaintiff's evidence for failure to furnish bill of particulars should have been granted.

Judgment reversed with directions.

1. Frauds, statute of —153

Invalidity of alleged oral contract whereby defendant's decedent agreed to

leave all his property to plaintiff in compensation for services rendered and to be rendered by her to him was sufficiently pleaded by general denials contained in defendant's answer. Civ.Code, § 1624, subd. 6; Code Civ.Proc. § 1973, subd. 6.

2. Frauds, statute of §54½

Alleged oral contract whereby in consideration of plaintiff's promise to marry defendant's decedent, and of services rendered and to be rendered by her to him, decedent agreed that instead of paying her in cash for her services at current wages, he would leave her all his property in compensation for her services, if established, was unenforceable. Civ.Code, § 1624, subd. 6; Code Civ.Proc. § 1973, subd. 6.

3. Pleading §329

Where paper delivered by plaintiff to defendant pursuant to defendant's demand for a bill of particulars was a total and unqualified noncompliance with the demand, the extreme penalty provided by statute precluding the giving of evidence to prove plaintiff's claim was applicable. Code Civ.Proc. § 454.

4. Pleading §313

The purpose of statute providing for bill of particulars is to give adverse party reasonable notice of items constituting claim which he is required to meet, so that he may be prepared for trial. Code Civ.Proc. § 454.

5. Pleading §313, 327

A "bill of particulars" is in nature of an amplification of the pleading to which it relates, and it is to be construed as part of it for certain purposes. Code Civ.Proc. § 454.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Bill of Particulars".

6. Pleading §385

A bill of particulars has effect of restricting the evidence and limiting the recovery to matters set forth therein, provided proper objections are made, and trial court's attention called to any material departure from it. Code Civ.Proc. § 454.

7. Pleading §329

Where plaintiff sought to recover against estate of deceased on quantum meruit for services rendered decedent during his lifetime consisting of housekeeping, nursing, assistance in management of bakery, and keeping books and accounts of decedent's business interests, defendant's motion to preclude introduction of evidence by plaintiff should have been granted upon plaintiff failing to furnish demanded bill of particulars. Code Civ.Proc. § 454.

8. Appeal and error §1176(1)

Where judgment for defendant would have inevitably followed if defendant's motion to exclude plaintiff's evidence for failure to furnish bill of particulars had been granted, upon determining that defendant's motion to exclude evidence should have been granted, District Court of Appeal would direct entry of judgment for defendant to save circuitry of action. Code Civ.Proc. § 454.

Morris Oppenheim, San Francisco, for appellant.

Jack G. McBride, Joseph F. Murphy, San Francisco, for respondent.

GOODELL, Justice.

Respondent filed a creditor's claim for \$64,000 against decedent's estate and on its rejection commenced this action. The jury brought in a verdict for \$7500. Appellant moved for a judgment notwithstanding the verdict and on its denial judgment on the verdict was entered and this appeal taken.

The first count of the verified complaint alleged an oral contract made in 1941 whereby in consideration of plaintiff's promise to marry decedent, and of services rendered and to be rendered by her to him, he agreed that instead of paying her in cash for her services at current wages he would leave her all his property in compensation for her services; that she accepted the offer of marriage and agreed to perform certain services consisting of housekeeping, nursing care and attention, assisting in the management and operation

of decedent's bakery business, and assisting in keeping books and accounts of his business interests; that she performed such services from February 15, 1941 until decedent's death in April, 1947, and that they were of the reasonable value of \$64,000.

In the second count plaintiff alleged that decedent became indebted to her "for services rendered", of the reasonable value of \$54,000.

To each count appellant entered a general denial and pleaded the two-year statute of limitations.

[1, 2] Under Civil Code, § 1624, subd. 6, and Code Civ.Proc. § 1973, subd. 6, an oral contract such as that alleged is invalid. Such invalidity was pleaded by the denials contained in the answer. *Healy v. Obear*, 29 Cal.App. 696, 698, 157 P. 569, 570. Since no contract in writing was pleaded or proved, the first cause of action went out of the case, and plaintiff had to rely on her second count based on a *quantum meruit*. *Long v. Rumsey*, 12 Cal. 2d 334, 341, 84 P.2d 146.

The common count "for services rendered" supplied no detailed information whatever. It incorporated, however, the creditor's claim containing the general statement contained in the first count, that plaintiff had rendered four different kinds of services, but stated nothing further respecting them.

When the administrator answered he demanded a bill of particulars. None was supplied, and his motion to exclude evidence, made under § 454, Code Civ.Proc., was denied.

Thus the defendant had to go to trial with no information whatever respecting the \$64,000 demand save the general statement contained in the creditor's claim that it was for services rendered in (1) housekeeping; (2) nursing care and attention; (3) assistance in the management and operation of a bakery, and (4) keeping books and accounts of decedent's business interests.

In their opening statement plaintiff's counsel told the court and jury in plain language that his client's services to decedent included "living with him, for a

period of about five years, occupying the same apartment." Later it was stipulated that they lived together from November, 1941, until decedent's death on April 27, 1947. They were never married.

There was no attempt to prove the allegations of the first cause of action, namely, the making of an oral contract (in consideration of marriage or otherwise) to compensate for plaintiff's services. Plaintiff herself was not permitted to testify. § 1880, subd. 3, Code Civ.Proc.

With respect to "housekeeping" services, there was testimony given by two managers of the apartment house in San Francisco in which plaintiff and decedent lived as husband and wife, that plaintiff did the housekeeping in the apartment.

There was no evidence with respect to any "nursing care and attention."

With respect to "assistance in the management and operation of a bakery", one of plaintiff's witnesses, a woman who had worked with her, testified that at times plaintiff had worked overtime when the witness had not; that on many occasions at quitting time plaintiff had stayed on, and had worked, also, on Sundays and holidays. She was not asked respecting the extent of such overtime and presumably she had no idea whatever as to what it amounted to in hours or days. On occasions she, too, had worked overtime *but had never been paid for it*. On her cross-examination 86 cancelled payroll checks were introduced, payable to, and endorsed by, plaintiff, showing that from October, 1942, to the sale of the bakery in June, 1944, she was paid weekly the same as the other employees.

With respect to the claim for "keeping books and accounts for decedent's business interests" it appears that after the sale of the bakery decedent bought a tavern in San Francisco. There was testimony that plaintiff attended to the depositing of money and to some bookkeeping in connection with it, but there was no evidence as to the character of her work, the volume or extent of it, the period over which it spread, or its value. Decedent's nephew (a witness for plaintiff), who on January 1, 1946 bought a half interest in the tavern

from his uncle, testified that thereafter either he or the decedent, and not the plaintiff, made the deposits, and that for six months before he became a partner he had worked there, during which time he attended to the deposits and cashed checks "although she did do some of that also." This witness had never seen plaintiff in the tavern with decedent.

The wife of the former owner of the tavern testified that on mornings about 6:30, while on her way to work, she would see plaintiff going into the tavern with the books, and on other occasions about closing time she would see her outside the tavern in her car apparently awaiting for it to close. She testified, further, that decedent had told her that plaintiff did a lot of bookkeeping work for him in the tavern, but she did not know this of her own knowledge. This witness' husband when he owned the place had had a bookkeeper but she could not say whether he had been kept on by decedent.

In the absence of a witness it was stipulated that one Sunday this absent witness, an auditor, had called at the apartment occupied by decedent and plaintiff and found them doing some work on books, also that plaintiff on some occasions would work on the books over at the place. The stipulation recites that "the exact nature of the work is unknown, length of time spent on the books unknown, and value unknown."

The appellant contends that the denial of his motion to exclude evidence was an abuse of discretion.

Section 454, Code Civ.Proc., provides that "It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within ten days after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof. The court or judge thereof may order a further account when the one delivered is too general, or is defective in any particular. If the pleading is verified the account must be verified * * *."

Defendant demanded a bill of particulars of "specific items, dates and amounts upon which the complaint * * * and the claims mentioned therein are predicat-

ed." The demand was ignored and appellant at once served a notice of motion to exclude evidence under § 454. About a month later plaintiff delivered a paper entitled "Bill of Particulars". This paper did not pretend to supply any kind of itemization or description of plaintiff's \$64,000 claim, or of any of its four component parts. The second count, based on the quantum meruit, alleged that decedent became indebted to plaintiff "for services rendered", the reasonable value of which was \$64,000, but the paper was no amplification, or explanation of that broad allegation. It was, instead, a *listing of supposed assets of decedent's estate, totalling \$64,000*, with the explanation appended that "The above comprises the property of decedent, which he promised to leave to the plaintiff as compensation for the performance of services rendered by her to him." It amounted to a mere re-assertion by plaintiff of her claim to the whole estate, the assets of which the administrator presumably already knew.

When this "bill of particulars" came in appellant served a second notice of motion to exclude evidence, which motion the court denied.

[3] The situation thus presented was not the every-day case where the bill "delivered is too general, or is defective in any particular" and where it is common practice for the judge to order a further account. The paper delivered was no bill of particulars at all, and did not pretend to be. It amounted to a total and unqualified noncompliance with the demand. In such case the extreme penalty provided by the section, of precluding the giving of evidence to prove the claim, is applicable. *Graham v. Harmon*, 84 Cal. 181, 185, 23 P. 1097; *McCarthy v. Mt. Tecarte Land & Water Co.*, 110 Cal. 687, 43 P. 391; *Fisher v. Brotherton*, 82 Cal.App. 532, 540, 255 P. 854, and *McManus v. Larson*, 122 Cal.App. 716, 10 P.2d 523.

There are several cases in which bills of particulars have been supplied after the expiration of the statutory time where the demandant instead of acting promptly delayed until the time of trial and then moved to exclude evidence, e. g. *McCarthy case*, supra; *Ames v. Bell*, 5 Cal.App. 1, 4, 89 P.

619. The courts in the exercise of their discretion have uniformly denied such eleventh-hour motions and have been upheld in so doing. This, however, is not such a case since defendant's motion was made some six months before the trial, pursuant to the procedure approved in the McCarthy case, *supra*. The court's reason for denying the motion does not appear, but it certainly could not have been lack of diligence.

In the McCarthy case, *supra*, the court suggests "the reason which called the section [454] into existence" [110 Cal. 687, 43 P. 392] as follows: "In the simplification of pleadings it is designed to protect the adverse party from embarrassment upon the trial, by enabling him to demand and obtain in advance a detailed statement of the items charged against him."

[4-6] The close relation, if not the *identity*, of a bill of particulars to the pleadings in an action is shown in several cases. In *Long Beach City School Dist. v. Dodge*, 135 Cal. 401, 407, 67 P. 499, 502, the court said: "* * * while permitting pleadings to be condensed and simplified in respect to such matters, the Code has provided against surprise by requiring the plaintiff to furnish, when demanded in writing, a copy of the account, under the penalty of being precluded from giving evidence thereof * * *." In the same case it is said in effect that to require a full and detailed statement in the pleading itself "would lead to an unnecessary prolixity in pleading, which it was intended to avoid by giving a remedy under section 454 * * *." In *Ames v. Bell*, *supra*, 5 Cal. App. 1, 4, 89 P. 619, 620, the court says: "The purpose of the above section [454] is to give the adverse party reasonable notice of the items constituting the claim which he is required to meet, so that he may prepare for trial. It is in the nature of an amplification of the pleading to which it relates and is to be construed as a part of it for certain purposes. It has the effect of restricting the evidence and limiting the recovery to the matters and things set forth therein, provided proper objections are made, and the court's attention called to any material departure from it. When the

court or judge orders a further account or bill of particulars, as the section provides may be done, the further or amended account is to be construed as an *amended pleading for certain purposes*." (Emphasis added.)

The error in denying defendant's motion is accentuated by the character of the evidence admitted in this case. In the first place, the demand was not only large in amount, but avowedly designed to take the whole estate. The defense was accorded no showing of the basis of the \$64,000 demand *either* by the pleadings *or* by a bill of particulars. If, as said in *Ames v. Bell*, *supra*, one of the functions of such bill is to restrict the evidence and limit "the recovery to the matters and things set forth therein", it is obvious that this case went to the jury with no such restriction or limitation. A proper bill would have at least shown how much was claimed for each one of the four services alleged. No such amount was shown for the bakery services, and, as this court said in *Fisher v. Brotherton*, *supra*, 82 Cal.App. 540, 255 P. 858, "As the record stands * * * all evidence touching the subject-matter included in that demand was improperly admitted." The same may be said respecting the claim for bookkeeping services. In the last-cited case this court had before it a situation where the plaintiff at first ignored a demand and later attempted to comply with it. In enforcing the section by disallowing a substantial part of plaintiff's claim we said: "There is, however, no uncertainty in the meaning of section 454 of the Code that, when the demand is not complied with within the prescribed time, the party is thereby precluded from giving evidence on the subject-matter of the account."

McManus v. Larson, *supra*, 122 Cal.App. 716, 10 P.2d 523, is another case where the extreme penalty was imposed. Plaintiff there ignored the demand, and when, after a warning by defense counsel, he persisted in ignoring it, the defense moved to exclude evidence and the court granted the motion. Plaintiff then, on the day when the motion was granted, belatedly served a purported bill of particulars and later

moved under § 473 for relief from his default. The latter motion was denied. At the trial the court excluded plaintiff's evidence and entered judgment for defendant. The judgment was affirmed and both the order excluding evidence and the order denying relief were upheld.

[7] There is no reason why the plain language of § 454 should not be enforced here, as it was in those cases, and every reason why it should.

We have confined the discussion largely to the claims for bakery and bookkeeping services for the reason that it is fairly clear that plaintiff could not have furnished a bill of particulars for "housekeeping" or for "nursing care and attention" without stating herself out of court. *Ballerino v. Ballerino*, 147 Cal. 544, 82 P. 199; *Gjurich v. Fieg*, 164 Cal. 429, 129 P. 464, Ann.Cas. 1916B, 1f1; *Hill v. Westbrook's Estate*, 95 Cal.App.2d 599, 213 P.2d 727. On that subject (meretricious relations) it should be remarked, incidentally, that the court properly instructed the jury.

The jury's award of \$7500, then, must have been addressed to bakery and bookkeeping services alone, respecting both of which the defense had no pre-trial information as the law requires it should have. The evidence on those two parts of the claim went in without any restriction or limitation whatever on the recovery and under the plain terms of § 454 and the cases cited it should have been excluded.

There is a further consideration of some importance in view of the opening statement and the stipulation respecting the meretricious relations. If there had been a specification by way of bill of particulars respecting the bakery and the bookkeeping services, showing just what was plaintiff's position with respect to their rendition,—the times, conditions and circumstances thereof—the defense would have had an opportunity before trial of preparing to meet whatever claims the plaintiff made, dependent on the way she made them, by a showing that whatever services were so rendered were, *by reason of the admitted meretricious relationship*, intended to be gratuitous. See *Gjurich v. Fieg*, supra, 164 Cal. 429, 129 P. 464, Ann.Cas.1916B,

111. In the recent case of *Hill v. Westbrook's Estate*, 95 Cal.App.2d 599, 213 P.2d 727, the difficulty was in determining what part, if any, of plaintiff's services might have been compensable. The judgment was reversed because the findings were too general and indefinite.

Without an exposition of plaintiff's position by a bill of particulars the estate in the case at bar could not adequately prepare its defense on this important phase of the case. Hence, in short, it was denied a fair trial.

[8] Had the court granted defendant's motion to exclude evidence, a judgment for defendant would have inevitably followed (as it did in *McManus v. Larson*, supra). Accordingly, and to save circuitry of action we are now directing the entry of such judgment. This result was to be foreseen by plaintiff at the time when she deliberately refused to comply with defendant's demand.

It is not necessary to discuss any of the other points raised by the appellant.

The judgment is reversed with the direction to the trial court to enter judgment in favor of the defendant for his costs. The appeal from the order denying defendant's motion for judgment notwithstanding the verdict is dismissed.

NOURSE, P. J., and DOOLING, J.,
concur.



96 Cal.App.2d 725

**SHENSON et al. v. FRESNO MEAT PACK-
ING CO. et al.**
Civ. 4002.

District Court of Appeal, Fourth District,
California.

March 29, 1950.

Suit by Louis Shenson and others against Fresno Meat Packing Company, an association doing business under a fictitious name, Marcus Newman, and Mike Pestorich, for an accounting. The Superior Court of Fresno County, Ernest Klette, J., granted a nonsuit,

and plaintiffs appealed. The District Court of appeal, Griffin, J., held that where plaintiffs would not have been entitled to government subsidies directly, they would not be permitted to collect subsidies in an indirect manner.

Judgment affirmed.

1. Sales ⇨215

Where a bill of sale for cattle was furnished when sellers delivered cattle to buyer, buyer became owner of cattle at time of delivery.

2. Equity ⇨54

A party is forbidden to do indirectly that which he is forbidden to do directly.

3. Equity ⇨65(2)

Where two or more enter into a fraudulent scheme for purpose of obtaining property in which all are to share, and scheme has been carried out and results of fraud are in hands of parties, equity will not interfere to aid any of parties in obtaining their shares, but will leave parties in position in which they placed themselves.

4. Principal and agent ⇨69(2)

An agent who has received proceeds of profits of an act committed by him on behalf of and at direction of principal, and for which principal is criminally responsible, is under no duty to deliver them to principal if crime is more than a minor offense.

5. War and national defense ⇨129

Where owners of cattle and slaughterer allegedly entered into custom slaughtering agreement, whereby slaughterer agreed to slaughter all cattle delivered to it by owner and to sell all dressed carcasses at best available prices, and slaughterer collected government subsidies paid to licensed slaughterers who obtained a quota, and owners were not qualified in their own names to receive subsidies, owners were not entitled to an accounting of subsidies received by slaughterer. 18 U.S.C.A. §§ 287, 1001.

6. War and national defense ⇨129

The prime purpose of the regulations providing for subsidies to licensed slaughterers of cattle who obtained a quota was to prevent unlicensed, ineligible,

and unqualified persons from engaging in slaughter of livestock during war, and to keep slaughter under close governmental supervision and control.

Denver C. Peckinpah, L. N. Barber, Fresno, for appellants.

Matt Goldstein, Fresno, for respondents.

GRIFFIN, Justice.

Nine plaintiffs brought this action under nine separate counts. Each count alleged generally that the particular plaintiff involved was a dealer in buying and selling livestock and that defendant Fresno Meat Packing Company was and had been from 1941 to 1943, engaged in custom slaughtering for the plaintiff pursuant to an oral agreement whereby defendant agreed to slaughter all cattle delivered to it by plaintiff and to sell all the dressed carcasses at the best available prices; that the expenses were to be borne by defendant company; that defendant guaranteed the collection of the selling price and to account to the plaintiff; that the plaintiff agreed to compensate defendant for its services in the slaughtering and sale of the cattle; that in June, 1943, plaintiff and defendant reduced the oral agreement to writing and thereafter, until 1946, the plaintiff continued to deliver cattle to defendant for custom slaughtering; and that defendant slaughtered and sold the same for the account of plaintiff. This written agreement provides in part as follows:

The defendant is denominated the Slaughterer and the plaintiff is called the Buyer. (1) "The parties * * * confirm and ratify the arrangement and agreement heretofore existing between them, which arrangement and agreement is hereinafter set forth." (2) "The Buyer * * * agrees to *sell* and deliver to the Slaughterer cattle * * * which the Slaughterer is to process and sell upon the terms hereinafter set forth." (*Italics ours*). (3) "The Slaughterer agrees to slaughter all beef * * * delivered to it by the Buyer and out of the selling price thereof the Slaughterer shall have the right to deduct and retain for itself the following:" On beef

\$3.50 per head, etc., and in addition the Slaughterer may retain all offal, consisting of heart, liver, etc. (4) "The Slaughterer agrees to sell all animals slaughtered by it for the best and highest available prices at the sole cost and expense of the Slaughterer, and also agrees to guarantee the collection of the selling price thereof." (5) "* * * to remit to the Buyer the selling price of all animals slaughtered by it, less its charges as herein provided * * *." (6) "In the event that any beef" so delivered "shall be condemned * * * the Buyer shall receive no reimbursement * * * for such condemned animal". (7) All hides * * * remain the property of the Buyer" and the "Slaughterer agrees to keep regular books of account which shall be subject to the inspection of the Buyer * * *."

Three of the plaintiffs failed to sign the agreement but continued to deliver cattle to the defendant under the same arrangement. The amended complaint then alleges that from June, 1943, until October, 1946, the Reconstruction Finance Corporation made payments of subsidy for the slaughter of the cattle pursuant to claims filed by the defendant with the Defense Supplies Corporation; that defendant falsely and fraudulently represented in said claims that all the cattle delivered by plaintiff to defendant were *owned* by defendant at the time of slaughter and that defendant did not kill any cattle belonging to another; that without a showing of ownership defendant was not eligible to claim slaughter payments for the cattle. In this respect it is alleged as a part of the fraud that defendant neglected to inform plaintiff of such ineligibility but did apply, in its own name, for such payments, as *owner*; that as a result, defendant was paid a subsidy by the United States Government in excess of two cents per pound; that defendant failed and refused to pay over to plaintiff any amount in excess of two cents per pound, and for this claimed excess plaintiff seeks an accounting.

Defendant denied generally the allegations of the complaint but admitted that each plaintiff *sold* and delivered to defendant the cattle claimed, under and pursuant to the written agreement, which provided

that payment therefor should be based on a *dressed weight yield basis*, and that under the written agreement, made a part of the answer, defendant was the lawful owner of the cattle and was entitled to all subsidies paid; that all sums due under the agreement have been paid.

As a separate defense it is alleged that separate monthly statements were rendered to plaintiffs showing all moneys due and that defendant paid said sums in full discharge of any claims made. In another defense defendant claims that in the cause of action attempted to be alleged by each plaintiff, it is shown by his own pleadings that the recovery he seeks to obtain from defendant is for a part of the money received by defendant as a result of a false and fraudulent claim presented by defendant to an agency of the United States Government, and that therefore no right of action against defendant accrued to plaintiff because each plaintiff participated therein; that due to the fact that the plaintiffs were *pari criminis* to render them judgment under these circumstances would be against public policy and in contravention of the statutes therein made and provided.

At the outset it was agreed that the court should first determine if plaintiffs were entitled to an accounting. After hearing their evidence the court granted a nonsuit. From the judgment of dismissal based thereon plaintiffs appeal.

It is conceded that if the relationship between the plaintiffs and defendants was that of seller and buyer, and defendants were the lawful owners of the cattle at the time the application was made, plaintiffs cannot recover. Plaintiffs, in their brief, state that although the evidence is sufficient to show that the written contracts defining the relationship between the parties were obtained by the fraud of the defendants, plaintiffs have chosen not to attack these written agreements upon that ground, but rely upon the testimony surrounding the execution of those agreements as evidence supporting their interpretation of the contracts and establishing therefrom that the relationship of principal and agent only existed.

[1] It should be here noted that the contract provides definitely that "The Buyer agrees to sell and deliver to the Slaughterer cattle" etc. The sales slips filled out by defendant, and delivered to the several plaintiffs at the time they delivered the meat showed "bought of" the particular plaintiff named, and "sold to Fresno Meat Packing Company", giving the date. Opposite the description of the meat and its weight, is the notation "Dressed weight yield basis". When plaintiffs delivered the cattle to defendant a bill of sale for said cattle was also furnished. This evidence rather conclusively shows that the defendant became the owner of the cattle at that time. It is plaintiffs' contention that the remaining portion of the written agreement, as well as the oral testimony of the several plaintiffs, indicate that it was not the intention of the plaintiffs to part with ownership of the cattle at that time but it was clearly intended that defendant was only acting as agent for them, as owners, in butchering and selling the beef. In connection with this construction testimony was taken of the several plaintiffs. The general purport of their testimony is in accordance with the testimony of plaintiff Shenson, which is as follows:

He stated that he was a livestock dealer and would go out in the country and buy cows and bring them to defendant's plant, furnish a bill of sale showing that the cattle belonged to him and that they were then slaughtered and sold by defendant and that he was then paid the sale price less a killing charge which was deducted therefrom; that in case a cow was condemned as unfit for consumption he was paid nothing and he was charged for its killing; that in some years he sold cattle to defendant outright; that in 1943 he was restricted as to the amount of cattle that he could bring in; that in June, 1943, he signed a paper at the request of the manager of defendant company, who told him that in order for the company to kill, the O.P.A. required that it have plaintiff's quota; that he did not read the agreement but asked if the other buyers had signed it; that when he was informed that the others had signed it he signed the agreement and that there was no change in the way he continued to do business with

the defendant except that about 60 days after he started under the written agreement he received a subsidy of two cents a pound, dressed weight, retroactive to June 1, 1943; that he had a conversation with the manager at defendant's plant and he was told that the plaintiffs would obtain the subsidy; that he only received two cents per pound subsidy and he asked the defendant's manager if he could not take his cattle to another slaughter house because he believed he could obtain a greater amount; that the manager told him he was welcome to go but that his quota stayed there; that he showed him where defendant company was receiving \$16.50 subsidy from the government based on live weight, whereas, he was only receiving \$9 on the same animal in dressed weight. The witness testified that he knew that in order for him to kill cattle or have the cattle killed and to sell the meat he had to have a quota; that he did not know that he had to have a license from the Office of Food Administration for this purpose. Another plaintiff testified that defendant told him that it was not necessary for him to have a killing license because they could kill his cattle on their license, and therefore he did not take out any license.

Under the evidence it is shown that the Reconstruction Finance Corporation would not have made any payment upon a claim for subsidy unless there was proper certification that the slaughterer, at the time, had ownership of the cattle.

Under plaintiffs' pleadings and the evidence offered by them, if true, no other conclusion could be reached except the one that defendant was guilty of fraud in presenting a false and fraudulent claim to the government by fraudulently claiming that the defendant was the *owner* of the cattle slaughtered. The presentation of such a fraudulent claim is a felony under the Federal Criminal Code, Sec. 35, as amended. U. S. Code Annotated, Title 18, sec. 80 [now §§ 287, 1001]. It is fundamental that money stolen from the government through fraud might be recovered by the government when such money is in the hands of the thief, but the trial court in this action would have no authority to award it to a

third party not connected with the transaction or to order it distributed in an accounting proceeding between the wrongdoers. In *Butler v. Agnew*, 9 Cal.App. 327, at page 332, 99 P. 395, 398, it is said: "The test whether a demand which is connected with an illegal transaction may be enforced at law is: Does the plaintiff require the aid of the illegal transaction to establish his case? If the plaintiff cannot prove his case without showing that he has broken the law, the court will not assist him, whatever the justice of his claim against the defendant." See, also, 3 C.J.S. Agency, p. 79, § 183.

[2] It is apparent that plaintiffs required the aid of the illegal transaction here involved to establish their case. They could not recover in their own names against the government if the government failed or refused to pay the subsidy for several reasons. First, they, in their own names, were not qualified to receive this subsidy; and secondly, in order for anyone to have qualified to receive a subsidy payment legally, he had to comply with certain requirements. Under Restriction Order 1, and Food Distribution Order 27, 8 Federal Register 2785, March 6, 1943, one had to first obtain a quota and secure a license before he could slaughter cattle during the war period because the government was interested in limiting the amount of cattle that could be slaughtered, and the persons eligible for payment were those who secured a quota and license thereunder and who slaughtered 4,000 pounds or more of livestock in one established calendar month after May, 1943. It must be shown that such applicants kept records thereof for two years. The order then provides: "No person who kills livestock for the account of others is eligible to file application for payment on account of such livestock." Plaintiffs were not slaughterers. Before they could slaughter for themselves they had to have a valid and effective permit at the time of such slaughter. 8 Federal Register Mar. 6, 1943, pp. 2785, et seq. Under subdivision 2 thereof no such permits would be issued until the applicant had filed an application on the form approved by the director containing the information required. None of the

plaintiffs had obtained such a permit. Two or three of them endeavored to obtain one and the permits obtained were defective for failure of the applicant to comply with the requirements and they were warned that the permits had been canceled and were not to be used. Plaintiffs had no sufficient quotas required of slaughterers, a prerequisite to the obtaining of any subsidy, and it would have been a violation of law on their part to slaughter cattle without a permit. Assignment of a right to a subsidy was prohibited. The evidence clearly shows that plaintiffs, by reason of these facts, joined with defendant, a duly licensed slaughterer, who qualified for a permit under the combined quotas of all of the plaintiffs, representing that defendant was the owner of the cattle and the quotas, apparently for the purpose of qualifying and jointly obtaining the subsidy. If true, this was an illegal transaction and one upon which plaintiffs must rely for a recovery. It was conceded at the trial that plaintiffs were ineligible to collect subsidies in their own names, and under the regulations the government was precluded from making any payments of subsidies to the plaintiffs herein. To now grant these plaintiffs the relief that they seek would be to enable them to do indirectly that which they could not do directly. It is the rule that a party is forbidden to do indirectly that which he is forbidden to do directly. *Hunter v. Superior Court*, 36 Cal.App.2d 100, 109, 97 P.2d 492.

[3] With certain exceptions, the general rule is stated to be that where two or more have entered into a fraudulent scheme for the purpose of obtaining property in which all are to share, and the scheme has been carried out so that all of the results of the fraud are in the hands of the parties, a court of equity will not interfere on behalf of the others to aid them in obtaining their shares but will leave the parties in the position in which they have placed themselves. In *Wise v. Radis*, 74 Cal.App. 765, 242 P. 90, two real estate brokers, one licensed and the other unlicensed, brought an action in accounting to divide commissions paid to the one broker who was licensed. The court denied the unlicensed broker a recovery, and said, 74 Cal.App. at page 775 et seq., 242 P.

at page 94: "No principle of law is better settled than that a party to an illegal contract or an illegal transaction cannot come into a court of law and ask it to carry out the illegal contract or to enforce rights arising out of the illegal transaction. He cannot set up a case in which he necessarily must disclose the illegal contract or the illegal transaction as the basis of his claim. * * * Respondent's cause of action grows directly out of this illegal contract between himself and appellant. Only through it and by proving it can he get at his share of the commission." To the same effect are *Firpo v. Murphy*, 72 Cal.App. 249, 236 P. 968; *Sheble v. Turner*, 46 Cal.App.2d 762, 117 P.2d 23; *Lucientes v. Vartholomae Oil Corp.*, 64 Cal.App.2d 443, 149 P.2d 28.

Plaintiffs seek to avoid this general rule and its effect upon this transaction by claiming that the accounting here sought is predicated upon the theory of principal and agent. They claim that in collecting the subsidy from the government, the defendants were acting as their agents and that it follows that the defendants were under the obligation of serving the interests of the plaintiffs with undivided loyalty and the highest good faith; that a fiduciary relationship existed between them and that if the agent received a benefit as a result of violating his duty of loyalty, the principal is entitled to recover from him what he has received, citing *Restatement of the Law of Agency*, sec. 407; and that profits made and advantages gained by an agent in the execution of his agency belong to the principal, citing 2 *Am.Jur.* p. 215, sec. 268. They further claim that when money or property has been actually paid or delivered to an agent for his principal, it is usually held that the latter may recover such money or property from the agent, although it was received by the agent as the fruits of an illegal contract or transaction, citing 2 *C.J.* 746, 3 *C.J.S.*, *Agency*, § 167.

[4] In *Restatement of the Law of Agency*, sec. 412, this general rule is stated, together with the exceptions there noted. One of the exceptions is that "An agent who has received the proceeds or profits of an act committed by him on behalf of and at the direction of the principal and for

which the principal is criminally responsible is under no duty to deliver them to the principal if the crime is more than a minor offense." If the defendant was acting as agent for the plaintiffs, as established, plaintiffs were presenting false claims to the government because, they, as plaintiffs, were not entitled to the subsidy. It cannot be said that the punishment for the filing of such a claim was for a minor offense. The penalty provided is for a fine of not more than \$10,000, or imprisonment for not more than ten years, or both. U.S. C.A. Title 18, sec. 80. It is highly improbable to believe that if the United States Government brought an action against the defendant for a violation of this section, or to seek a return of the subsidies paid, plaintiffs would therein contend, as they do now, that the defendant was acting as their agent in making such false claim.

We are foreclosed, by the order granting a nonsuit, of the benefit of a finding on the question of knowledge of plaintiffs of the illegality of the contract and whether they acted in *pari delicto* with the defendants in securing the subsidy in which they shared with the defendants for a period exceeding 40 months.

In *Firpo v. Murphy*, 72 Cal.App. 249, at page 253, 236 P. 968, 969, it was said: "that whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case."

[5, 6] Reduced to a simple statement, plaintiffs' evidence in this case shows that the principals, the plaintiffs, who were themselves ineligible to collect a subsidy payment, sought to profit by the alleged fraudulent act of their agent, if such, and to obtain an accounting of moneys which the agent collected for the ineligible principal by fraudulent and illegal means. The mere statement of the position in which plaintiffs find themselves furnishes a complete answer to their claim for an accounting, under this theory. The prime purpose of the regulations was to prevent unlicensed, ineligible and unqualified persons from engaging in the slaughter of livestock during the war. Its further purpose was to keep slaughter under close governmental supervision and control. The subsidy was paid to those

only who were legitimately engaged in the slaughtering business and who placed themselves under the supervision and control of the governmental agencies. No other persons were permitted to obtain payment of such subsidies. An interpretation which would make law-breakers of the parties to the transaction should be rejected if there is another possible and reasonable interpretation, as there unquestionably is in this case. *Shelley v. Byers*, 73 Cal.App. 44, 57, 238 P. 177. Plaintiffs should not now prevail in obtaining benefits from their own wrong and their own noncompliance with the regulations in an action for accounting.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.



96 Cal.App.2d 709

DANZ v. DANZ.

Civ. 14079.

District Court of Appeal, First District,

Division 2, California.

March 29, 1950.

Hearing Denied May 25, 1950.

Proceeding by Marjorie E. Danz against Ralph Danz to enforce a divorce judgment dated November 2, 1923, which awarded custody of parties' minor daughter to plaintiff and ordered defendant to pay \$30 a month as alimony and for maintenance of said minor child. The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., ordered execution for \$810 and interest covering arrearages which had accrued prior to July 11, 1924, date of plaintiff's remarriage, and the parties cross-appealed. The District Court of Appeal, Goodell, J., held that there was no abuse of discretion in trial court's refusal to enforce judgment beyond time of plaintiff's remarriage, particularly in view of fact that court could not, at time it acted, modify blanket order, or enforce payment of alimony 24 years after remarriage, and that affidavits filed on behalf of plaintiff contained sufficient proper allegations to justify consideration of their merits.

Orders affirmed.

1. Divorce $\S$ 247, 310

Statute providing that on remarriage of wife husband shall no longer be obligated to provide for her support, but such remarriage shall not affect his duty to provide for maintenance of children of marriage, merely enacted into statutory form a rule of public policy recognized prior to date of its enactment. Civ.Code, § 139.

2. Divorce $\S$ 247, 310

Where final judgment of divorce dated November 2, 1923, awarded custody of parties' minor daughter to mother and ordered father to pay a certain sum monthly as alimony and for maintenance of minor child, and on July 11, 1924, mother remarried, remarriage terminated father's alimony obligation, but he remained obligated to support his minor daughter. Civ.Code, §§ 138, 139.

3. Divorce $\S$ 263, 311

Where parties were divorced in November, 1923, and in July, 1924, wife remarried, and in 1947 sought execution on divorce judgment providing one sum for alimony and maintenance of parties' minor child, but no attempt was made after wife's remarriage to have judgment modified so as to fix amount payable solely for child's maintenance, and child attained her majority in 1939, limiting execution to amount due on date of former wife's remarriage was not an abuse of discretion. Civ.Code, §§ 138, 139; Code Civ.Proc. §§ 681, 685.

4. Execution $\S$ 73

Under statute providing for levy of execution after expiration of the five-year period after entry of judgment, court may still deny judgment creditor its process if debtor shows circumstances occurring subsequent to that period on which, in exercise of its sound discretion, it should conclude that creditor is not then entitled to collect his judgment. Code Civ.Proc. § 685.

5. Divorce $\S$ 263, 311

In proceeding by former wife to secure execution on divorce judgment entered in 1923 awarding a certain sum for maintenance of wife and parties' minor child, where affidavits filed on behalf of plaintiff contained some hearsay, opinions,

conclusions, and irrelevant and immaterial averments, but there were sufficient proper allegations remaining to justify consideration of their merits, denial of defendant's motion to strike out a series of averments was not error.

6. Appeal and error ⇨949

In proceeding to enforce a judgment after lapse of five years from its entry, whether creditor has exercised due diligence is for trial court to determine in its discretion, and its determination will not be disturbed, in absence of a clear abuse of discretion. Code Civ.Proc. § 685.

7. Divorce ⇨267, 311

In proceeding by former wife to secure execution on divorce judgment entered in 1923 awarding a certain sum monthly for maintenance of wife and parties' minor child, where affidavits and those of her former counsel stated that wife was unable to secure enforcement of judgment due to defendant's illness and unemployment, and affidavit filed by defendant's father stated that defendant's economic and physical condition was very poor and defendant was unable to be gainfully employed until July, 1940, ordering execution on judgment up to time of plaintiff's remarriage in 1924 was not an abuse of discretion. Code Civ.Proc. §§ 681, 685; Civ. Code, §§ 138, 139, 209.

8. Statutes ⇨147

Where statute relative to enforcement of judgment by leave of court after expiration of five years from entry of judgment contained clause enacted in 1895 that statute would not revive a judgment barred by limitations "at the time of the passage of this act", and same clause appeared in 1933 amendment, time referred to in clause related to 1895, and court in 1947 had power to order issuance of an execution on a judgment obtained in 1923. Code Civ. Proc. § 685.

Wm. E. Barden, San Francisco, Hugh F. Mullin, Jr., San Mateo, for appellant.

Newell J. Hooley, San Francisco, Abraham Setzer, San Francisco, for respondent.

GOODELL, Justice.

In proceedings instituted in 1947 under § 685 of the Code of Civil Procedure to enforce a judgment after the lapse of five years from its entry, an execution was ordered for \$810 (and interest) covering arrearages which accrued prior to July 11, 1924. Cross appeals were taken.

The marriage of Ralph and Marjorie E. Danz was dissolved by a final judgment of divorce dated November 2, 1923, which awarded the custody of Barbara, their minor daughter, to the mother and ordered the father to pay \$30 a month "as alimony and for the maintenance of said minor child." The interlocutory judgment failed, as did the final, to apportion alimony and child support.

On July 11, 1924 Mrs. Danz married Edward Arata, and Barbara lived with them (see § 209, Civ.Code) until she attained her majority in 1939.

From the entry of the interlocutory judgment until Barbara's majority defendant paid nothing at all under the \$30 order.

No attempt was made after Mrs. Danz remarried to have the judgment modified so as to fix an amount payable thenceforth solely for the maintenance of Barbara, and it remained throughout her minority just as originally written.

The Appeal of Marjorie E. Arata.

The order under review directed execution to issue for the 27 months elapsing between the interlocutory judgment and plaintiff's remarriage, at the rate of \$30 a month. Plaintiff does not, of course, complain of this. She appeals from the order in so far as it refuses an execution for the monthly arrearages accruing from her remarriage to the time when the daughter reached majority.

Section 139, Civ.Code provides " * * * Upon the remarriage of the wife, the husband shall no longer be obligated to provide for her support but such remarriage shall not affect his duty to provide for the maintenance of the children of his marriage."

[1] That part of the section was added in 1933, some ten years after the Danz

divorce, but as said in *Hansen v. Hansen*, 93 Cal.App.2d 568, 571, 209 P.2d 626, 628, it "merely enacted into statutory form a rule of public policy recognized long prior to 1933 by judicial decisions." Such decisions are *Cohen v. Cohen*, 150 Cal. 99, 88 P. 267, 11 Ann.Cas. 520, *Parker v. Parker*, 203 Cal. 787, 794, 266 P. 283 and *Atlass v. Atlass*, 112 Cal.App. 514, 297 P. 53. Such extraordinary circumstances as are suggested in the decisions, which might create rare exceptions to that rule, are not present here since the record affirmatively shows that plaintiff has been supported by her present husband. The record shows, also, that Barbara has been supported by him, although at "great self-sacrifice and deprivation." The remarriage, then, terminated defendant's alimony obligation as of July 11, 1924.

[2] There can be no question that defendant remained obligated to support his daughter, but nobody obtained a modification of the judgment (§ 138, Civ.Code) to make it speak anew respecting the changed situation. Thus the case in all essential respects is similar to *Hale v. Hale*, 6 Cal. App.2d 661, 45 P.2d 246, 248, where there was the same kind of blanket order, and where, similarly, the wife had remarried and the children had attained majority. The lower court there, acting under § 685, ordered an execution for \$5735 and on appeal the court said "It appears * * * that at the date of the remarriage of plaintiff, there was then due upon the judgment the sum of \$2,530. No good reason appears why defendant should not be compelled to pay this amount." The lower court was directed to amend its order downward to \$2530. What was thus ordered on that appeal is precisely what the trial court ordered here. The following language in the *Hale* opinion, 6 Cal.App.2d at page 664, 45 P.2d at page 247, exactly fits this case: "There is no doubt that during the minority of his children and while the plaintiff was unmarried, he should have complied with the judgment of the court. The aid of this court should not now be extended to him so that he may avoid this just obligation. To determine what portions of the entire amount during the later

years after the remarriage of plaintiff should be allowed for the support of Earl who attained his majority in August, 1932, would be to indulge in speculation and guess and such determination is clearly not the province either of this court or of the trial court. *Parker v. Parker*, supra."

In the *Parker* case the divorce judgment, entered in 1912, contained a blanket order for \$40 a month for the support of the wife and minor daughter. The wife remarried, *the daughter became a member of the new family* (see § 209, Civ.Code), and in 1922 attained her majority. Three years later, in 1925, plaintiff moved under § 685 for an execution for arrearages. In that proceeding the court ordered an execution to issue for \$1200, which was \$20 a month for the five years next preceding the daughter's majority. The basis for this reduction from \$40 to \$20 a month does not appear. Such order was reversed because it was in effect a retroactive modification of the judgment. With no power to modify the judgment retroactively, as there held, the only alternative remaining in the instant case was that of enforcing in toto the \$30 order, an *indeterminable part of which was avowedly for alimony*, for a period of approximately 15 years, during all of which time the judgment creditor was married to, and supported by, her second husband. This presented to the court somewhat of a dilemma in a case addressed wholly to its discretion. The enforcement of the judgment had ceased to be a matter of right about 1928 when the five-year period expired; when the motion was heard in 1948 the plaintiff's right to alimony had been gone for about 24 years, and her right to receive maintenance money for the child had been gone for almost 9 years.

We might add that in the *Parker* case, as in this, the daughter had lived as one of the family of her mother and stepfather for most of the time during her minority, and the court (203 Cal. 793-794, 266 P. 286) deemed that to be one of the factors "pertinent in the consideration by the trial court of the application and in the determination as to what extent, if at all, the relief should have been granted

in the exercise of a wise discretion." Presumably the court did likewise in deciding this motion.

The case of *Saunders v. Simms*, 183 Cal. 167, 190 P. 806, relied on by plaintiff, is not in point since the order there was not a blanket one for alimony and child support, but one merely for the payment to the mother of \$15 a month for the child's support. The fact that the mother had remarried was entirely immaterial.

[3] As appears earlier, the court in the present case enforced the judgment up to the time of plaintiff's remarriage. It cannot be said on this record that there was any abuse of discretion in its refusal to enforce it beyond that time, particularly in view of the fact that the court could not, at the time it acted, (a) modify the blanket order, or (b) enforce the payment of alimony 24 years after the remarriage.

The Appeal of Ralph Danz.

The appellant Danz contends that the court abused its discretion in ordering execution in that the affidavits in support of plaintiff's motion failed to set forth sufficient reasons for her failure to proceed under § 681 within the five years therein limited. *Butcher v. Brouwer*, 21 Cal.2d 354, 358, 132 P.2d 205, holds that the 1933 amendment of § 685 places the burden of showing such reasons on the judgment creditor.

Plaintiff's affidavit showed that her attorney had unsuccessfully sought temporary support and maintenance for her and her daughter and had informed her "and she verily believed that the defendant had no money or property with which to comply with any order * * * and that said attorney was unable to enforce the payment thereof."

In his affidavit the attorney deposed: "That prior to the trial * * * affiant caused said defendant * * * to be served with an order to show cause why he should not * * * pay the plaintiff alimony, child support, counsel fees and court costs, pendente lite, all to no avail, the defendant having claimed that he was disabled, unemployed and without means or

the ability to meet any order" and that "subsequent to the entry of each of said decrees, by diligent search and inquiry which included negotiation with the * * * attorney for said defendant [he] endeavored to enforce said decrees but without success." Further, that at no time subsequent to the decrees could he "learn of any property owned by said defendant not exempt from execution which could be levied upon under such process, and based thereon avers that the issuance of execution during the time limited by section 681 * * * would have been futile."

These averments in the affidavits of plaintiff and her former attorney do not show, as counsel claim they do, mere "gossip among mutual friends and business and social acquaintances." They relate to investigations made by plaintiff's then counsel, in court and out of court, respecting defendant's ability to pay, or to respond to an execution if issued. They relate, moreover, to *advice of counsel* upon which plaintiff acted, which can hardly be called mere gossip among business acquaintances. The situation was not at all comparable with that in *Hatch v. Calkins*, 21 Cal.2d 364, 132 P. 2d 210, relied on by plaintiff.

In her affidavit plaintiff further deposed: "That the defendant contended that he was ill and disabled by arthritis and unable to work and was dependent upon the largess of his father Henry Danz, for his support and maintenance."

In an affidavit filed by defendant's father he deposed: "That some time in 1924 or thereabouts, defendant came to live with affiant at the home of affiant at Portola * * * that at said time, defendant was totally crippled and unable to do any kind of work, and was suffering from arthritis; that plaintiff knew of defendant's physical condition; that Ralph and affiant lived together until early in 1932, to wit: the month of April, at which time affiant moved his home to Lily Avenue * * * San Mateo * * * and that Ralph accompanied affiant to said Lily Avenue place; that at all time and continuously until July, 1940, Ralph lived with affiant at affiant's home on said Lily Street; that Ralph's economic and physical condition were very

poor, and until July, 1940, Ralph was unable to be gainfully employed, knowledge of which crippled condition was had by plaintiff."

The father's purpose in making this affidavit was of course to aid his son, but although so designed his affidavit not only corroborated the briefer statements contained in plaintiff's affidavit and in that of her former attorney, but decidedly amplified and augmented the showing before the court and cured any deficiencies in plaintiff's affidavits. From the father's affidavit alone the court could have concluded that defendant's disability and inability to pay not only continued throughout the five year period but thereafter until 1932, and even beyond that, since he says "until July, 1940, Ralph was unable to be gainfully employed, knowledge of which crippled condition was had by plaintiff."

From reading these three affidavits (all uncontradicted) the court could have concluded that plaintiff (to quote from *Butcher v. Brouwer*, supra, 21 Cal.2d at page 358, 132 P.2d at page 207) had followed "available information to the point where a reasonable person would conclude that there was no property subject to levy" within the five-year period.

[4] The authorities hold that even after the five-year period the court may still deny the judgment creditor its process if the debtor shows circumstances occurring subsequent to that period upon which, in the exercise of a sound discretion, it should conclude that he is not then entitled to collect his judgment. *Di Corpo v. Di Corpo*, 33 Cal.2d 195, 200, 200 P.2d 529.

The record shows that in 1930 plaintiff instituted proceedings on the criminal side to have defendant punished for the non-support of the minor child, and that 14 hearings were held without success but at which defendant's father testified that he was then supporting defendant and his second wife. In such hearings, the resources of defendant, if any, would have been uncovered. Moreover in the affidavit of defendant's father defendant's inability to work up to 1940 is shown, from which it could be inferred that he had no resources.

In the briefs of defendant there is a statement that in 1940 he owned an improved piece of real estate, but such statement is not borne out by the record itself. In the briefs there are statements, also, that defendant had an automobile, but the record itself makes no showing of the person in whose name it was registered, or of any other tangible fact indicating that it was discoverable or would have been available to a levy of execution. In short, there is nothing in the record to indicate that at any time prior to shortly before the proceedings instituted in 1947 defendant had any assets whatever.

No time need be consumed in discussing the question whether the existence of the uncollected judgment (of 1927) for \$119.25 held by another creditor did, or did not, furnish plaintiff a sufficient reason, or an added one, for not pressing earlier for an execution. Further it may be conceded that the affidavit of plaintiff's present counsel, employed as late as 1947, sheds little or no light on defendant's ability to respond to the order from 1922 to 1927 or 8.

[5] It may be conceded, also, that the affidavits filed on behalf of plaintiff contain some hearsay, opinions, conclusions, and irrelevant and immaterial averments (as do those of defendant). Defendant's motion to strike out a series of averments was denied, and an appeal was taken from that order. There was no error therein, since, as was said in *Pemberton v. Pemberton*, 95 Cal.App.2d 472, 213 P.2d 118, 123 (a case under § 685): "While there were certain portions of the statements in the affidavits which might well have been stricken on the theory that they were conclusions, there were sufficient proper allegations remaining to justify the consideration of their merits." Such proper allegations are found in the affidavits filed by both sides as already appears, and it is to be presumed that the court based its action on those allegations, not on the improper ones.

[6, 7] "Whether or not a creditor has exercised due diligence is for the trial court to determine in its discretion, and its determination will not be disturbed in the absence of a clear abuse of discretion." *Di*

Corpo v. Di Corpo, supra, 33 Cal.2d 195, 200, 200 P.2d 529, 531. We find no such abuse in this case.

[8] Finally, defendant contends that the concluding clause of § 685 bars, in any event, any action on the judgment. That clause reads: “* * * nothing in this section shall be construed to revive a judgment for the recovery of money which shall have been barred by limitation at the time of the passage of this act.” That question is settled contrary to defendant’s contention by the case of Greeley v. Suey Sing Benevolent Ass’n, 28 Cal.App.2d 536, 538, 83 P.2d 54.

The orders appealed from are affirmed.

NOURSE, P. J., and DOOLING, J., concur.



RABER v. TUMIN et al.
Civ. 17301.

District Court of Appeal, Second District,
Division 1, California.
March 30, 1950.

Hearing Granted May 25, 1950.*

Action by Bertrand Raber against Saul Tumin and another for injuries sustained while on business premises of named defendant at his invitation. The Superior Court of Los Angeles County, Joseph M. Maltby, J., entered an order granting a nonsuit, and plaintiff appealed. The District Court of Appeal, White, P. J., held that the evidence was sufficient to take case to jury under res ipsa loquitur doctrine as against named defendant, but not as against codefendant, who was not an occupant of premises, but merely engaged in carpenter work therein.

Order reversed as to named defendant and cause remanded, and order affirmed as to codefendant.

1. Trial ⇨165

On motion for nonsuit, the evidence must be viewed most favorably to the plaintiff, with every legitimate inference drawn in his favor and conflicts disregarded.

* Subsequent opinion 226 P.2d 574.

2. Trial ⇨139(1)

Nonsuit may be granted only when, disregarding conflicting evidence and giving plaintiff’s evidence proper value and indulging in every legitimate inference deducible therefrom, evidence is insufficient to support verdict for plaintiff.

3. Negligence ⇨136(14)

Evidence that ladder which had been leaning against wall near front door of store was found lying across prostrate body of invitee warranted inference that ladder fell upon and injured invitee, and was sufficient to take action against proprietor of store for such injuries to jury under “res ipsa loquitur” doctrine.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of “Res Ipsa Loquitur”.

4. Appeal and error ⇨994(2)

The credibility of plaintiff’s testimony, accuracy of his recollection, or possibility that retrograde amnesia resulting from injury might have caused him to forget that he himself set in motion the ladder which caused injury was not for appellate court to determine on appeal from judgment of nonsuit.

5. Negligence ⇨121(2)

Res ipsa loquitur is a doctrine of necessity to be invoked only when necessary evidence is not readily available.

6. Negligence ⇨121(2)

If the circumstances surrounding accident are such that when taken by ordinary experience and observation it may reasonably be inferred that defendant failed to fulfill a duty he owed to injured party, “res ipsa loquitur” doctrine should be invoked.

7. Negligence ⇨121(2)

Res ipsa loquitur doctrine is founded on theory that plaintiff does not know what caused accident.

8. Negligence ⇨121(2)

Where accident was such as does not occur without the negligence of someone and injury could have been caused only by instrumentality within exclusive control of defendant and was not due to any contributing act of plaintiff, “res ipsa loquitur” doctrine is applicable.

9. Negligence ⚖️50

Occupant of premises owed invitee affirmative duty to keep premises in a reasonably safe condition, being bound to inspect them with such care and as often as necessary to ascertain whether they were safe, and to exercise reasonable care to protect invitees from injury through negligence.

10. Negligence ⚖️121(2)

Under *res ipsa loquitur* doctrine, the inference of negligence arises from mere occurrence of accident.

11. Negligence ⚖️121(2)

If court can say, in the light of common experience, that accident was more likely than not to have been the result of defendant's negligence, "*res ipsa loquitur*" doctrine is applicable.

12. Negligence ⚖️136(14)

Inference that ladder leaning against front wall of store fell upon and injured invitee was insufficient to take action for such injuries to jury under "*res ipsa loquitur*" doctrine as against one other than occupant of premises who was engaged in carpenter work on partition wall at time of accident, in absence of evidence that any vibrations caused by his activities or any other act of his caused ladder to fall.

Linnell & Smith, Charles T. Smith, Long Beach, for appellant.

Spray, Gould, Duckett & Bowers, Malcolm Archbald, Los Angeles, and Max Z. Wisot, Long Beach, for respondents.

WHITE, Presiding Justice.

This appeal concerns the propriety of the granting of a nonsuit in an action arising out of personal injuries sustained by plaintiff and appellant while on the business premises of defendant and respondent Saul Tumin.

It was charged that while plaintiff was lawfully on the premises he was struck on the head by a ladder, timber or other object which defendant Tumin negligently maintained on the premises. Recovery was also sought against one Endriss, who

was engaged in carpenter work on the premises at the time of the accident.

The scene of the accident was a store space 16 or 17 feet wide, facing north, with the front door very nearly in the center of the north wall. On either side of the front entrance were display windows. The area occupied by the display windows was separated from the rest of the store by a wall hereinafter referred to as the "north" wall. Approximately 16 feet south of the north wall, there stood a partition extending from the east wall to the west wall, dividing the store space into two approximately equal areas. The accident occurred in the space created by the north wall, the partition, and the east and west brick walls of the building, an area 16½ feet from north to south and 16 or 17 feet from east to west. These dimensions, while apparently accepted by all parties, are only approximations, no evidence as to exact measurements having been introduced.

Plaintiff, who was an electrical contractor, came to the store premises at the request of defendant Tumin to determine what electrical work might be needed. Defendant Tumin had just taken possession of the store as lessee. Plaintiff examined the electrical fixtures in the presence of defendant Tumin. Tumin then left the store. Defendant Endriss was working at the partition. After Tumin had left, plaintiff started toward the front door. The last thing he remembered before losing consciousness was that he was close to the front door. Upon hearing a crash, defendant Endriss came to the front of the store and found plaintiff lying face upward with the ladder across his body. The ladder was described as being constructed of one-by-six lumber that is, the sides of the ladder were one-by-sixes, approximately eight feet long. The treads were one-by-eights.

Plaintiff testified that prior to the accident the ladder was leaning against the north wall and near the east wall of the building.

In support of the order of nonsuit, respondent argues that the mere fact that the ladder was lying across plaintiff's body does not warrant an inference that it was

the cause of his injury; that it was impossible for the ladder to have fallen sideways without the application of considerable force, and that under the evidence there was no way in which such a force could have been applied. It is argued that it is as reasonable to infer that plaintiff himself set the ladder in motion; and further, that since the accident is entirely unexplained, the doctrine of *res ipsa loquitur* is not applicable.

[1,2] It is well established that on a motion for nonsuit the evidence must be viewed most favorably to the plaintiff, with every legitimate inference drawn in his favor, and conflicts disregarded. *Barnett v. La Mesa Post No. 282*, 15 Cal.2d 191, 99 P.2d 650; *McClelland v. Acme Brewing Company*, 92 Cal.App.2d 698, 207 P.2d 591. "A nonsuit or a directed verdict may be granted 'only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given.' * * * Unless it can be said as a matter of law that, when so considered, no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury." *In re Estate of Lances*', 216 Cal. 397, 400, 14 P.2d 768.

[3,4] The basic fact upon which plaintiff's case depends is that the ladder fell. If this can be considered, for the purposes of a nonsuit, as legally proved, then the inference that the ladder was negligently left in an unstable position becomes permissible. Viewing the evidence in the light most favorable to plaintiff, we must assume that he did not himself disturb the ladder; that the ladder was leaning against

the north wall a little distance out from the east wall; that plaintiff was nearing the east side of the front door and was perhaps from four to six feet or more from the ladder, when he was rendered unconscious. He was found with the ladder lying across his body. This evidence is, we think, sufficient to warrant an inference that the ladder fell upon him. Again, remembering that we are dealing with a motion for a nonsuit, the credibility of plaintiff's testimony, the accuracy of his recollection, or the possibility that "retrograde amnesia" resulting from his injury might have caused him to forget that he himself set the ladder in motion, are not for this court to determine. The argument that it was a physical impossibility for the accident to have happened in the manner supposed under plaintiff's theory of the case is answered by the statement that, accepting plaintiff's testimony as true, as we must, the accident could have happened in no other way.

[5-8] If an inference that the ladder fell upon plaintiff is justifiable, and we think it is, then the doctrine of *res ipsa loquitur* must be applied. This doctrine is one of necessity, to be invoked only when necessary evidence is not readily available. If the circumstances surrounding the accident are such that when tested by ordinary experience and observation it may reasonably be inferred that the defendant has failed to fulfill a duty he owed to the injured party, the rule should be invoked. *Williamson v. Pacific Greyhound Lines*, 78 Cal.App.2d 482, 486, 177 P.2d 977. The very theory upon which the doctrine is founded is that the plaintiff does not know what caused the accident. *Metz v. Southern Pacific Co.*, 51 Cal.App.2d 260, 267, 124 P.2d 670. The three conditions prescribed as the bases of the doctrine of *res ipsa loquitur* (*Ybarra v. Spangard*, 25 Cal.2d 486, 489, 154 P.2d 687, 162 A.L.R. 1258), are present in the instant case. (1) Such accident does not occur without the negligence of someone. There is no proof that appellant felled himself. (2) It could have been caused only

by the fall of the ladder, which was within the exclusive control of defendant Tumin. (3) The ladder's fall was not due to any contributing act of appellant.

[9] Defendant Tumin, as invitor, owed plaintiff an affirmative duty to keep the premises in a reasonably safe condition. He was bound to inspect them with such care and as often as was necessary to ascertain whether they were safe. *Moran v. Zenith Oil Co.*, 92 Cal.App.2d 236, 206 P.2d 679; *Blumberg v. M. T. Inc.*, 34 Cal. 2d 226, 209 P.2d 1. Not only must the occupant of premises abstain from wilfully injuring his invitee, "but he owes such person the duty of maintaining his property in a safe condition, and of exercising reasonable care in protecting the invitee from injury through his negligence." *Stockwell v. Board of Trustees*, 64 Cal. App.2d 197, 200, 148 P.2d 405, 406.

[10, 11] In the doctrine of *res ipsa loquitur*, the inference of negligence arises from the mere occurrence of the accident. *Griffen v. Manice*, 166 N.Y. 188, 196, 59 N.E. 925, 52 L.R.A. 922, 82 Am.St.Rep. 630. The adoption of such an inference from the mere occurrence of the accident is based upon human experience from which it is known that the events under immediate investigation do not ordinarily happen unless someone has been negligent. Although the falling of the ladder in the instant case, like the falling of an elevator (*O'Connor v. Mennie*, 169 Cal. 217, 146 P. 674, or the start downhill of a parked car (*Price v. McDonald*, 7 Cal.App.2d 77, 45 P.2d 425), might be explained by proof that they were not caused by the negligence of the person in control of them, nevertheless the plaintiff in each of them is entitled to have his case submitted to the jury under the doctrine of *res ipsa loquitur*. Under the authority of *La Porte v. Houston*, 33 Cal.2d 167, 169, 199 P.2d 665, and *Escola v. Coca-Cola Bottling Company*, 24 Cal.2d 453, 457, 150 P.2d 436, it may be announced as a rule that if the court can say, in the light of common experience, the accident was more likely than not to have been the result of the defend-

ant's negligence, the doctrine of *res ipsa loquitur* is applicable.

To infer that the fall of the ladder leaning against the wall of respondent Tumin's store room was occasioned by reason of the latter's negligence in not removing it or laying it lengthwise on one side of the room, cannot be held not to be in harmony with universal experience and common sense. If respondent Tumin has an explanation of its presence, such explanation can be presented to the jury, to be by them weighed against the view that its position against the wall of the room where appellant as invitee entered in the prosecution of his duties was due to respondent Tumin's negligence.

Without impinging on the right of the jury to determine the ultimate fact as to the cause of the accident, it must be held that appellant was entitled to have the rule of *res ipsa loquitur* applied under the circumstances here present, where he entered a store at the request of the proprietor and while there was struck down. To so hold is no more unreasonable than to hold that one is possessed of such right who while walking along the street is struck down by an object falling from a building.

[12] While the doctrine of *res ipsa loquitur* is applicable to respondent Tumin, the same cannot be said of respondent Endriss. The floor of the store was composed of asphalt tile; the side walls were of brick. There is no evidence on which to base an inference that any vibrations caused by Endriss' activities or that any other act of his caused the ladder to fall. Inasmuch as he was under no obligation to remove any dangerous instrument from the store, his sole responsibility being to perform his own work in a careful manner, the order of nonsuit as to him was correct. But in view of the foregoing conclusions that the doctrine of *res ipsa loquitur* is applicable to respondent Tumin, the order of nonsuit as to him was error.

The order granting the nonsuit as to respondent Endriss is affirmed. As to respondent Tumin the order is reversed and

the cause remanded. Appellant to recover costs against respondent Tumin; respondent Endriss to recover his costs, if any, against appellant.

DORAN and DRAPEAU, JJ., concur.



96 Cal.App.2d 786

PEOPLE v. HOUSER.

Cr. 4446.

District Court of Appeal, Second District,
Division 2, California.

April 3, 1950.

Frederick S. Houser was convicted on two counts of robbery in the first degree, and after judgment and sentence, defendant filed a petition for a writ of error *coram nobis*. The Superior Court for Los Angeles County, Walter S. Gates, J., made an order denying the petition, and defendant appealed. The District Court of Appeal, McComb, J., held that defendant's contentions were not reviewable in a *coram nobis* proceeding in absence of a motion for new trial or appeal from the judgment.

Affirmed.

Criminal law §997

Where defendant claimed that he was deprived of substantial rights because of error in giving of an instruction and in admission and exclusion of evidence, that conviction was against weight of evidence, that judge and prosecutor were guilty of misconduct, that false evidence was used and that defendant was improperly represented by counsel, but no motion for new trial was made and no appeal was taken from the judgment, defendant could not have his contentions reviewed thereafter on a petition for writ of error *coram nobis*.

McCOMB, Justice.

On November 18, 1948, after trial before a jury, defendant was found guilty on two counts of robbery in the first degree. On November 23, 1948, the court pronounced judgment and sentenced defendant to be confined in the state prison for the term prescribed by law, the sentences to run consecutively. Defendant did not make a motion for a new trial nor did he appeal from the judgment which became final.

On July 5, 1949, defendant filed in the superior court a petition for a writ of error *coram nobis*. On July 8, 1949, the trial court denied this petition and from this order defendant appeals.

Defendant alleged in substance that he had been deprived of substantial rights because: (a) the trial court erred in giving an instruction on intoxication; (b) the trial court erred in admission and exclusion of evidence; (c) his conviction was against the weight of the evidence; (d) both the judge and the district attorney were guilty of misconduct; (e) false evidence was used; and (f) he was improperly represented by his counsel.

Question: May the superior court entertain an application for a writ of error coram nobis where alleged errors could have been cured on (1) a motion for a new trial, or (2) appeal from the judgment, when defendant has failed to avail himself of either remedy?

This question must be answered in the negative. Where defendant's contentions could have been presented on (1) a motion for a new trial or (2) appeal from the judgment and he has failed to avail himself of either remedy, a writ of error *coram nobis* will not be entertained to review the alleged errors. (People v. Young, 88 Cal.App.2d 601, 602, 199 P.2d 21, and cases therein cited.)

The foregoing rule is applicable to the present case. Defendant did not take advantage of either of the remedies available to him, to wit: a motion for a new trial, or an appeal from the judgment. The questions he now attempts to raise could have been raised in either proceed-

Frederick S. Houser, in pro. per.

Fred N. Howser, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

ing. Having failed to do so the trial court properly denied his application for a writ of error *coram nobis*.

Affirmed.

MOORE, P. J., and WILSON, J., concur.



96 Cal.App.2d 797

TRANCOSO et al. v. TRANCOSO et al.
Civ. 17137.

District Court of Appeal, Second District,
Division 3, California.

April 4, 1950.

Maria Rodrigues Trancoso, Maria Trancoso, and others sued Ysidro Trancoso and others to establish a trust in realty conveyed by plaintiff Maria Trancoso and another to such plaintiff and named defendant as joint tenants. From a judgment of the Superior Court of Los Angeles County, J. F. Moroney, J., determining that grantees held title to the realty in trust for all the parties, named defendant appealed. The District Court of Appeal, Vallée, J., held that plaintiff Maria Trancoso's testimony as to conveyance of the realty in trust for all the parties was not inherently improbable, but substantial evidence supporting trial court's determination, in absence of showing that anything testified to by her could not have occurred.

Judgment affirmed.

1. Trial ☞91

Denial of motion to strike from evidence an exhibit which trial judge believed had been properly admitted was not error as based on judge's mistaken belief that he could not grant motion because exhibit was received in evidence without objection.

2. Trial ☞91

A trial judge, in his discretion, may entertain and grant motion to strike evidence which should not have been received, though no objection was made to its reception.

3. Appeal and error ☞901

A reviewing court need not make critical or any other search of record to determine whether evidence supports trial judge's findings, but appellant's duty is to show in his brief wherein evidence does not support such findings.

4. Appeal and error ☞995

Testimony is not inherently improbable, so as to warrant its rejection by reviewing court, unless things related or described by witness could not have occurred.

5. Appeal and error ☞995

To warrant appellate court's rejection of witness' statements, believed by trial court, as inherently improbable, their truth must be physically impossible or their falsity must be apparent without resorting to inferences or deductions.

6. Appeal and error ☞994(3)

Conflicts in witness' testimony and even testimony subject to justifiable suspicion do not justify reversal of judgment, as determination of witness' credibility and truth or falsity of facts on which determination depends is exclusive province of trial judge or jury.

7. Appeal and error ☞1010(1)

Whether evidence of particular fact is clear and convincing must be determined by trial court, whose determination must be accepted by reviewing court as conclusive, if supported by substantial evidence.

8. Appeal and error ☞1010(1)

A grantor's testimony that conveyance of realty by her and another to herself and one of her sons was in trust for benefit of herself and all her children or survivors thereof constituted substantial evidence sufficient to support trial court's determination that realty was held by grantees in trust as against contention that such testimony was inherently improbable, in absence of record showing that witness testified to anything that could not have occurred.

A. James Ayers, Los Angeles, for appellant.

Ernest Best, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by defendant Ysidro Trancoso from a judgment decreeing that title to certain real property is held by Maria and Ysidro Trancoso in trust and that Ysidro has a lien thereon for \$1,500.

Maria Trancoso is the mother of all the other parties plaintiffs and defendants. October 24, 1924, Geronimo Trancoso and Maria Trancoso conveyed the property to Maria Trancoso and Ysidro Trancoso as joint tenants. The complaint alleged, and the court found and decreed, that the conveyance was in fact in trust and that Maria and Ysidro Trancoso held title for the use and benefit of all the plaintiffs and defendants or the survivor or survivors of them. Ysidro Trancoso alone appeals from the judgment.

[1, 2] Appellant's assignments of error are: 1. The court operated under a mistake of law in its belief that it could not strike an exhibit offered by plaintiffs, which exhibit went in evidence without objection. 2. The evidence is insufficient to support the findings.

At the trial plaintiffs offered a document in evidence. It was received without objection. Later appellant moved to strike it. The motion was denied. As we read the record, the learned trial judge did not deny the motion because he was laboring under the mistaken view that he could not grant it for the reason the document had been received in evidence without objection. A trial judge, of course, in his discretion may entertain and grant a motion to strike evidence which should not have been received, even though no objection was made to its reception. It appears that the motion was denied because the judge believed the document had been properly admitted in the first instance.

[3] The contention that the evidence is insufficient to support the findings is based on the assertions that "the testimony of Maria Trancoso is inherently improbable", the evidence is not clear and convincing,

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and the quantum of proof should "be carefully scrutinized." Without a review of the evidence or reference to the transcript appellant asks us to make a "critical examination of the record." It is not incumbent on a reviewing court to make a "critical" or any other search of the record to determine whether the evidence supports the findings. It is the duty of appellant to show in his brief wherein the evidence does not support the findings. *Wieczorek v. Texas Co.*, 45 Cal.App.2d 450, 457, 114 P.2d 377.

[4, 6] Testimony is not inherently improbable unless it appears that what has been related or described could not have occurred. *People v. Klinkenberg*, 90 Cal. App.2d 608, 627, 204 P.2d 47. "To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." *People v. Huston*, 21 Cal.2d 690, 693, 134 P.2d 758, 759.

[7] The rule that to establish a particular fact the evidence must be clear and convincing is directed to the trial courts. Whether the evidence is clear and convincing must be determined by the trial court and a reviewing court must accept that determination as conclusive if there is substantial evidence to support it. *Baines v. Zuieback*, 84 Cal.App.2d 483, 488, 191 P.2d 67.

[8] We have examined the record and find nothing in the testimony of Maria Trancoso that could not have occurred. There is substantial evidence to support the determination of the trial court.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

96 Cal.App.2d 872

SHERIDAN v. STEPHENSON et al.

Civ. 4017.

District Court of Appeal, Fourth District,
California.

April 7, 1950.

Red Sheridan sued W. A. Stephenson, doing business as Merit Oil Company, and others, for breach of an oral contract whereunder plaintiff allegedly was granted an exclusive distributorship of defendant's oils and greases in a specified territory for so long as plaintiff sold a specified amount of defendant's products monthly. The Superior Court of Kings County, Clark Clement, J., rendered a judgment adverse to plaintiff, and plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that a complained of instruction relative to measure of damages was not sufficiently prejudicial to plaintiff to justify reversal under the evidence.

Judgment affirmed.

Appeal and error — 1064(1)

In action for breach of oral contract whereunder plaintiff allegedly was granted an exclusive distributorship of defendant's oils and greases in a specified territory for so long as plaintiff sold a specified amount of defendant's products monthly, instruction that plaintiff's damages would be difference in cost between defendant's oils and greases delivered to plaintiff for cash, and the greater cost to plaintiff, if any, of oils and greases of similar grade and quality which plaintiff could buy elsewhere, and that damages could not exceed what plaintiff would have gained had contract been performed, was not sufficiently prejudicial to plaintiff to justify reversal of judgment for defendant.

David S. Folsom, Corcoran, for appellant.

Rue C. Gibson, Fresno, for respondents.

BARNARD, Presiding Justice.

This is an action for damages for breach of an oral contract.

W. A. Stephenson operated the Merit Oil Company, a small concern engaged in selling greases mostly for use on tractors and other farm machinery. He did not manufacture oils or greases, but at times "compounded" or mixed them as specially ordered, or to adapt them for summer or winter use. For some years the plaintiff, who lived at Corcoran, acted as defendant's distributor and sold about 95% of its output, paying cash for the goods and reselling to his customers.

After a dispute between them in October, 1946, the plaintiff ceased buying greases from the defendant and began buying them direct from a grease manufacturing company in Los Angeles, the same company from which the defendant had been buying the greases with which he had supplied the plaintiff.

The complaint in this action alleged that the parties entered into an oral agreement in 1939, whereby the plaintiff agreed to distribute and sell the defendant's products under a certain trade name, and the defendant agreed to give him an exclusive distributorship in a certain territory for as long as he "sold at least \$250 worth of Merit oil and greases each month"; that pursuant to this agreement he expended \$10,000 in purchasing from the defendant "large quantities of such oils and greases" and purchased more than \$250 worth each month; that on October 17, 1946, the defendant without cause terminated the agreement and refused to sell him any more such products; that he then had on hand \$3000 worth of defendant's oils and greases, and that he had thus been damaged in the sum of \$13,000. As a second cause of action, it was alleged that pursuant to this contract the plaintiff had expended for the benefit of the defendant the sum of \$13,000 "for advertising, equipment, oils and greases and other expenses"; and that payment had been demanded and refused. Judgment was prayed for in the sum of \$13,000. The answer admitted that an oral distributorship contract had existed but denied the allegations as to its exclusive nature and as to its continuance. It further denied that the defendant had

breached this contract, and alleged that the plaintiff had quit handling the defendant's products on October 17, 1946. A jury returned a verdict in favor of the defendant, and the plaintiff has appealed from the judgment which followed.

The appellant admits that the evidence is amply sufficient to support the verdict, but contends that two errors committed by the court require a reversal. It is first argued that the court erred in refusing "to admit evidence of appellant's costs of advertising respondent's products." So far as the record shows, the appellant was shown "a number of sheets of paper" by his counsel and asked what it was. He replied that it was "an inventory of business from 1937 up to and including ten months of 1946"; that it was business done year by year, including purchases and advertising; that it was prepared by his bookkeeper, and that it represented a summary of his business for that period. It was then offered in evidence and an objection was sustained. The matter was then dropped, it was not marked for identification, and no offer of proof was made. It has not been brought before us in any manner and there is nothing to indicate whether or not any part of it was material, or whether or not its rejection could have prejudiced the appellant.

A part of one instruction given is also assigned as error. This instruction told the jury that if it found the defendant had breached this agreement without cause, it would then be its duty "to compensate plaintiff for the actual loss sustained" as a result of this breach. It then stated, in the portion complained of, that plaintiff's damages would be the difference in cost between Merit oils and greases delivered to him and the greater cost to him, if any, of other oils and greases of similar grade and quality, and that in no event could such damage exceed what he would have gained had the contract been fully performed. It is argued that this is not the correct measure of damages in such a case as this; that the proper elements of damages here were the amounts expended by the appellant in contemplation of the performance of the contract, and the amount of prospective profits which could reasonably have been

anticipated had the contract remained in force; and that the appellant had built up a substantial business "by virtue of an exclusive territory and extensive advertising of respondent's trade name with the result that the trade name was of greater value than the product itself."

Under appellant's theory it was incumbent upon the appellant to prove the facts upon which the claimed elements of damage must be based. The appellant points to no evidence in the record, and we can find none, which would establish these essential facts or which would have supported a judgment in any amount in his favor on that theory.

While slightly conflicting, the evidence strongly indicates that the appellant himself ended their relationship because of his dissatisfaction with the respondent and its products, and that the respondent did not terminate the agreement. It appears, without conflict, that the appellant had long been dissatisfied with the respondent's products, that he had been looking for another place to buy supplies, and that he considered at the time of the trial that he had bettered himself by making a new connection with the same concern from which the respondent was getting its supplies. On October 17, 1946, he wrote to the Los Angeles concern asking if it would supply him with such products and stating "I have become very dissatisfied with the line I am handling, and since the product seems to become more unstable, I am ready for a complete change over." In a letter to the respondent dated October 28, 1946, he referred to lost customers and stated that he had been compelled to take back a large quantity of respondent's main product, that this product had long been a source of dissatisfaction and was "even worse now", and that, due to respondent's refusal to take back broken containers of grease, his business had become unsalable. He testified at great length as to his long continued dissatisfaction with the respondent's products; that they were bad to begin with, had grow worse, and were causing him to lose his customers; that they were decidedly inferior to those he later got direct from the Los Angeles concern; that

he was getting all he wanted of such supplies which were far superior to, and cost him less, than the respondent's product; and that "there was something wrong with Merit's, that is the reason we separated." While he stated that his present operating costs were higher, he attributed this to his own ill health. Appellant admits in his brief that it was established at the trial that he could purchase "equal or superior products in the open market at a lower cost than Merit products." Such evidence as there is in the record covering respondent's "trade name" strongly indicates that the appellant considered it a handicap rather than a benefit to him.

If it be assumed that the instruction in question is erroneous it cannot be held to be sufficiently prejudicial to justify a reversal, in view of the evidence which was produced. The court also instructed the jury that the general rule is that the measure of damages, for the breach of an obligation arising from such a contract as

this, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby or which, in the ordinary course of events, would be likely to result therefrom. Also, that it was incumbent upon the party thus injured to use all ordinary care to keep the injury as slight as possible. The apparent conflict between these instructions and the one complained of loses its importance in view of the evidence received, and the absence of any evidence to establish the elements of damage relied on by the appellant. There was a complete failure of proof in that respect, and the instructions given covered the issues so far as presented by the evidence. The general rule was, in effect, modified or limited by the instruction complained of in accordance with the evidence before the jury.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

35 Cal.2d 80

PEOPLE v. WEST PUB. CO.
S. F. 17970.

Supreme Court of California.
April 4, 1950.

Action by the People of the State of California against the West Publishing Company, a corporation, to enforce an alleged statutory liability for use taxes based on sales from July 1, 1935, to December 31, 1939.

The Superior Court of San Francisco County, James G. Conlan, J., rendered a judgment in favor of the plaintiff. The defendant appealed.

The Supreme Court, Spence, J., affirmed the judgment, holding that recovery of the use taxes in question was not barred by the statute of limitations, that failure of defendant to exhaust administrative remedies precluded it from raising certain questions, and that imposition of use taxes on certain sales was not a violation of the commerce and due process clauses of the Federal Constitution.

1. Licenses ⇨32(2)

State's claim for use taxes not collected by seller on sales from July 1, 1935, to December 31, 1939, based on determination by state board of equalization of amount due upon seller's failure to make returns, was not barred by three-year statute of limitation, where assessment became final 30 days after February 28, 1940, on which date board made determination of delinquency and notified seller, and action to enforce payment was commenced October 15, 1940, as against seller's contention that time for bringing suit commenced to run on 16th day following close of each quarterly period for which liability was asserted. Gen.Laws, Act 8495a, §§ 7, 10, 12, 24.

2. Limitation of actions ⇨34(7)

General statute prescribing three-year limitation for commencement of action on statutory liability was not applicable to state's claim against seller for use taxes, in view of specific limitation provisions in Use Tax Act which were controlling. Gen. Laws, Act 8495a, § 24; Code Civ.Proc. § 338, subd. 1.

3. Administrative law and procedure ⇨796
Licenses ⇨30

In effective performance of designated functions under Use Tax Act, state board of equalization may pass on questions of law and fact, but administrative determination of questions of law is subject to judicial review. Gen.Laws, Act 8495a, §§ 10, 12.

4. Licenses ⇨32(2)

Seller, having failed to exhaust administrative remedies before state board of equalization for alleged erroneous inclusion of certain sales and alleged non-allowance of certain counterclaims in estimating seller's liability under Use Tax Act, could not complain of alleged errors in state's action to enforce payment of tax. Gen. Laws, Act 8495a, §§ 10, 12.

5. Commerce ⇨63

Imposition of use tax on certain sales within state by foreign corporation not qualified to do intrastate business and requiring such seller to collect tax, did not impose undue burden on interstate commerce in violation of Federal Constitution. Gen.Laws, Act 8495a; U.S.C.A.Const. art. 1, § 8, cl. 3.

6. Constitutional law ⇨287

Imposition of use tax on certain sales within state by foreign corporation not qualified to do intra-state business and requiring such seller to collect tax, did not constitute a denial of property without due process of law in violation of Fourteenth Amendment. Gen.Laws, Act 8495a; U.S.C.A.Const. Amend. 14.

John W. Preston, Los Angeles, for appellant.

Fred N. Howser, Attorney General, and James E. Sabine, Deputy Attorney General, for respondent.

SPENCE, Justice.

This action was commenced by the state to enforce statutory liability of the West Publishing Company, a Minnesota corporation, for use taxes levied as the result of

its sale of law books and legal periodicals to California customers during the period of July 1, 1935, to December 31, 1939, inclusive, pursuant to the California Use Tax Act of 1935, as amended. (Stats.1935, ch. 361, p. 1297, as amended by Stats.1937, chs. 401, 671, 683, pp. 1327, 1874, 1935, Stats.1939, ch. 677, p. 2154; Deering's Gen. Laws, Act 8495a; now Revenue and Taxation Code, Div. 2, pt. 1.) After personal service of process had been made upon three of defendant's salesmen operating in this state, defendant appeared specially in this action and moved to quash the service of summons on the ground that it was a foreign corporation engaged exclusively in interstate commerce and was not doing business in this state so as to be amenable to its process. Defendant also contested the constitutionality of the Use Tax Act as applied to its local activities, claiming that its subjection to the requirements of the tax would constitute a regulation of and a direct burden upon interstate commerce and would deprive it of its property without due process of law. The motion to quash service of summons was denied, and this court thereafter denied defendant's application for a writ of prohibition to restrain the trial court from proceeding further in the action. *West Publishing Co. v. Superior Court*, 20 Cal.2d 720, 128 P.2d 777; certiorari denied 317 U.S. 700, 63 S.Ct. 524, 87 L.Ed. 559. The trial of this action then followed and judgment was entered in favor of the state in the sum of \$36,668.39, with interest and costs. From such judgment defendant has appealed.

Appellant apparently concedes that in view of the recent decision of the Supreme Court of the United States in *General Trading Co. v. State Tax Comm.*, 1944, 322 U.S. 335, 64 S.Ct. 1028, 88 L.Ed. 1309, it may constitutionally be required to collect the use tax on sales in this state attributable to the solicitation of its local salesmen. But in challenge of the amount of its use tax liability as here adjudicated, appellant urges these points: (1) the bar of the statute of limitations on a portion of the tax claim; (2) the unconstitutionality of the tax levy in relation to its mail

order sales as a burden on interstate commerce and in violation of the due process clause of the Fourteenth Amendment of the federal Constitution; and (3) the non-allowance of certain counterclaims in diminution of the state's tax recovery.

In response to these contentions, respondent asserts: (1) the timeliness of the action as brought on the entire tax claim pursuant to the terms of the Use Tax Act; (2) the failure of appellant to avail itself of its administrative remedies as precluding its complaint here of alleged errors in the tax agency's computation of the tax assessment; but in any event (3) the integrated local activity of appellant negatives its constitutional objections to its tax liability on mail order business with California customers; and (4) counterclaims have no place in an action to enforce the payment of taxes, unless expressly so authorized by statute. Consideration of the legal principles applicable to the disposition of the matters in controversy leads to the conclusion that the judgment should be affirmed.

This appeal is presented upon an agreed statement. The nature of appellant's activities in this state has been discussed at some length in prior opinions of this court—*West Publishing Co. v. Superior Court*, supra, 20 Cal.2d 720, 128 P.2d 777, certiorari denied 317 U.S. 700, 63 S.Ct. 524, holding appellant "present in this state" for the purpose of the service of process, and *West Publishing Co. v. McColgan*, 27 Cal.2d 705, 166 P.2d 861, affirmed 328 U.S. 823, 66 S.Ct. 1378, 90 L.Ed. 1603, holding appellant subject to the state Corporation Income Tax Act (Stats.1937, ch. 765, p. 2184, as am. Stats.1939, ch. 1049, p. 2902; Deering's Gen.Laws, Act 8494a)—and it will only be necessary now to recite such facts as may be required for the determination of the specific issues here in controversy.

Appellant is a Minnesota corporation, with its principal place of business in St. Paul, Minnesota. It is engaged in the business of publishing and selling law books and legal periodicals throughout the United States. It has not qualified to do intrastate business in California. However, during the period here involved it main-

tained "places of business" in this state—space occupied in certain law offices located in Sacramento, San Francisco, and Los Angeles in return for the use of its books stored in such offices—and it had four regularly employed solicitors operating therefrom and devoting their entire time to appellant's business. It advertised in local legal periodicals and newspapers its places of business where its local representatives could be contacted. Appellant's employees in this state were authorized to and did solicit orders; accept down payments in connection with the orders taken, usually involving an installment arrangement; obtain and forward to appellant credit information concerning appellant's present and prospective customers; collect delinquent accounts upon the request of appellant's credit department; undertake adjustments in case of complaints by customers as to the condition of the books upon arrival, delivery service, or other matters; assist prospective purchasers in the disposal of second-hand books; and keep appellant advised concerning the current status of attorneys in this state. The books were sold by appellant under title-retaining contracts, appellant retaining title until full payment was made therefor. Orders obtained by appellant's local salesmen were required to be sent to the home office for approval or rejection, and in the latter event instructions were given to the salesmen either to rewrite the contract or refuse it altogether. In addition to the orders obtained through the solicitation of its local salesmen, appellant also did a certain amount of business in response to mail orders forwarded directly to appellant's home office by persons resident in this state. With respect to the source of appellant's business in this state, the trial court found that "approximately 60% in amount of the orders received by [appellant] from California customers * * * resulted from solicitation by [its] employees" in this state ("approximately 35% * * * from current solicitation * * * and approximately 25% * * * from prior solicitation") and "approximately 40% * * * were mail orders" sent directly to appel-

lant's home office. Appellant filled all orders by direct shipment from its Minnesota publishing plant, via common carrier and with transportation charges prepaid to its customers in this state. Appellant also shipped books, without prior order, to California customers owning prior editions of the particular publication, and in the event of objection to such method of sales promotion, the matter would be referred to a local salesman for adjustment and disposition.

Appellant failed to file a return for use taxes for the period here involved, and the State Board of Equalization, under authority of section 10 of the Use Tax Act and upon such information as it had in its possession, made an estimate of \$900,000 as the total amount of appellant's sales of "tangible personal property" for "storage, use or other consumption * * * in this State" (or \$50,000 for each quarterly period). Written notice of the estimate and computed tax liability was mailed to appellant on February 28, 1940; it made no application for a redetermination as authorized by section 12 of the Act; and the amount so determined by the board to be due from appellant became final. The trial court made findings in accord with the board's computation of appellant's total tax liability upon the filing of suit—\$36,922.50, consisting of \$27,000 for use taxes, interest amounting to \$4,522.50 as accrued to September 15, 1940 (sec. 8), and penalties in the sum of \$5,400 (secs. 10, 12)—but allowed a "credit for payments of tax, interest and penalties subsequently made by [appellant's] customers directly to the [board]" on the books purchased during the period involved. Accordingly, judgment was entered in favor of the state in "the sum of \$36,668.39, together with interest on the sum of * * * \$26,809.32 (the amount of delinquent use taxes as reduced from \$27,000 by reason of the credit) at the rate of * * * $\frac{1}{2}\%$ * * * per month, or fraction thereof, from September 15, 1940, to date of judgment, together with interest on the whole of said judgment at the rate of * * * 7% * * * per annum from the date of judgment until paid," plus costs.

[1] In objection to such adjudication of its total tax liability, appellant first argues that a portion of the state's tax claim is barred by the statute of limitations. By the terms of the Act, the use tax is payable quarterly, "on or before the fifteenth day of the month next succeeding each quarterly period" (sec. 7), and an action may be brought by the board "at any time within three years after any amount * * * required to be collected has become *due and payable* and any time within three years after the delinquency of any tax" (sec. 24; emphasis added). This action was commenced on October 15, 1940. Appellant maintains that the statutory period of limitations began to run on its "liability for any quarterly period involved in this action, on the 16th day of the month following such period," and accordingly the recovery of the use tax on sales made prior to October 15, 1937, is barred by the applicable section of the Act itself above quoted, as well as by section 338, subdivision 1, of the Code of Civil Procedure, prescribing a like three-year period of limitation for the commencement of an action "upon a liability created by statute."

But the appellant's argument gives no effect to other pertinent provisions of the Use Tax Act. As heretofore noted, this action was commenced to collect an amount determined by the board to be due from appellant under authority of section 10, upon the "failure" of a "person" subject to the terms of the Act "to make a return" for the period in question. Section 12 provides that "all amounts determined to be due by the board under the provisions of section 9 or 10 * * * shall become *due and payable at the time they become final*" (emphasis added), and that they become "final" thirty days after the service of the board's notice of determination if, as here, no petition for redetermination has been filed within such period. The board made its determination of appellant's use tax delinquency for the period involved on February 28, 1940; "thirty days" thereafter the assessment became "final"; and any action to collect the amount which had then become "due and payable" pursuant to the board's

determination could be brought within three years under the express provisions of section 24 above quoted. The present action was commenced within the year and therefore well within the authorized period.

[2] This conclusion as to the timeliness of respondent's action finds support in the decisions reached in the cases of *People v. Hochwender*, 20 Cal.2d 181, 124 P.2d 823, and *People v. Nymer*, 71 Cal.App.2d 550, 163 P.2d 92, where similar provisions in the Retail Sales Tax Act, which is complementary to the Use Tax Act, were considered, and in each instance it was held that the date at which the tax board's assessment became final started the running of the three-year period of limitation. Appellant's contention that the time for bringing suit commenced to run on the 16th day following the close of each quarterly period for which liability was asserted completely ignores the provisions of the Act authorizing the making of determinations by the board (secs. 9 and 10) and prescribing the addition of "a penalty of 10 per cent of such amount" of the taxes upon failure to pay on the due date—that is, when the assessment becomes "final," or "thirty days" after the service of the notice of assessment in the absence of the filing of "a petition for redetermination" within that time (sec. 12). The precise line of argument here advanced by appellant was expressly rejected in the *Hochwender* case under similar statutory provisions effecting the fixing of the delinquency date, at which time the three-year period of limitation began to run. *People v. Hochwender*, 20 Cal.2d 185, 124 P.2d 823. While the legislature has provided a three-year period for the board's audit of a return filed under the Use Tax Act and the determination of whether an additional assessment should be made (sec. 15), it has specifically excluded such time limitation where there has been "a neglect or refusal to make a return," indicating that in such circumstances the delinquent date stems from the board's assessment when made "upon [such] information [as it has] in its possession" and coincident with the attachment of the prescribed penalty. If the retailer then accedes to the board's determination of the use taxes due

and pays the amount so computed within "thirty days" after service of the notice of assessment, the penalty for noncompliance is obviated. In such manner, the statutory procedure for the effective functioning of the use tax collection from persons properly subject to the Act is followed pursuant to the legislature's plan in the event of either contingency affecting the commencement of the three-year period of limitations—the *filing of a return* with the aforesaid limit for review by the board, and the *failure to file a return* with the delinquent date awaiting the board's action as authorized. *People v. Nymer*, supra, 71 Cal.App.2d 550, 552-553, 163 P.2d 92. While the board could have made its determination of appellant's use tax liability for each quarterly period on the 16th day following the close thereof, it was not so required by the terms of the Act. It proceeded precisely as authorized by the Act in making its determination for the period in question on February 28, 1940, on which day notice thereof was mailed to appellant, and "thirty days" thereafter the assessment became "final," so that within the following three years an action for the collection of the entire amount of the delinquent taxes, plus the penalty and interest accruals, could be brought. Accordingly, the timeliness of the present action, commenced on October 15, 1940, is clear. Appellant's citation of the general statute of limitations Code Civ.Proc., sec. 338, subd. 1, and its application in tax cases can be of no assistance here, for the Use Tax Act contains its own specific provisions in that regard, and they are controlling. *People v. Hochwender*, supra, 20 Cal.2d 181, 184-185, 124 P.2d 823; *People v. Nymer*, supra, 71 Cal.App.2d 550, 553, 163 P.2d 92.

[3,4] Appellant next challenges the propriety of the judgment by reason of the (1) alleged erroneous inclusion of its mail order sales within the use tax computation and (2) failure to allow certain counterclaims in fixing its total liability. In opposition to the consideration of these objections, respondent properly cites the rule of the exhaustion of administrative remedies as here applicable. Thus, appellant, though subject to the provisions of the

Use Tax Act and accordingly required to file returns, nevertheless failed to so comply with the statute; it thereby became necessary for the board to determine appellant's use tax liability on an estimated basis and so notify appellant (sec. 10); and appellant made no "petition for redetermination" but permitted the amount so determined by the board to become final (sec. 12). Yet now appellant seeks a reduction in the amount of its use tax assessment for reasons which it neglected and refused to present to the administrative agency expressly empowered to determine and dispose of disputed issues of liability in the granting of appropriate relief. Here appellant not only has failed to exhaust its administrative remedies, but it has neglected to make any use of the orderly procedure provided for securing a correct tax assessment before judicial redress is sought. Analogous considerations were before this court in *West Publishing Co. v. McColgan*, supra, 27 Cal.2d 705, 166 P.2d 861, where appellant as plaintiff, seeking a refund of the corporation income tax collected from it for certain taxable years, had failed to file returns under the governing Act for the period involved and to furnish information therefor to the Commissioner, who was thereupon required to make an estimated assessment pursuant to the terms of the statute. In such situation, it was pertinently said in 27 Cal.2d at page 712, 166 P.2d at page 865: "Plaintiff cannot complain of alleged errors in the computation of tax liability, when it refused to avail itself of its administrative remedies to prevent or correct such errors. (Citing numerous authorities, including the leading case of *Abel-leira v. District Court of Appeal*, 17 Cal. 2d 280 [109 P.2d 942, 132 A.L.R. 715].)"

Appellant argues that since its objections to the use tax assessment only involve questions of law as distinguished from pure issues of fact, it was not required to present its contentions first to the board before asserting them in this litigation. But in the effective performance of its designated functions under the terms of the Use Tax Act, the board necessarily must pass upon matters of both law and fact, and though the "administrative determination of ques-

tions of law is subject to judicial review upon which the courts may substitute their own judgment for the administrative determination" (42 Am.Jur. sec. 210, p. 622; note 4, citing numerous cases), the board nevertheless should be afforded the opportunity to rectify any determination it has made and consider a revision of its tax assessment. *Alexander v. State Personal Board*, 22 Cal.2d 198, 200, 137 P.2d 433. This principle of initial resort to prescribed administrative processes has received particular emphasis in tax enforcement cases.

(*Stason, Judicial Review of Tax Errors—Effect of Failure to Resort to Administrative Remedies*, 28 Mich.Law Rev. 637; Note, 44 Mich.Law Rev. 1035.) So illustrative is the case of *Gorham Manufacturing Co. v. State Tax. Comm.*, 266 U.S. 265, 45 S.Ct. 80, 69 L.Ed. 279, where the Supreme Court of the United States refused to consider constitutional objections urged with regard to a franchise tax because the complaining taxpayers had failed to apply to the State Tax Commission for "revision and correction of the tax * * * 'according to law and the facts,' * * * [and so] avail itself of the administrative remedy provided by the statute." 266 U.S. at pages 269-270, 45 S.Ct. at page 81.

[5] But aside from this procedural qualification affecting appellant's initial presentation of its argument here, its first contention may not be sustained on the merits. Appellant makes the constitutional objection that its required collection of the use tax on mail order sales would impose a burden upon interstate commerce and violate the due process clause of the Fourteenth Amendment. In discussing this issue, there should be noted at the outset the two prior opinions of this court wherein appellant's method of doing business in this state was fully reviewed in relation to asserted tax obligations: *West Publishing Co. v. Superior Court*, supra, 20 Cal.2d 720, 128 P.2d 777, holding that the nature and range of appellant's local activities established it as a "retailer maintaining a place of business in this State" (sec. 6) and that such "presence" in this jurisdiction rendered it liable to the service of process under the terms of the Use Tax

Act in this precise action; and *West Publishing Co. v. McColgan*, supra, 27 Cal.2d 705, 166 P.2d 861, declaring that appellant received from the state such benefits in the conduct of its business transactions as would justify the state's exaction of a price therefor—payment of the corporation income tax. The California Use Tax Act makes no exception with regard to the imposition of the tax on mail order sales, and the principles of decision governing pertinent cases adjudicated by the Supreme Court of the United States sustain the Act's application to such controverted portion of appellant's business with customers within this state.

There is no violation of the commerce clause involved in the requirement that an out-of-state seller of goods collect a use tax on goods sold for use within the state, *Nelson v. Sears, Roebuck & Co.*, 1941, 312 U.S. 359, 61 S.Ct. 586, 85 L.Ed. 888, 132 A.L.R. 475; *Nelson v. Montgomery Ward & Co.*, 1941, 312 U.S. 373, 61 S.Ct. 593, 85 L.Ed. 897, even when the seller is engaged exclusively in interstate commerce, *Felt & Tarrant Mfg. Co. v. Gallagher*, 1939, 306 U.S. 62, 59 S.Ct. 376, 83 L.Ed. 488; *General Trading Co. v. State Tax Comm.*, 1944, supra, 322 U.S. 335, 64 S.Ct. 1028, 88 L.Ed. 1309. In the *Sears Roebuck and Montgomery Ward Co.* cases, the contested application of the Iowa Use Tax Act, practically identical in language with the California Use Tax Act, focused directly on mail order sales, with the company in each instance maintaining that such portion of its business was without the orbit of the state's taxing power in that it arose from orders sent by Iowa purchasers to the company's out-of-state branches and filled by direct shipments through the mails or common carrier from those branches to the purchasers. In upholding the validity of the Iowa use tax in its application to the mail order sales, the court noted that such business could not be divorced from the integrated local activities of the company in Iowa flowing from its maintenance of retail stores there and its permit to do business within the state; and accordingly Iowa was empowered to impose upon the company the burden of the use tax collection

as the price of enjoying the full benefits flowing from its Iowa business—intrastate as well as interstate. (See Altman and Keesling, Allocation of Income in State Taxation [1946], p. 30.)

Appellant argues that the rationale of these two cases would not apply here because there, contrary to the present situation, the company had qualified to do business within the state and so submitted to its jurisdiction. But such distinction was expressly rejected as a controlling factor in the later case of General Trading Co. v. State Tax Comm., supra, 322 U.S. 335, 64 S.Ct. 1028, 88 L.Ed. 1309, where the effective operation of the Iowa use tax was considered in relation to goods shipped directly to Iowa customers from the company's out-of-state headquarters as the result of orders solicited by the company's traveling salesmen sent into the state for that purpose but not permanently located there. The company had never qualified to do business as a foreign corporation in Iowa nor did it have any office, branch or warehouse there, but its local activities were deemed sufficient to establish it as a "retailer maintaining a place of business in [the] state" within the meaning of the Iowa statute and thus bring the transactions in question within the taxing power of the state. (See Altman and Keesling, Allocation of Income in State Taxation [1946], supra, p. 39.) So it is pertinently said in 322 U.S. at page 338, 64 S.Ct. at page 1029: "* * * the fact that in the Sears Roebuck and Montgomery Ward cases the interstate vendor also had retail stores in Iowa, whose sales were appropriately subjected to the sales tax, is constitutionally irrelevant to the right of Iowa sustained in those cases to exact a use tax from purchasers on mail order goods forwarded into Iowa from without the State. All these differentiations are without constitutional significance. * * * The tax is what it professes to be—a non-discriminatory excise laid on all personal property consumed in Iowa. The property is enjoyed by an Iowa resident partly because the opportunity is given by Iowa to enjoy property no matter whence acquired. The exaction is made against the ultimate con-

sumer—the Iowa resident who is paying taxes to sustain his own state government. To make the distributor the tax collector for the State is a familiar and sanctioned device. *Monamotor Oil Co. v. Johnson*, 292 U.S. 86, 93-94, 54 S.Ct. 575, 578, 78 L.Ed. 1141; *Felt & Tarrant Co. v. Gallagher*, supra."

[6] Likewise foreign corporations, not licensed to do business in the state, have been held amenable to the requirement of use tax collection despite their contention that such subjection would amount to a denial of due process. *Felt & Tarrant Mfg. Co. v. Gallagher*, supra, 306 U.S. 62, 59 S.Ct. 376, 83 L.Ed. 488; *General Trading Co. v. State Tax Comm.*, supra, 322 U.S. 335, 64 S.Ct. 1028, 88 L.Ed. 1309. Such decisions rest on considerations indicating the extent of the local activities in which the company engages and the protection which it receives from the state with regard thereto as justification for the tax. So appropriate is a brief recapitulation of the significant factors disclosed by the record here: Although not qualified to do intrastate business here, appellant maintained "places of business" in this state which it advertised in local publications as its local offices where its local representatives could be contacted. Its salesmen were in this state on a permanent basis, employed at a full-time salary, assigned specific territory for the solicitation of customers, and available at appellant's places of business. Without distinction between mail or solicited orders, appellant's salesmen performed such services for appellant as obtaining and forwarding credit information concerning appellant's customers and prospective purchasers, arranging for the payment of and collection upon delinquent accounts when so requested by appellant's credit department, adjusting complaints with dissatisfied customers, and advising appellant concerning the current status of attorneys in this state, their ownership of law books and their prospective interests in appellant's various publications as a basis for appellant's determination of the circularization of its advertising matter to members of the legal profession. The state provided a market in which appel-

lant operated in competition with local law book publishers, and its salesmen received the same protection and other benefits from the state as salesmen carrying on business activities for a company engaged in intrastate business. Appellant's books were sold under title-retaining contracts, and pending the payment of the full purchase price, appellant's property interest was protected by the state as likewise was its property interest in books which it shipped into the state without prior order and which then awaited appropriate disposition. Thus, the state protected appellant's business transactions within its borders and maintained courts in which it might enforce payment for the sale of its publications. Such factual summarization clearly demonstrates that appellant in maintaining its "places of business" in California has enjoyed such protection, opportunities, advantages, and benefits from the state as to bring it within the constitutional application of the Use Tax Act on *all* its sales with reference to an integrated course of business activity, whether the result of direct solicitation of its salesmen operating here or through mail orders as part of its overall California business. *Nelson v. Sears, Roebuck & Co.*, supra, 312 U.S. 359, 61 S.Ct. 586, 85 L.Ed. 888, 132 A.L.R. 475; *Nelson v. Montgomery Ward & Co.*, supra, 312 U.S. 373, 61 S.Ct. 593, 85 L.Ed. 897; *General Trading Co. v. State Tax Comm.*, supra, 322 U.S. 335, 64 S.Ct. 1028, 88 L.Ed 1309.

Nor does it avail appellant here to urge as its second contention in dispute of its adjudicated tax liability, that the trial court erred in "disallowing [its] counterclaims for \$920.65 and \$1,052.50, respectively." While the foregoing discussion concerning appellant's failure to exhaust its administrative remedies adequately disposes of this point of objection, a further observation relating to these alleged counterclaims should be made. Appellant seeks to offset against the assessment, which was based upon estimated sales of \$900,000 for the tax period in question, the amount which it claims to be attributable to sales to state agencies for both that tax period and a later tax period, without making any

showing at any stage of the proceedings that the amount of its actual sales, less the claimed sales to such agencies, was not far in excess of the estimate of \$900,000. Under these circumstances, it appears peculiarly appropriate here to apply the rule requiring the taxpayer to exhaust administrative remedies before asking for judicial relief, and it becomes unnecessary to discuss the question of whether a counterclaim may ever be interposed in an action brought by the state for the purpose of enforcing a tax liability.

The judgment is affirmed.

GIBSON, C. J., SHENK, EDMONDS, CARTER, and SCHAUER, JJ., and DOOLING, Justice pro tem., concur.



35 Cal.2d 40

**POWELL et al. v. PACIFIC ELECTRIC
RY. CO. et al.
L. A. 21092.**

Supreme Court of California, in Bank.
April 4, 1950.

Action by William S. Powell, and another, against the Pacific Electric Railway Company, and others, for the death of plaintiffs' son in a collision between a truck in which the son was riding and defendants' interurban train. The Superior Court for Los Angeles County, Charles E. Haas, J., rendered an adverse judgment, and the plaintiffs appealed. The Supreme Court, Spence, J., held that whether the train's motorman was guilty of negligence was a question for the jury.

Judgment affirmed.

For prior opinion, see 205 P.2d 432.

I. Appeal and error ☞989

When a verdict is attacked as unsupported, power of appellate court begins and ends with determination as to whether there is any substantial evidence contradicted or uncontradicted which will support conclusion of the jury, and when two

or more inferences can be reasonably deduced from the facts, reviewing court is without power to substitute its deductions for those of the trial court.

2. Railroads ⚡320

Where motorman of interurban train saw truck enter right of way when train was 200 feet from crossing, and truck was traveling only eight miles per hour, motorman was not chargeable with knowledge that truck was not under perfect control and that it would not slow its speed to a complete stop at customary place. Vehicle Code, § 575.

3. Railroads ⚡350(12)

In action for death of truck occupant in grade crossing collision, whether motorman of interurban train acted as a man of ordinary prudence in operation of his train when he first saw truck on right of way and assumed that it would be able to stop was a question for the jury. Vehicle Code, § 575.

4. Railroads ⚡347(1)

In wrongful death action against electric railroad arising out of grade crossing collision railroad's operating rule requiring application of air brakes when 150 feet from crossing and prohibiting release until crossing was clear of approaching vehicles was admissible to show standard of care railroad thought appropriate to insure safety of others at crossing.

5. Railroads ⚡350(6)

While violation by motorman of interurban train of operating rule prohibiting release of air brakes after train was 150 feet from grade crossing was not negligence per se, it was a circumstance for the jury to consider on issue of motorman's negligence.

6. Railroads ⚡351(8)

Trial ⚡243

In action for death of truck occupant when truck and interurban train collided at grade crossing, instruction that railroad's operating rule requiring application of air brakes on approach to grade crossing, while not the law, permitted an implication of breach of duty from a finding of violation of the rule was not misleading

nor conflicting with further charge that motorman would not be guilty of negligence if he used same degree of care that any prudent person would have used under the same or similar circumstances.

7. Railroads ⚡350(6)

In action for death of truck occupant arising out of collision between interurban train and truck at grade crossing, whether motorman violated operating rule prohibiting release of air brakes after train was 150 feet from crossing until clear of approaching vehicles was a question for the jury.

8. Railroads ⚡320

Where wig-wag signal set to operate 1000 feet back from grade crossing was oscillating and warning of interurban train's approach, and there was nothing to suggest to motorman that driver of truck would not heed warning, motorman was not required to anticipate that truck's brakes would fail as driver attempted to stop at customary place before reaching crossing. Vehicle Code, § 575.

9. Railroads ⚡338.4

Where interurban train was only 75 feet from crossing, was traveling at reduced speed of 24 miles per hour and required 250 feet to stop at time motorman realized that truck slowly approaching crossing would not stop, railroad was not liable for results of ensuing collision under the doctrine of the last clear chance.

Charles A. Thomasset, Los Angeles, for appellants.

C. W. Cornell, O. O. Collins, Malcolm Archbald, John R. Allport and John H. Gordon, Los Angeles, for respondent.

SPENCE, Justice.

Plaintiffs appeal from a judgment entered on a verdict denying them recovery of damages for the death of their minor son in a railroad crossing accident.

[1] As sole ground for reversal, plaintiffs urge that the evidence established as a matter of law that defendant railway company was negligent, and that such neg-

ligence was the proximate cause of the fatal accident. But this appears to be the "usual fact case" for the jury's determination of liability upon the controverted issues. *Taylor v. Wright*, 69 Cal.App.2d 371, 374, 159 P.2d 980. So applicable is the elementary rule that "when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." *Crawford v. Southern Pacific Co.*, 3 Cal.2d 427, 429, 45 P.2d 183, 184; see, also, *Raggio v. Mallory*, 10 Cal.2d 723, 725, 76 P.2d 660; *Juchert v. California Water Service Co.*, 16 Cal.2d 500, 507-508, 106 P.2d 886; *Peri v. Los Angeles Junction R. Co.*, 22 Cal.2d 111, 117, 137 P.2d 441; *Bryant v. Market Street R. Co.*, 71 Cal.App. 2d 508, 509, 163 P.2d 33. Such settled principle of law requires affirmance of the judgment herein.

The record consists of the judgment roll and a settled statement from which appear the following facts: Appellants' son died as the result of injuries sustained in a collision between one of respondent's interurban trains and a truck operated by one Lester D. Dewey. At the time, decedent was in the employ of Mr. Dewey and was being transported to the latter's place of business. The fatal collision occurred about 1:00 p.m. on August 28, 1946, at the intersection of 92nd Street and respondent's private right of way in the city of Los Angeles. The weather was clear. At the crossing point involved, 92nd Street, running east and west, was 30 feet wide, and the right of way, running north and south, was more than 100 feet wide. Graham Avenue paralleled the right of way on the easterly side, and it was 32 feet wide with curbs on both sides. On a pole at the northwest corner of Graham Avenue and 92nd Street there was an automatic wig-wag signal, and Graham Avenue itself was protected by a boulevard stop on its easterly side.

The right of way had six sets of rails, the first four of which at the trial were designated from east to west as A, B, C, and D. The accident occurred when respondent's southbound through train traveling on track C collided with the truck in which appellants' son was riding as it crossed the right of way from east to west on 92nd Street. The easterly rail of track C was 55 feet from the westerly curb of Graham Avenue. The truck made a boulevard stop on the easterly side of Graham Avenue, crossed that street, and entered respondent's right of way, proceeding over tracks A and B without stopping until it reached track C, where it was struck by the southbound train. There was no traffic ahead of the truck and none crossing in the other direction.

The truck was a 1936 Diamond T two-ton, flat bed, open body model with no stakes, sides or roof, and was regularly used by the owner to transport merchandise in his furniture business. At the time of the accident, appellants' son and two other boys were sitting on the truck platform behind the cab. The impact of the collision hurled appellants' son over his two companions and onto the ground, where he was struck by the train and suffered skull injuries from which he subsequently died. The point of impact was established as seven feet south of the prolongation of the north curb of 92nd Street and fifty-four feet west of the west curb of Graham Avenue.

Lester D. Dewey, the driver of the truck and a witness for appellants, testified that traveling west on 92nd Street, he made the boulevard stop at Graham Avenue, continued "straight across Graham" at "about 8 miles an hour" and was "headed into the Pacific Electric right of way" at the "92nd Street crossing"; that he was "approximately half way across" Graham Avenue when he "first saw the train," which was then about "900 feet" away and "rolling [at] a pretty good rate of speed"—perhaps "fifty miles an hour"; that he did not know "whether or not the wig-wag was going" but "if it was, [he] didn't see it"; that when he "made the boulevard stop"

at Graham Avenue, his "brakes were operating all right"; that after he saw the train coming and that he "didn't have a chance to beat it [across]," he tried to stop as he started over the tracks but without effect because of an unexpected and complete failure of his hydraulic brakes; that he "kept right on going," rolling "very slowly"; that he then "pulled the emergency back, but [it] wasn't good enough to stop [the truck] before it got on the track [C] * * * just enough to catch the right front wheel of the front end of the truck"; that "at the time the train actually hit the truck, he [the motorman] probably wasn't going over fifteen miles an hour, because he had already used his brakes [to] slow the train down." In the course of cross-examination, Mr. Dewey stated that he "first * * * thought [he] might have time to beat the train across" but then he "saw it was traveling pretty fast" so he decided "as he reached 'A' track" to stop; that "if the brakes hadn't [gone] out, [he] could have stopped [the truck] instantly * * * at the speed [he] was traveling," which was about eight miles per hour; that the stop would have been at "about lane 'B'"; that he was "familiar with that crossing" and that was the "customary place for people to stop."

The motorman, Wilmer I. Kivett, testified in substance, as a witness for respondent, that as he approached 92nd Street, he was operating two cars; that the sun was shining and for a distance of 2,000 feet north of the scene of the accident, his view of the intersection was unobstructed; that there was no traffic ahead of him and none crossing the intersection; that when he was about 600 feet away from the scene of the accident, he started braking and continued braking for a distance of 400 feet, thus reducing his speed to 25 miles per hour; that he released his air and started coasting when he first saw the truck, and continued to coast until he was about 75 feet from the scene of the actual collision, when he applied his emergency brake; that he was not braking at all for a distance beginning at a point 200 feet north of the intersection [when

he first saw the truck] to a point approximately 75 feet from the intersection; that the truck was on the first rail of the tracks denominated A when he first saw it; that while he was approaching, he saw the truck cross tracks A and B without stopping; that at 25 miles per hour he could have stopped his train within 250 feet, and that he did bring it to a stop about 20 feet south of the south curb of 92nd Street.

It was stipulated that this witness at the coroner's inquest, which was held seven days after the accident, testified as follows: "I was southbound and had pinched down to the company speed of 25 miles an hour or less for the crossing and about 150 feet from the crossing I saw the truck enter the right-of-way. I thought the truck was going to stop and I released my air and at that time I was going about 25 miles an hour. Then, I saw the truck wasn't going to stop so I put my train into emergency about 75 feet from 92nd Street and the truck rolled onto the private right-of-way and the left front corner of the car caught the right front wheel and fender of the truck throwing it around and off the right-of-way." He further stated at that time that when he "first observed" the truck, it was "at the west curb line of Graham" just "entering the right-of-way" and his train was about "150 feet north of 92nd Street"; that he "thought [the truck] was going to stop," but he "couldn't tell * * * if [its] brakes had been applied"; that "[the truck] wasn't traveling very fast"; that "the wigwags were in operation when [the train] entered the intersection" and he "assumed that the truck was going to stop."

Over respondent's objection, appellants were permitted to introduce into evidence certain train operating rules and regulations of the railway company, whereby it was required that motormen reduce their "speed * * * a sufficient distance in advance" of a highway crossing "so that train will be allowed to coast on approach to crossing, to enable full braking power being obtained in emergencies." The rules further provided that "after speed of train has been reduced to speed applying [at the

crossing] and there is no vehicle or other conveyance seen approaching that will conflict, brakes may then be released and train allowed to coast."

In this state of the evidence, the trial court submitted to the jury for consideration, under appropriate instructions, the following matters for determination of respondent's liability: (1) appellants' charge of negligence against the railway company by reason of the conduct of its motorman; (2) respondent's claim of contributory negligence affecting appellants' right of recovery; (3) the question of the proximate cause of the fatal collision; and (4) whether or not the accident was unavoidable. The jury brought in its verdict in favor of the railway company and judgment was entered thereon. Appellants' motion for a new trial, made on the ground, among others, of insufficiency of the evidence, was denied. This appeal followed.

In contending that they are entitled to a judgment as a matter of law, appellants urge these points: (1) the absence of any evidence in the record as to contributory negligence in bar of their recovery; (2) the liability of the railway company because its motorman was negligent and his negligence proximately contributed to the happening of the fatal accident; and (3) the testimony of the motorman as an admission of liability. Appellants' first proposition is correct, but their second and third claims involve the redetermination of evidentiary matters which were essentially questions of fact for the jury to decide.

[2, 3] As appears from the above recital of the evidence, respondent's train was 150 to 200 feet from the crossing when the motorman first saw the truck enter the right of way and he "thought the truck was going to stop." At that time the driver of the truck was aware of the approach of the train and admittedly intended to stop at the "customary place for people to stop"—on track B—to allow trains traveling on the track immediately to the east, track C, to pass. Accordingly, the truck driver applied his brakes when on track A, as he was traveling but eight miles per hour, a speed which would have permitted his truck, load-

ed as it was at that time, to have "stopped instantly" if his brakes had not failed to work. There was nothing in these movements which would apprise the motorman, as he first saw the truck proceeding in the right of way, that it was not under perfect control, that it would not slow its speed to a complete stop at the customary place, as the driver admitted that he intended to do, and let the train pass. *Korchak v. Pacific Electric R. Co.*, 9 Cal.App.2d 89, 93, 48 P.2d 752. Appellants argue that under section 575 of the Vehicle Code, the truck was required to stop not less than 10 feet from the first rail of the tracks; and that in full view of the motorman and to his knowledge and admitted observation, the truck did not stop but continued to cross the tracks A and B to the point of collision. In other words, when the motorman in his train operations released the air and started to coast, the truck was in violation of said section 575, and according to appellants, that should have been a warning to the motorman that the truck might not come to a halt but would attempt to cross track C ahead of the approaching train. However, such argument does not take into account the full picture—that although there was a violation of the statutory requirement, nevertheless the slow travel of the truck while proceeding in the right of way might reasonably suggest the driver's intent to stop before reaching the track of the approaching train. Clearly it was for the jury to determine as a question of fact whether the motorman acted as a man of ordinary prudence under the circumstances in the operation of his train when he first saw the truck on the right of way and assumed its probable procedure. *Peri v. Los Angeles Junction R. Co.*, supra, 22 Cal.2d 111, 120, 137 P.2d 441, and cases there cited.

[4-6] Nor does respondent's above-noted operating rule avail appellants in establishing their right to recover because of the happening of the fatal accident. The rule was properly admitted in evidence as bearing on the standard of care respondent thought appropriate to insure the safety of others at its track crossings. (2 Wigmore

on Evidence [3d Ed.] § 282, p. 132; 3 Shearman & Redfield on Negligence, § 506, p. 1281.) While a violation of such rule would not constitute negligence *per se*, it would be a circumstance for the jury to consider on the issue of respondent's negligence. *Gett v. Pacific Gas & Elec. Co.*, 192 Cal. 621, 625, 221 P. 376; *Nelson v. Southern Pacific Co.*, 8 Cal.2d 648, 654, 67 P.2d 682; *Simon v. City and County of San Francisco*, 79 Cal.App.2d 590, 597-598, 180 P.2d 393; *Holder v. Key System*, 88 Cal.App.2d 925, 935, 200 P.2d 98. The court so instructed the jury as to the legal effect of the rule—that while “not the law,” a “breach of duty” might be implied from a finding of violation of the rule. Neither was it “misleading” nor did it effect a conflict for the court to give the further charge that the motorman would not be guilty of negligence in the operation of the train if the jury found that he “used the same degree of care that any prudent person would have used under the same or similar circumstances.” Since respondent's rule was “not the law” but only a factor to be considered in the jury's evaluation of the motorman's conduct as a factual issue, *Simon v. City and County of San Francisco*, *supra*, 79 Cal.App.2d at page 598, 180 P.2d 393, the standard of care that he was bound to exercise remained “that of the man of ordinary prudence under the circumstances.” *Peri v. Los Angeles Junction R. Co.*, *supra*, 22 Cal.2d 111, 120, 137 P.2d 446.

[7-9] In challenging the propriety of the motorman's operation of the train, appellants argue that the situation which confronted him was one precisely anticipated by respondent's rule, to the effect that he should not release the brakes on approaching an intersection when there is another vehicle seen approaching which “will conflict.” Accordingly, appellants argue that had he continued to brake his train instead of releasing the air when he first saw the truck enter the right of way, the accident could have been averted. But the evidence was such that the jury may have concluded that there was in fact no violation of the rule, and that the motorman exercised due care under the circumstances to avoid the

collision with the truck. The motorman testified that he thought the truck was going to stop before reaching track C and yield the right of way to the train, and the jury could reasonably have inferred therefrom that the motorman justifiably regarded the truck as a vehicle that would not “conflict” with the train as it approached the intersection. Moreover, according to the motorman, the wigwag signal, set to operate “1000 feet back” from the crossing, was oscillating in warning of the train's approach and there was nothing to suggest to the motorman that the driver of the truck would not heed such warning. *Billig v. Southern Pacific Co.*, 192 Cal. 357, 363, 366, 219 P. 992. Therefore, when the motorman released the air and started to coast, he had no notice or reason to believe that the truck's brakes would fail to function as the driver attempted to stop at the “customary place”—on track B—before reaching track C. In fact, it would be difficult to hold the motorman obliged to anticipate such brake failure on the truck when the driver himself admitted that he did not know or have reason to expect such happening. However, as soon as the motorman saw that the truck was not going to stop, he applied the emergency brake to the train but at that time, he was only 75 feet from the crossing, traveling at a reduced speed of 25 miles per hour, and requiring 250 feet to effectuate a stop. Manifestly the impact with the truck was then inevitable in view of its proximity. However, there was ample evidence for the jury to have inferred that the sole proximate cause of the fatal collision was the failure of the brakes on the truck to function, with the result that the truck rolled onto track C in front of the approaching train, and that the motorman's conduct was consistent with the action of an ordinarily prudent man under the circumstances. Such cases as *Girdner v. Union Oil Co.*, 216 Cal. 197, 203, 13 P.2d 915, cited by appellants in relation to the application of the doctrine of last clear chance, are not in point here. Nothing in the evidence here suggests that the motorman, after he became aware of the truck's perilous situation, had a clear or, in fact, any opportunity to avoid the accident by

the exercise of ordinary care. *Erwin v. Morris*, 10 Cal.App.2d 168, 171, 51 P.2d 149; *Dickey v. Thornburgh*, 82 Cal.App.2d 723, 729, 187 P.2d 132. Rather this was simply a case for the jury's determination of respondent's liability according to the ordinary rules of negligence bearing upon the motorman's conduct, *Korchak v. Pacific Electric Ry. Co.*, supra, 9 Cal.App.2d 89, 93, 48 P.2d 752, and its disposition of the factual issues in respondent's favor will not be disturbed. *Peri v. Los Angeles Junction R. Co.*, supra, 22 Cal.2d 111, 120, 137 P.2d 441.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.



35 Cal.2d 108

ERICKSON v. BOOTHE.

Sac. 5905.

Supreme Court of California, in Bank.

April 12, 1950.

Action for declaratory relief by Mazie Erickson, formerly Mazie Tangeman, executrix of the last will and testament of Timothy Carlon, deceased, against Clyde D. Boothe. The Superior Court of Merced County, Ranse R. Sischo, J., entered a judgment declaring that defendant was entitled to be restored to possession of realty and to an accounting, and plaintiff appealed. The Supreme Court, Gibson, C. J., held that since the judgment provided for an accounting it was an interlocutory judgment and not appealable.

Appeal dismissed.

Prior opinion 207 P.2d 894.

Appeal and error ⇐80(3)

Judgment declaring that defendant was entitled to an accounting of rents, issues and profits taken by plaintiff while in possession of realty under erroneous judgment, which had been reversed on appeal, was an

"interlocutory judgment" and not appealable, since it contemplated further judicial proceedings in the action before final adjudication.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Interlocutory Judgment".

LaFayette J. Smallpage, Harold J. Willis, Stockton, T. B. Scott, Modesto, and Val G. Preston, Merced, for appellant.

Taylor & Taylor, Edward T. Taylor and Edward T. Taylor, Jr., Modesto, for respondent.

GIBSON, Chief Judge.

This action, for declaratory relief, was brought to determine whether defendant lessee had effectively exercised an option to "re-lease" certain real property under the terms of a lease contract. A judgment in favor of plaintiff was reversed on appeal without direction. *Erickson v. Boothe*, 79 Cal.App.2d 266, 179 P.2d 611. Plaintiff thereafter filed a dismissal, and defendant, who had also sought declaratory relief, moved the trial court for judgment in accordance with the decision on appeal. The trial court set aside the dismissal and entered judgment declaring that defendant had effectively exercised the option and was entitled to be restored to the possession of the property, and concluded that defendant was entitled to an accounting of the rents, issues and profits taken by plaintiff who obtained possession of the premises at the close of the original trial.

Plaintiff has appealed from this judgment, urging several grounds for its reversal. We are of the opinion, however, that the appeal must be dismissed because the judgment is not appealable. It provides that defendant "is entitled forthwith to an accounting by plaintiff for the rents, issues and profits of said premises while plaintiff was in possession thereof," and "that unless said parties are able to agree on said accounting and unless payment thereof is made by plaintiff to defendant" by specified dates defendant, if he so elects, may "proceed in this action to recover said rents, is-

sues and profits thereof. * * *." It is manifest that the judgment is merely interlocutory and was so intended because the court contemplated that further judicial proceedings would be necessary in this action before there would be a final adjudication of the matter. An appeal does not lie from such a judgment. *Lacey v. Bertone*, 33 Cal.2d 649, 653, 203 P.2d 755.

The appeal is dismissed.

**SHENK, EDMONDS, CARTER
TRAYNOR, SCHAUER, and SPENCE,
JJ., concur.**



35 Cal.2d 76

**ANSELL v. CITY OF SAN DIEGO.
L. A. 21280.**

Supreme Court of California, in Bank.
April 4, 1950.

Action by H. G. Ansell against the City of San Diego, a municipal corporation, and others, for damages resulting from collision between plaintiff's automobile and defendant's rubbish truck. The Superior Court of San Diego County, Arthur L. Mundo, J., granted defendant's motion for judgment of dismissal, and plaintiff appealed. The Supreme Court, Schauer, J., held that statute requiring verified claim to be filed with clerk or secretary of legislative body of municipality did not apply to or control claims or actions against a public agency.

Judgment reversed, and cause remanded.

For prior opinion of District Court of Appeal, see 209 P.2d 618.

I. Counties 213

Municipal corporations 741(1)

States 197

Statute requiring the filing of claims for injuries or property damage as result of negligence of public officer or employee

1. That section reads as follows: "Whenever it is claimed that any person has been injured or any property damaged as a result of the negligence or careless-

ness of any public officer or employee occurring during the course of his service or employment or as a result of the dangerous or defective condition of any with the officer or employee and the clerk or secretary of the legislative body of public agency applies only to actions against officers and employees of the public agency and not to actions against the public agency. Government Code, §§ 2, 1981.

2. Automobiles 230

Under statute requiring the filing of claims for injuries or property damage as result of negligence of public officer or employee with the officer or employee and the clerk or secretary of the legislative body of public agency, failure to file claim with allegedly negligent city employee driving municipally owned rubbish truck did not preclude maintenance of personal injury action against city. Government Code, §§ 2, 1981; Vehicle Code, § 400; St. 1939, p. 3175, § 110.

J. A. Donnelley and Richard P. McNulty, San Diego, for appellant.

McInnis & Hamilton, J. W. McInnis and Jean F. DuPaul, City Attorney, San Diego, for respondents.

SCHAUER, Justice.

Plaintiff appeals from a judgment of dismissal of his action for damages against defendant City of San Diego, a municipal corporation, resulting from a collision between an automobile owned and driven by plaintiff and a rubbish truck owned by defendant and allegedly negligently operated by a city employee while acting within the scope of his employment. The record on appeal consists of a clerk's transcript and, by stipulation of the parties, a partial reporter's transcript. Trial was before the court without a jury. The allegedly negligent city employee was originally joined as a defendant but before trial the action was by stipulation dismissed as against him.

The parties agree that the sole issue on appeal is whether plaintiff sufficiently complied with claim provisions of section 1981¹ of the Government Code, and the reporter's

ness of any public officer or employee occurring during the course of his service or employment or as a result of the dangerous or defective condition of any

transcript sets forth only the evidence relating to that issue.²

[1] It appears, however, that an action for damages caused by the negligent operation of a motor vehicle by an employee of a municipal corporation, acting within the scope of his employment, may be maintained against the municipal corporation employer (see Vehicle Code, § 400) without alleging or proving compliance with section 1981 of the Government Code. That section is found in a chapter (Ch. 6 of Div. 4 of Tit. 1) of the Government Code which deals with liability of officers and employees public agencies and provides for the filing of public agencies and provides for the filing of a claim with both the officer or employee and the clerk or secretary of the legislative body of the public agency. The section (1981) is based upon Stats. 1931, p. 2476, ch. 1168, sec. 1, 1st, 3d sents., p. 2477, as amended (Deering's Gen. Laws, Act 5150, § 1), the provisions of which were unanimously declared by this court in *Dillard v. Kern County*, (1943), 23 Cal.2d 271, 274, 144 P.2d 365, 367, 150 A.L.R. 1048, to apply "only to actions against officers or employees of the public agency and not to actions against the public agency." Support for the declarations of the *Dillard* case is found in *Jackson v. City of Santa Monica* (1936), 13 Cal.App.2d 376, 386, 57 P.2d 226 (hearing by this court denied); *Raynor v. City of Arcata* (1938), 11 Cal.2d 113, 122, 77 P.2d 1054, and *Redlands High School Dist. v. Superior Court* (1942), 20 Cal.2d 348, 357, 125 P.2d 490. Thus, in the *Jackson* case it is stated that [13 Cal.App.2d

376, 57 P.2d 231] "the purposes of Act 5150 were to prescribe rules of procedure for the enforcement of claims against officers, to provide for the defense of suits for damages against officers, and to authorize the insurance of officers at public expense; the purpose was not to lay out procedure for the enforcement of negligence claims against cities or the state. The filing of claims against officers with cities or the state was required only for the information of city or state authorities. Therefore, under the acts in question [Deering's Gen. Laws, Acts 5149 and 5150], where a city, but not an officer thereof, is charged with liability, a claim need be filed with the city only in the cases specified in Act 5149 [claims of liability by reason of dangerous or defective condition of public property]." And in the *Raynor* case this court pointed out that "The provisions of [Act 5149] * * * are not applicable herein, where the injury is alleged to have resulted from negligent operation of a public motor vehicle, rather than from the dangerous or defective condition of public property. Act 5150, Stats. 1931, p. 2476, relates to liability of public officers, not to liability of the city or other governmental agency. [citing the *Jackson* case, supra.] [11 Cal. 2d 113, 77 P.2d 1059]

It may also be noted that a comparison of the language of section 1981 with those provisions of section 1 of Act 5150 upon which it is based clearly indicates that insofar as concerns the point here at issue the provisions of the two statutes are substantially the same, and that therefore,

public property, alleged to be due to the negligence or carelessness of any officer or employee, within 90 days after the accident has occurred a verified claim for damages shall be presented in writing and filed with the officer or employee and the clerk or secretary of the legislative body of the school district, county, or municipality, as the case may be. In the case of a State officer the claim shall be filed with the officer and the Governor."

2. At the time of the collision here involved the charter of San Diego (§ 110; Stats. 1939, p. 3175) provided that "No suit shall be brought on any claim for money

or damages against The City of San Diego, or any officer or commission of the City, until a demand for the same has been presented to the Auditor and Comptroller and rejected in whole or in part by the Council. If rejected in part, suit may be brought to recover the whole. Except in those cases where a shorter period of time is provided by law, all claims for damages against the City must be presented within six months after the last item of the account or claim has accrued." Pursuant to such charter provisions plaintiff did, within six months after the accident, file a demand with the city auditor and comptroller.

pursuant to the requirement of section 23 of the Government Code, the later enactment (§ 1981) is to be construed as a restatement and continuation of the earlier (Act 5150). Consistently with the construction principle laid down by section 2 of the Government Code, it was directly held in *Tyree v. City of Los Angeles* (1949), 92 Cal.App.2d 182, 184, 206 P.2d 912, 913 (quoting the unpublished opinion authored by Judge Bishop for the Appellate Department of the Superior Court in *Rubin v. City of Los Angeles*), and *Saldana v. City of Los Angeles* (1949), 92 Cal.App.2d 214, 217, 206 P.2d 866 (also citing Judge Bishop's opinion in the *Rubin* case) that "section 1981 does not apply to claims made against a city" and that failure to file the claims with the respective employees charged by the plaintiff with negligent driving in those cases did not, insofar as the provisions of section 1981 are concerned, preclude action against the city. And in express reliance upon those two cases it has more recently been held in *Glenn v. City of Los Angeles*, (1950), 96 Cal.App.2d 86, 214 P.2d 533, that presentation of a claim to the city was not required by section 1981 in order to hold the city liable for damages when plaintiff was struck by a negligently operated city-owned automobile.

Defendant city can find no comfort in the holding of *Artukovich v. Astendorf* (1942), 21 Cal.2d 329, 333, 131 P.2d 831 (see also *Johnson v. Fresno County* (1944), 64 Cal.App.2d 576, 578, 149 P.2d 38), that under the provisions of former Political Code section 4075 (now found in the Government Code, see sections 29700-29721) a claim must be filed with a county before it can be held liable for injuries resulting from the negligent driving of a county truck. Political Code section 4075, unlike Government Code section 1981, specifically provided that "All claims against any county * * * shall be presented to the board of supervisors * * * before any suit may be brought on any such claim, and no suit shall be brought on any such claim

until said claim has been presented as herein provided * * *."

[2] We hold that section 1981 of the Government Code does not apply to or control claims or actions against a public agency; any contrary implications in *Johnson v. Fresno County* (1944), supra, 64 Cal.App.2d 576, 578, 149 P.2d 38; and *Abrahamson v. City of Ceres* (1949), 90 Cal.App.2d 523, 528, 203 P.2d 98, are disapproved.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with the law as hereinabove declared.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.



96 Cal.App.2d 859

PEOPLE v. GLENN.

Cr. 2582.

District Court of Appeal, First District,
Division 2, California.

April 7, 1950.

Hearing Denied May 4, 1950.

Thomas L. Glenn was convicted in the Superior Court in and for the County of Alameda, O. D. Hamlin, Jr., J., of grand theft, and he appealed. The Court of Appeal, Nourse, P. J., held that evidence showing that defendant as an attorney received and retained funds of clients without authority, sustained conviction.

Affirmed.

1. Embezzlement § 44(1)

Evidence that money was paid attorney by client on behalf of another client for use in paying state unemployment insurance and that attorney retained payment as a fee instead of paying the in-

the same subject matter shall be construed as restatements and continuations, and not as new enactments."

3. "The provisions of this code in so far as they are substantially the same as existing statutory provisions relating to
216 P.2d—29½

surance, sustained conviction of grand theft.

2. Embezzlement ⚡44(1)

Evidence that money from sale of debtor's property was turned over to attorney to be placed in escrow for purpose of paying creditors, that attorney opened an account as trustee, that substantial amounts were withdrawn from account as fees and that other amounts were withdrawn for purposes unrelated to the trust, sustained conviction of grand theft.

3. Embezzlement ⚡44(1)

Evidence that attorney received \$4000 from client to repay loan of \$500 and for payment of certain bills, that attorney paid only \$325.41 in bills and that all other bills were left unpaid, sustained conviction of grand theft.

4. Embezzlement ⚡44(1)

Evidence that money was received by attorney from client for purpose of loaning the money to certain parties on a first deed of trust and that amount of loan if made was returned to attorney but that he never repaid client, sustained conviction of grand theft.

5. Embezzlement ⚡44(1)

Evidence that attorney had received money for client, from sale of real property, that he retained \$1,700.00 of the amount without authority and that frequent demands for payment of that balance had been made by client, sustained conviction of grand theft.

6. False pretenses ⚡49(1)

Evidence that attorney had agreed on behalf of client and others to bring about rezoning of certain property for \$1500.00 cash and \$1,000 when the rezoning was accomplished, that the \$1,000 was thereafter paid on the representation that the area had been rezoned when in fact it had not been, sustained conviction of grand theft.

7. Attorney and client ⚡145

Attorney who was to become entitled to additional fee upon rezoning of property for business use could not become entitled to additional fee because his unsuccessful efforts had allegedly retarded measures

against clients so that they were able to continue their business for two years in residential district.

8. Criminal law ⚡1166½(12)

In prosecution of attorney for embezzlement of clients' funds, where a portion of the money which attorney had misappropriated from client was claimed by him as counsel fees in a suit to terminate a joint tenancy, action of trial judge in questioning attorney as a witness relating to the reasonableness of an attorney's fee in a proceeding to terminate a joint tenancy was not prejudicial misconduct, particularly in view of court's charge on its own motion that if the court had asked any questions which seemed to suggest the opinion of the court as to any question of fact, the jury should not be influenced thereby.

9. Criminal law ⚡715

In prosecution on 12 counts of grand theft, use by prosecution of a chart of the 12 alleged thefts for purposes of illustration and subject to an instruction that chart was not evidence, was proper and nonprejudicial.

10. Criminal law ⚡641(1)

A party who is represented by counsel is not entitled as a matter of right to be heard by himself and whether he shall be permitted to be so heard is in discretion of trial court.

11. Criminal law ⚡1166½(1)

The court's refusal to allow defendant to appear as counsel in his behalf during selection of jury was not prejudicial where defendant was otherwise permitted to participate as attorney throughout trial.

12. Criminal law ⚡713

In prosecution of attorney for theft of money received from clients wherein defense was rested almost entirely on claim that attorney was entitled to keep the money in payment of fees, the canons of ethics and accepted practices of the legal profession became proper matters for argument, and oral argument of the district attorney condemning the defendant attorney's breach of the ethics of his profession was not misconduct.

13. Criminal law Ⓒ720(6)

District attorney in argument is entitled to draw his conclusions from the facts in evidence.

14. Criminal law Ⓒ728(3)

Defendant who believes that district attorney has exceeded proper limits in argument should make assignment of error at the time in order that trial court may instruct the jury if the argument is improper.

15. Criminal law Ⓒ730(1)

Whether district attorney has used improper argument is largely within discretion of trial court.

16. Criminal law Ⓒ730(1), 919(5), 1037(1)

Where no objection is made by defendant to misconduct of district attorney claimed to be prejudicial or court sustains objection and properly admonishes jury, such misconduct is insufficient to justify granting of new trial or reversal of judgment.

17. Criminal law Ⓒ941(1)

In prosecution of attorney for embezzlement of clients' funds, alleged receipt which if produced at trial would merely have added to proof of chicanery surrounding whole transaction, did not require new trial on ground of newly discovered evidence.

18. Criminal law Ⓒ829(3)

In prosecution of attorney on charge of obtaining money by false pretenses, requested instruction that the crime could not be predicated upon a representation or a promise in the future was adequately covered by given charge defining false pretense as a fraudulent representation of a present or past fact.

19. Criminal law Ⓒ829(4)

In prosecution of attorney for embezzlement of clients' funds, subject matter of proposed instructions covering defense that the moneys were lawfully retained as attorney's fee was adequately covered by given instructions which stated the attorney's contention and authorized acquittal if jury believed that defendant was authorized to retain the funds involved or if there was reasonable doubt as to whether

he was authorized to receive or retain any such sum as attorney's fees.

20. Criminal law Ⓒ1173(1)

Alleged error in refusal to give proposed instructions is not ground for reversal in absence of claim that subject matter was not fully covered by given instructions or of showing that rejection was prejudicial.

Thomas L. Glenn, in pro. per., and Ivan C. Sperbeck, Oakland, attorney for appellant.

Fred N. Howser, Attorney General of the State of California, Clarence A. Linn, Deputy Attorney General, J. F. Coakley, District Attorney of the County of Alameda, Cecil Mosbacher, Assistant District Attorney, Laurence E. Dayton, Assistant District Attorney, Oakland, attorneys for respondent.

NOURSE, Presiding Justice.

Defendant was found guilty by a jury on 12 counts of grand theft and appeals from the judgments of conviction entered thereon and from the orders denying a new trial. We will first consider the contention that the verdicts are not supported by the evidence.

[1] *Count 1.* Theft of \$900 on July 10, 1946, given defendant by his client Reilly in behalf of his client Rasmussen. The latter was a contractor who was in debt when Reilly associated with him. Defendant acted as attorney with respect to both the debts and the association. Because of continuing pressure of Rasmussen's creditors it was agreed that Reilly would take the business in his name and as a matter of form buy Rasmussen out. Most pressing debts were \$1100 to Internal Revenue and \$900 State unemployment insurance. Reilly first agreed to pay \$1100 to be used on the payment of those debts, which amount he paid to defendant in June, 1946. On July 10, 1946, he gave defendant a check for \$900 more saying that Rasmussen had that much more coming to him and that it was to be used for the same purpose. In August defendant paid

\$1100 to the Internal Revenue; the State unemployment insurance was never paid. Defendant contends that he was entitled to keep the \$900 as fee; that the money Reilly paid was intended for Rasmussen, that Rasmussen knew he owed defendant a fee and did not instruct him to use the \$900 for creditors or demand return to himself, whereas Reilly could not restrict the use of the money he owed to Rasmussen; that defendant reported the \$900 as taxable income. However respondent quotes testimony of Rasmussen and Reilly showing that defendant himself informed Rasmussen that the \$900 due the State had to be paid immediately and advised him to get it from Reilly and that Reilly told defendant that he brought the defendant the \$900 for payment of these taxes with the knowledge of Rasmussen. It is argued that this evidence shows a binding understanding between defendant, Rasmussen and Reilly to use the \$900 only for the necessary payment to the State, and the evidence fully supports that theory.

[2] *Counts 2 to 8.* These were closely interrelated. They all relate to thefts from defendant's client Piotti. In 1947 Piotti, a tavern owner, was deeply in debt and became ill; he therefore offered his tavern for sale. One of his creditors, Harry Davis, brought defendant to his home. According to the evidence of the People, it was agreed that defendant would act as escrow holder for the sale, pay off the creditors and after everything had been paid take his fee which "wouldn't be too much" and give Piotti what was left. He induced Piotti, who was ill, to sign a power of attorney in the name of Mrs. Piotti. Mrs. Piotti concluded a sale of the tavern for \$27,000 and a check of \$26,500 dated June 2, 1947, was turned over to defendant to be placed in escrow for the purpose of paying the creditors. On June 3, 1947, defendant opened an account for himself as trustee (not mentioning a specific trustor) in which the \$26,500 was deposited. A copy of the ledgersheet of that account shows that from June 3 to October 3, 1947, the whole deposit was withdrawn (there was even a small overdraft) and no deposit except the original one was made until

that date. Some of the withdrawals were concededly legitimate but the following ones are made the basis for the grand theft charges. Immediately on June 3, 1947, defendant withdrew \$2500 as his fee, (count 2) on June 11, \$1000 (count 3) and on August 18 again \$1000 (count 7), all as fees. On July 8, 1947, he gave a check for \$1500 on the trust account to refund a deposit to that amount made in May, 1947, on the purchase price of real property belonging to another client of defendant, which amount defendant had then deposited in his personal account (count 4). On July 24, 1947, he gave a check of \$300 on the trust account to pay off the same amount which he had received on November 19, 1946, on a judgment recovered for another client which amount he had then deposited in his personal account (count 5). On August 4, 1947, he gave a check of \$500 as a loan to Betty Nelson, who had engaged him as an attorney with respect to the settlement of the liabilities and the termination of a joint tenancy interest of her husband who had been killed in an accident a week before; that check was paid out of the Piotti trust account (count 6). On September 2, 1947, he gave to Mrs. Murray, a client, a check of \$3500 on the same trust account as second party payment on an amount of \$6700 he had received for her in April, 1947, from the sale of real property, and which amount he had not deposited in the trust account. Piotti stood in no relation whatever to any of the four clients of defendant to whom these payments were made. During the period of these seven withdrawals, undisputed tax debts in large amounts remained unpaid; the Collector of Internal Revenue had served on defendant a levy for taxes due from Piotti. (Debts totaling \$7000 in which Davis, who introduced defendant to Piotti, had an interest were paid in full.) On July 25, 1947, Mrs. Piotti made written demand for an accounting of the escrow money and instructed defendant to deliver all funds and papers to her attorney Bernard Sheridan. Notwithstanding continued pressure by that attorney nothing was ever paid back. Defendant claimed \$5000 as fee. In a return

to the levy of the Collector of Internal Revenue of February 28, 1948, defendant stated that he had \$9,899 on hand after deduction of all payments made for Piotti and \$5000 fees. This amount was not paid to the Collector. For the first time at the trial defendant testified that in March, 1948, he had returned it to Piotti in cash taken from defendant's safe where he had put it in accordance with alleged instructions of Piotti to keep it from the hands of the creditors. He claimed that he had the receipts in the files which the district attorney took from his office. All this is denied by Piotti and is in conflict with prior statements of defendant. Defendant argues that he testified to an agreement entitling him expressly to a fee of \$5000, but even if this was not accepted (the Piottis denied it) he was entitled to a fee to come from the escrow amount and there was expert evidence that \$5000 was a reasonable fee for the work he did. Respondent points out the contradictions and impossibilities in defendant's evidence as to his services—among other things he testified to conferences in the year 1947 in behalf of Piotti with Frank Hogan, one time president of the American Bar Association, who died in 1944—and to the fact that much of the alleged service was performed, if at all, after his authority had been revoked. Defendant maintains that differences as to reasonableness of fees do not constitute theft. With respect to the payments to other clients from the trust account, defendant argues that these do not constitute theft because there was no proof that the money in that account belonged to Piotti as the account was not opened as an account for that specific trust but as containing money from clients in general. Respondent points to the fact that at the time the payments were made there had been no deposit of any other money in that account other than that of the Piotti trust.

[3] *Count 9.* Theft of \$3,142.59 from his client Betty Nelson. Betty Nelson, to whom defendant had loaned \$500 from the Piotti trust money, (count 6) gave defendant on September 30, 1947, \$4000 to repay the \$500 and for the payment of certain

bills. Defendant paid only \$325.41 in bills. All other bills he left unpaid. The money was expended partly over defendant's personal account, partly over the trust account. Defendant testified that he returned the \$4000 in November, 1947, and there was a supporting witness, but Mrs. Nelson denied it and there is much evidence that in the first part of 1948 defendant took the position that he still owed Mrs. Nelson the \$4000. He could not produce the receipt he said Mrs. Nelson had given him.

[4] *Count 10.* Theft of \$2500 from Betty Nelson on October 30, 1947. On October 21, 1947, Mrs. Nelson gave defendant a check for \$2500 to be loaned to Mr. and Mrs. Mouat on a first deed of trust. The Mouat property was encumbered. Defendant testified that he nevertheless made the loan and after some months received the money back, all without receipts. Mr. Mouat testified that he never received it. At any rate the money was not returned to Mrs. Nelson. Defendant testified that Mrs. Nelson had let him keep that money to take care of the loan, costs and fees she owed him. He contends that she owed him \$500 loan, \$500 costs and \$1500 fees. Mrs. Nelson denied all of this.

[5] *Count 11.* Theft of \$1500 from his client Mrs. Murray on November 19, 1947. Under count 8 on September 2, 1947, defendant paid back from Piotti's money \$3500 of an amount of \$6700 received for Mrs. Murray. Prior to that date (April 15, 1947) he had returned her \$1500. There were also a few other small receipts and payments in that time. From September, 1947, to March, 1948, Mrs. Murray pressed defendant to get the remaining amount of approximately \$1700. On February 13, 1948, he had his secretary pay her \$150 but had her sign a promissory note for it, not knowing the character of the paper, but thinking it was merely a receipt. Since then nothing was returned to her. Defendant contends that there could be no embezzlement as no demand to return the money was testified to, and that he, defendant, was entitled to the amount retained as fees; but the record

contains ample evidence showing frequent demands made upon the defendant over a period of more than a year. It also appears that no agreement was made as to fees and no authority to retain the money for that purpose was given.

[6,7] *Count 12.* Theft of \$1000 from W. A. Brechtel, a client, on December 23, 1947. Defendant had agreed in behalf of Brechtel and others to bring about the rezoning as business property of the district in which Brechtel and those others had business property for \$1500 cash and \$1000 "if and when the rezoning is accomplished." On December 23, 1947, he told Brechtel that the area had been rezoned and that they would get their license in a few days. On these representations the final \$1000 was paid. The area was not rezoned. This count was tried as constituting obtaining money by false pretenses. Defendant argues that the check of \$1000 was not given by W. A. Brechtel, as alleged, but by his son, Harry A. Brechtel and that the indictment was not amended. But it appears that the check was drawn by the son on the father's request and it is a fair inference that it was the father's obligation. He denies that he told the Brechtels that the rezoning had taken place and argues that the further fee of \$1000 was at any rate due because of defendant's services in retarding the measures against the Brechtels so that they could continue their wholesale business for two years in a residential district. But defendant was not hired for that service and could not charge a fee without the consent or knowledge of his client.

The foregoing statement of the evidence is a sufficient answer to defendant's contentions that the several verdicts are not supported by substantial evidence. The testimony of the witnesses offered to prove those facts was clear and free from legal objection. Such denials as were made by the defendant were matters for the jury.

[8] The first assignment of error charges prejudicial misconduct on the part of the trial judge in his questioning of defendant as a witness relating to the reason-

ableness of an attorney's fee in a proceeding to terminate a joint tenancy. It had been shown that a portion of the moneys which defendant had misappropriated from a client named Nelson was claimed by him as counsel fees in a suit to terminate a joint tenancy. The State endeavored to show that this is a simple proceeding and the court asked defendant if it was not the usual practice to fix such fee at one-third of the statutory probate fee. Defendant replied that such method was a guide but that he did not usually follow it. The court then asked defendant what he considered a reasonable fee for this service and defendant answered, "\$250-\$300." Then the court asked him if, using the probate method, such fee would not have been \$148. Obviously an attorney charged with the embezzlement of his client's funds cannot claim the money as counsel fees without being questioned as to the reasonableness of the fee when the parties have not agreed upon the amount of the fee to be paid. That was all that the district attorney and the trial court sought to show here.

It is not necessary to treat this as a comment by the court on the facts. The trial judge and all counsel in the case knew the nature of the proceeding to terminate a joint tenancy, and the method by which fees were fixed in that county. Since one of the questions for the jury was whether defendant had retained an excessive amount for that purpose it was proper for the court to see that the jury was informed of the common practice.

For this reason we do not discuss the effect of defendant's failure to assign misconduct, nor his highly technical objections to the instructions given the jury covering the incident. It is sufficient to quote the pertinent portion of the charge given on the court's own motion: "If the Court has at any time during the trial *asked any question*, made any ruling or used any language that has seemed to you to indicate the opinion of the Court as to any question of fact, you must not be influenced thereby, but must determine for yourselves all questions of fact, without regard to any opinion you may suppose the Court may have or entertain."

[9] Appellant assigns as error the exhibition of a chart of the 12 alleged thefts, which had not been admitted in evidence. A photostatic copy of the chart is in the file. The use was objected to but permitted for purposes of illustration only with an instruction that it was not evidence. The principal objection is that the chart does not show that it is a diagram of the contentions of the prosecution and not of the proof, whereas the court asked, "the figures on the chart are taken from the facts in evidence?" to which question the district attorney answered affirmatively. There is no contention that such was not the fact. The objection relates especially to the last column entitled "Whose Money Used," a point strongly disputed. All parties and the jury knew that the chart was based on the State's evidence. It did not purport to state conceded facts or to determine the truth of the conflicting evidence. The jury was instructed that the chart itself is not evidence in the case. It was used for illustration of the argument only. This was both proper and non-prejudicial. "Counsel may illuminate his argument by illustrations which may be as various as the resources of his talents." *People v. Kynette*, 15 Cal.2d 731, 757, 104 P.2d 794, 808.

[10,11] Appellant complains of the court's refusal to allow him to appear as counsel in his own behalf during the selection of the jury. On motion of the defense before the opening statement of the prosecution appellant was permitted to participate as attorney throughout the trial. His argument on this assignment is free from any citation of or reference to any authority. He states that the jury might have been prejudiced by the order, but gives no reason why that should be so. He was present throughout the selection of the jury and does not contend that he was denied the right to confer with or to advise his counsel. The record discloses that the appellant participated as counsel throughout the trial and made one of the arguments in his behalf. But the rule is that when a party is represented by counsel he is not entitled "as a matter of right" to be heard by himself—that it is a matter within the discretion of the trial court. 23 C.J.S., Criminal Law,

§ 979, page 317, and cases cited. That rule is applicable here. The appellant has not given any reason indicating prejudice to him in the ruling and we find none.

[12] The alleged misconduct of the district attorney in his oral argument was not accompanied by an assignment of error in the trial court. Nothing would be served by repeating the language complained of. It is sufficient to say that it was a condemnation of appellant's breach of the ethics of his profession as a lawyer, and not too intemperate under the facts of the case. His argument that he should have been treated throughout the trial, and in the argument to the jury, merely as an individual charged with grand theft is not persuasive. The facts proved disclosed that it was by reason of his position as a lawyer, and that alone, that he obtained the money from his clients. His defense rested almost entirely on his claim that he was entitled to keep the money in payment of attorney's fees. It was his case that put in issue his right, as a lawyer, to appropriate the various sums as attorney's fees. Under these circumstances the canons of ethics and the accepted practices of the legal profession became proper matters for argument to the jury.

[13-15] The right of the district attorney in his argument to draw his conclusions from the facts in evidence cannot be denied. *People v. McKenzie*, 12 Cal.App.2d 614-616, 55 P.2d 1200; *People v. Eggers*, 30 Cal.2d 676, 693, 185 P.2d 1. But the controlling factor in matters of this kind is that when the defendant believes that the district attorney has exceeded the proper limits in his argument an assignment of error should be made at the time in order that the trial court may instruct the jury if the argument is improper. The question whether the district attorney overstepped the bonds of propriety in his argument is largely within the discretion of the trial court. *People v. Mayes*, 113 Cal. 618, 622, 45 P. 860; *People v. Eggers*, *supra*, 30 Cal.2d 693, 185 P.2d 1; *People v. Codina*, 30 Cal.2d 356, 362, 181 P. 2d 881; *People v. Fisher*, 86 Cal.App.2d 24, 32, 194 P.2d 116. The latter case is closely in point. There the defendant was a Negro. He was charged with an assault with a

deadly weapon upon two Negroes. The twelve jurors were Negroes. The district attorney referred to these circumstances in his argument and expressed the hope that the jurors would discharge their duties fairly notwithstanding the racial circumstances. The reviewing court held that the remarks were improper, but that, since no objection had been made, they were not grounds for reversal.

[16] Both the Codina case and the Fisher case recognize the exception to this rule when the remarks are of such a nature that an admonition to disregard them would be ineffectual. This subject is so aptly treated in *People v. Berryman*, 6 Cal.2d 331, 337-338, 57 P.2d 136, 139, that we quote at length a portion of the opinion since it is a complete answer to the point raised here: "The general rule regarding misconduct of the district attorney which tends to and is likely to result in prejudice to the defendant is that where no objection is made to such misconduct by the defendant, or where objection is made and the court sustains the objection and properly admonishes the jury, the misconduct claimed to be prejudicial to defendant's rights will not furnish grounds sufficient to justify the granting of a new trial or the reversal of the judgment. (8 Cal.Jur., § 603, p. 623, and cases there cited.) There are two exceptions to this general rule. One is where the case is closely balanced and there is grave doubt of defendant's guilt, and the acts of misconduct are such as to contribute materially to the verdict, a miscarriage of justice results requiring a reversal. *People v. Fleming*, 166 Cal. 357, 381, 136 P. 291, Ann.Cas.1915B, 881. The other exception is where the act done or remark made is of such a character that a harmful result cannot be obviated or cured by any retraction of counsel or instruction of the court. In such cases the misconduct will furnish ground for a reversal of the judgment, even where proper admonitions are given by the court. *People v. MacDonald*, 167 Cal. 545, 551, 140 P. 256; *People v. Derwae*, 155 Cal. 592, 597, 102 P. 266.

"Appellant cannot possibly come within the first of these exceptions; that is, that the case against him is a close case and therefore the objectionable statement of the

district attorney contributed materially to the verdict against him notwithstanding the admonition of the court to the jury to disregard it. The evidence showed without a shadow of a doubt that the deceased Grant met his death as a result of the criminal act of someone, and points unerringly to the appellant as the perpetrator of the crime. In a case so overwhelmingly against the defendant, the objectionable remark of the district attorney could not have had any material weight with the jury even had they been disposed to violate the court's admonition. The evidence before us would have compelled the conviction of the defendant had the objectionable remark not been made. Neither do we think that appellant can bring the remark of the district attorney within the second exception; that is, that the statement was so inherently prejudicial to defendant's rights that the harmful results therefrom were not obviated and cured by the court's admonition." The court further cited with approval the following statement in *People v. Warr*, 22 Cal.App. 663, 670, 136 P. 304: "[I]t very seldom happens that a mere observation of an attorney, expressed during the heat of his oration, fastens itself with such tenacity upon the minds of the jurymen as not to be dislodged by a direct instruction from the trial judge."

[17] Two assignments of error are made in the order denying the motion for a new trial. The first relates to an assertion of newly discovered evidence. This relates to the charge of theft under count 10. The evidence at the trial was that Betty Nelson gave appellant \$2500 in cash to be loaned to Mouat on a first deed of trust. The property was encumbered and the loan could not be made. Appellant had testified that he had nevertheless given the money to Mouat and a few months later had received it back, all without receipts. On his motion for a new trial he claimed to have found a receipt from Mouat. But if he had produced such a receipt at the trial it would have availed him nothing; it would have merely added to the proof of chicanery surrounding the whole transaction. He had testified that Mrs. Nelson had "let him keep" the money for what she owed him, to wit, \$500 for

work on the loan, \$500 for costs, and \$1500 attorney's fees. If he had put in evidence the receipt from Mouat the only controversy would have been whether he stole the money from Betty Nelson on October 21, 1947, or on October 30th of the same year. The motion for a new trial was properly denied on this ground.

[18] The second ground urged relates to the complaint about instructions given and refused. His first assignment covers the refusal to give his proposed instruction relating to the charge of obtaining money by false pretenses outlined in count 12. He states that the portion instructing that the crime "cannot be predicated upon a representation or a promise in the future" was not elsewhere covered. In this he is mistaken. The trial court instructed the jury on that subject fully and we quote but a part of the instruction: "A false pretense is defined to be such a fraudulent representation of an existing or past fact which is made by one who knows it not to be true or made recklessly and without information justifying a belief that it is true, and which is adapted to influence the person to whom it is made to part with something of value. The representation must be of a present or past fact, and not a mere expression of opinion or representation of an act to be performed in the future."

[19] Appellant complains of the refusal to give his proposed instructions numbered 13 and 15 covering his defense that the moneys alleged to have been embezzled by him were lawfully retained as attorney's fees. Again he is mistaken in saying that the matter was not covered by instructions given. The jury was instructed: "The defendant has contended that certain sums of money received or retained by him were received or authorized by the owner thereof to be retained by him as attorney's fees. If from the evidence pertaining to any count or counts of the indictment you believe that the defendant was so authorized, or that there is a reasonable doubt as to whether or not any such sum was authorized to be received or retained by the defendant as an attorney's fee, you should

vote to acquit the defendant upon any such count or counts."

[20] Finally appellant lists, by number only, twelve proposed instructions which were not given as proposed. He does not claim that the subject matter was not fully covered by the instructions given, nor does he advance any reason why he was prejudiced by their rejection. In a case of this kind it is not sufficient to merely argue "error" without some attempt to show wherein the asserted error was prejudicial.

The judgments and the orders denying a new trial are affirmed.

GOODELL and DOOLING, JJ., concur.



96 Cal.App.2d 937

LAWRENCE et ux. v. DOTY et al.

Civ. 17250.

District Court of Appeal, Second District.
Division 3, California.

April 12, 1950.

Action by Robert H. Lawrence and wife against George R. Doty and others to rescind the purchase of a citrus grove. From a judgment of the Superior Court of Ventura County, Louis C. Drapeau, J., in favor of defendants, the plaintiff appealed. The District Court of Appeals, Shinn, P. J., held that the evidence was sufficient to sustain findings that defendants did not make any false or fraudulent representations, and that plaintiffs purchased in reliance upon their own judgment.

Judgment affirmed.

1. Vendor and purchaser Ⓒ44

In action to rescind purchase of citrus grove, evidence that vendor had made a complete disclosure of production over a period of years, that he represented that grove was a good grove on good soil but

not that it was top grade quality, that grove compared favorably with other groves in the locality and that water supply was as good as average in locality, was sufficient to sustain a finding that vendor and wife had not made any false or fraudulent representations, and that their representations were made honestly and in a reasonable belief that they were true.

2. Vendor and purchaser ⇨44

Statements by vendor of citrus grove to vendee prior to purchase regarding quality of grove were presumptively made honestly and in good faith.

3. Vendor and purchaser ⇨36(2)

Statements by vendor of citrus grove that grove was a good grove on good soil, that grove had sufficient water supply from well on the premises and that trees were in healthy condition could properly have been regarded as mere expressions of opinions, honestly and reasonably entertained, as respects rescission of purchase.

4. Vendor and purchaser ⇨33

Where purchasers go upon property with experts who find nothing wrong and so inform purchasers, and where purchasers are not hindered in their investigation nor persuaded to discontinue it and means for determining the facts are fully accessible, purchasers will be deemed to have acted upon their own judgment, being satisfied with result of investigation, and cannot be heard to say that they made less than full investigation unless they were hindered therein or persuaded by representations or other actions of vendor to discontinue inquiries before they were completed.

5. Vendor and purchaser ⇨44

In action to rescind purchase of citrus grove, evidence that purchaser went upon property with experts and examined trees and soil and that they were not hindered in their investigation nor persuaded to discontinue it and that means for determining the facts were fully accessible was sufficient to sustain a finding that purchasers bought in reliance upon their own judgment and not upon representations of vendors.

Martin H. Easton, Los Angeles, for appellants.

Don R. Holt, Edward Henderson, Ventura, Margaret Keller, Ventura, of counsel, for respondents.

SHINN, Presiding Justice.

This is an action of Robert H. Lawrence and wife against George R. Doty and wife for the rescission of a purchase by plaintiffs of a citrus grove for the sum of \$80,000, of which \$23,000 was paid down, and the balance secured by a note and trust deed. Plaintiffs had paid an additional \$17,000 and interest at the time they brought their action. It was alleged in the complaint that plaintiffs were inexperienced in the operation of citrus groves and ignorant as to their value; that defendants represented that the grove contained 11 acres planted to oranges and 8 acres planted to lemons; that the soil was good; the property had an abundant supply of water from a well on the premises; that the grove was of top grade; that the trees were all of good root stock; that the fruit was not damaged by frost or cold; that the lemon trees were highly productive; that all trees were in a healthy condition; that the grove had a total of 800 lemon trees; that the crop then growing was worth \$15,000; that the grove was worth \$80,000 and would produce a net profit sufficient for the support of a family. It was alleged that the representations were made with intent to deceive plaintiffs, that they were untrue and that the property was worth not more than \$40,000, which the defendants well knew. Plaintiffs made their purchase in January, 1946. The complaint alleged that they became suspicious as to the quality and value of the grove in the Spring of 1948, that they caused the soil and water to be analyzed and the trees and location to be examined by experts, and that on or about July 7, 1948, the falsity of the representations was established and could not have been established at an earlier date. Plaintiffs gave notice of rescission July 21, 1948, demanded the return of their money and offered to account for any sums due from them to the defendants. Defendants denied the charges of fraud and alleged that

prior to their purchase plaintiffs conducted a complete investigation of the property and its income, and purchased the same in reliance upon their own judgment and the advice of third persons. It was also alleged that in January, 1948, when the sum of \$2,500 fell due on the note, plaintiffs applied for and were granted an extension to and including July 15, 1948 in which to make said payment, and that plaintiffs thereby confirmed and ratified their said purchase. After an extended trial the court made findings that defendants did not make any false or fraudulent representations, that all of defendants' representations were made honestly and with the reasonable belief on their part that the same were true, and that on the date of plaintiffs' purchase the property had a reasonable market value of \$80,000. It was found that prior to January 1, 1947, plaintiffs conducted a complete investigation of the property, including the soil, water, trees and crops growing thereon, and the income that had been produced therefrom prior to their purchase; that plaintiffs, after their suspicions were aroused, offered the property for sale at prices ranging from \$65,000 to \$95,000; that in January, 1948 they applied for a six months' extension of time for the payment of a \$2,500 installment on the note, which was granted, and that plaintiffs by their operations of the property and other acts did confirm and ratify their purchase. Plaintiffs appeal from a judgment in favor of defendants.

As grounds for the appeal appellants claim insufficiency of the evidence to support any of the essential findings. Although they make a good argument upon the facts they emphasize the strength of their case, rather than the alleged weakness of the defendants' case, with relation to the following findings: (1) That defendants did not represent that the grove was a "top place"; (2) that the property was worth \$80,000; (3) that plaintiffs did not rely upon the representations of defendants; (4) that defendants did not represent that the grove was growing upon good soil; (5) that defendants did not represent that the orchard had as one of its appurtenances a

good water supply; (6) that the representations made by defendants were made honestly and with a reasonable belief that they were true; (7) that plaintiffs conducted a complete investigation of the property including soil, water, trees and crops prior to January, 1947, thereafter continued in possession endeavoring to sell the property, in January, 1948 obtained an extension of time for the payment of an installment of \$2,500 and by their conduct did confirm and ratify their purchase. The court made 52 separate findings. They recite in great detail the history of the development and operation of the property from the time it was acquired in 1928 by defendants until plaintiffs' attempted rescission in July, 1948. We shall paraphrase these findings, inasmuch as they summarize the evidence and indicate the court's factual conclusions therefrom. In January, 1946 there were 741 lemon trees on the easterly 7.15 acres and 985 orange trees on the westerly 10.90 acres; also improvements consisting of a residence, other buildings, water well, pipelines, irrigation system, windbreaks and roads of the total value of \$30,000. Over a ten year period, 1936 to 1945, the gross receipts from oranges had averaged about \$4,800 per year. For the years 1942-45, inclusive, gross receipts from lemons had been about \$8,500 per year. When plaintiffs purchased there were approximately 5,453 boxes of oranges and approximately 4,805 boxes of lemons on the trees; from the time the trees came into bearing the grove had always been a good producer; it had been affected by a freeze only twice, in 1937 and February, 1946; plaintiffs knew of the latter freeze and inspected the trees before they made their purchase; when plaintiffs purchased the orange and lemon orchards were in good condition and producing the average quantity of fruit for the locality; the grove is in a good location but is better for lemons than for oranges; around the residence and other buildings there is an underlying clay bed which fact was made known by defendants to plaintiffs before the purchase, but all the remainder of the land is a deeper sandy loam which produces a good grade of oranges, and lemons of

good quantity, of marketable quality and average size; defendants had never made an analysis of the soil as to its quality or depth; plaintiff Robert H. Lawrence before his purchase took upon the property his father-in-law, W. P. Thatcher, a citrus grower who lived near the Doty grove, also, William Phillips, manager of Mr. Thatcher's orchard and an experienced grower, also, John Newman, a friend of plaintiffs and manager of a company engaged in extensive citrus growing in Ventura County, experienced in citrus trees and soil; they tested the property with a soil tube, discussed the condition of the property, the trees, the type of soil and methods that should be used in operating the orchard; both said Newman and Phillips expressed their opinions to Robert H. Lawrence that the grove and the fruit thereon "looked alright to them"; before the purchase defendants exhibited to plaintiffs records of production of the grove for the years 1941-45 with packing house returns from the years 1936-45, inclusive, all of which were examined by plaintiffs; plaintiffs relied upon their own examination and the examination and opinions of Phillips, Newman and Thatcher and not upon any representations made by defendants, and after the freeze in February, 1946 and before the sale was consummated defendants offered to release plaintiffs from their agreement of purchase but plaintiffs refused the offer; plaintiffs marketed oranges and lemons in 1946 to the value of about \$16,000 and in 1947 to the value of about \$7,300.

There are at least three findings, any one of which is sufficient to support the judgment: (1) Defendants did not make any false or fraudulent representations; their representations were made honestly and in a reasonable belief they were true; (2) plaintiffs purchased in reliance upon their own judgment and not upon the representations of defendants; (3) plaintiffs ratified their purchase by remaining in possession from January, 1946 until July, 1948 and in requesting and obtaining a six month's extension for the payment of a \$2,500 installment after they had knowledge of facts which caused them to believe that they had purchased an inferior grove.

[1-3] The first finding, which we have combined from separate findings, is supported by the testimony of Mr. Doty that he made a complete disclosure of the production from the grove over a period of years; he represented it was a good grove on good soil but not that it was of top grade or quality; the grove had a sufficient water supply from a well on the premises but he made no representation as to the quality of the water. The court found that the soil and water were good, that the grove was a good one, which had produced and was capable of producing fruit in average quantities and of average quality for groves in the vicinity. The record contains sufficient evidence to support these findings, notwithstanding the fact there was evidence that neither the soil, water nor the trees was of the highest quality. There was testimony by competent witnesses that the grove compared favorably in these respects with other groves in the locality and that it came up to the representations of Mr. Doty. There was also expert testimony that the property was worth \$80,000. It necessarily follows that if defendants' representations were true the court could not reasonably have found them to have been made in bad faith. But regardless of their accuracy the evidence tended to prove that all the statements of the defendants concerning the property were justified by the facts which were known to them. It was undisputed that the grove had produced as a good grove. Although it was developed through investigations made by defendants during the two and a half years they were in possession that the water from the well was saline and many of the trees were afflicted with one disease or another, the claim that defendants knew these facts and concealed or misrepresented them is not supported by the record. There was evidence that while the growth of the orange trees had been retarded, this was not necessarily due to the quality of the water, and there was no evidence that defendants knew or had reason to believe when they sold the property that the water was not entirely suitable for citrus irrigation. The only water analysis ever made by defendants was not to

determine its fitness for citrus irrigation but was in connection with the installation of a water softener for household use in 1938, and a copy of this analysis was given to plaintiffs by defendants prior to the purchase. There was expert testimony to the effect that the water supply was as good as the average in the locality although not of superior quality. While admitting that he knew that a disease known as gummosis had appeared in the grove, Mr. Doty testified that he informed plaintiffs of that fact. Another disease, dry bark, according to the experts, had made its appearance only within two years preceding the trial and there was no evidence that Mr. Doty knew of its existence at the time of the sale, or even that it had made an appearance in the grove at that time. Some of the trees were afflicted with cirrhosis but not to an unusual extent for the locality, and Mr. Doty testified that he had not discovered that any of his trees were so afflicted. Plaintiffs' briefs do not refer to any evidence that would overcome as a matter of law not only the testimony of Mr. Doty that he believed all of his statements to be true, but also the presumption that they were made honestly and in good faith. And in addition all the statements Mr. Doty admitted having made could properly have been deemed by the courts mere expressions of opinion, honestly and reasonably entertained. *Carter v. Seaboard Finance Co.*, 33 Cal.2d 564, 569, 203 P.2d 758; *Harting v. Cebrian*, 10 Cal.App.2d 10, 16, 51 P.2d 195; *Meeker v. Cross*, 59 Cal.App. 512, 211 P. 229.

[4, 5] It would appear from the evidence that the court was almost required to find that plaintiffs acted upon their own judgment based upon the investigation they made. They went upon the property with experts and examined the trees and the

soil. Plaintiffs' advisors found nothing wrong with the property and so informed plaintiffs. They were not hindered in their investigation nor persuaded to discontinue it, and the means for determining the facts were fully accessible. It is thoroughly established that under such circumstances the buyer will be deemed to have acted upon his own judgment, being satisfied with the result of his investigation. *Cameron v. Cameron*, 88 Cal.App.2d 585, 199 P.2d 443; *Nielsen v. McKenna*, 8 Cal.2d 690, 67 P.2d 1044. He will not be heard to say that he made less than a full investigation unless he was hindered therein or persuaded by the representations or other actions of the seller to discontinue his inquiries before they were completed. *Carpenter v. Hamilton*, 18 Cal.App.2d 69, 62 P.2d 1397. Here, there is no evidence that plaintiffs failed to make a full investigation, or one that was satisfactory to them, because of their reliance upon the representations of defendants.

There was evidence that from a time soon after plaintiffs went into possession the grove was in charge of a manager who was experienced in citrus culture. Extensive tests and experiments were made and in October or November, 1947, plaintiffs began to doubt that the grove was what they expected it to be. But it is unnecessary to discuss the evidence from which the court concluded that plaintiffs had ratified their purchase and had not rescinded promptly after knowledge of facts which indicated to them that they had purchased an inferior grove. The other findings which we hold to be supported by the evidence are more than ample to support the judgment.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.

96 Cal.App.2d 748

**FORTIER TRANSP. CO. v. UNION PACK-
ING CO. et al.**

Civ. 16953.

District Court of Appeal, Second District,
Division 1, California.

March 30, 1950.

Fortier Transportation Company brought action against Union Packing Company and others arising out of collision involving four motor vehicles, wherein the defendants filed a cross-complaint. A judgment for defendant on the complaint notwithstanding verdict and an order granting new trial on the cross-complaint only was entered by the Superior Court of Los Angeles County, Charles P. Johnson, J., and the plaintiff appealed. The District Court of Appeal, Drapeau, J., held that whether the speed of plaintiff's vehicle or of defendant's vehicle was proximate cause of the accident, or was a bar to recovery because of contributory negligence of either driver were jury questions.

Order granting new trial on cross-complaint affirmed and judgment notwithstanding the verdict reversed.

1. Trial $\hookrightarrow$ 178

Trial court was not authorized to hear motion for directed verdict in judge's chambers without a record being made thereof. Code Civ.Proc. §§ 166, 629, 657, 663.

2. Automobiles $\hookrightarrow$ 168(2)

Driving of loaded tractor truck and semi-trailer, weighing 25,000 pounds or more, at a speed greater than 40 miles per hour is "negligence per se". Vehicle Code, § 515.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Negligence Per Se".

3. Automobiles $\hookrightarrow$ 245(42, 59)
Judgment $\hookrightarrow$ 199(3.7)

In action arising out of collision between plaintiff's "tanker", consisting of truck-tractor, semi-trailer and trailer, and defendant's cattle truck and trailer, where there was substantial evidence, consisting of testimony of driver of automobile which defendant's vehicle was passing at time of collision, that defendant's vehicle was ex-

ceeding the speed limit prescribed by statute, it was function of jury to find negligence and proximate cause, and its verdict for plaintiff under the facts should not have been set aside by judgment notwithstanding verdict. Vehicle Code, §§ 510, 511, 515.

4. Automobiles $\hookrightarrow$ 168(2)

The statute establishing a maximum speed limit for trucks and trailers applies also to a truck tractor with semi-trailer and additional trailer behind it. Vehicle Code, § 515.

5. Automobiles $\hookrightarrow$ 168(2)

In addition to maximum speed limits stated in Vehicle Code prima facie speed limits of less than maximum apply to all vehicles. Vehicle Code, §§ 510, 511, 515.

6. Automobiles $\hookrightarrow$ 168(2)

Irrespective of speed limits specified in miles per hour, the basic speed limit prohibiting a person from driving a vehicle upon a highway at speed greater than reasonable or prudent under circumstances governs all motor vehicles at all times. Vehicle Code, § 510.

7. Automobiles $\hookrightarrow$ 245(40)

In action arising out of collision between plaintiff's "tanker", consisting of truck-tractor, semi-trailer and trailer, and defendant's cattle truck and trailer, wherein defendant filed a cross-complaint, it was province of jury under evidence to apply basic speed law to all of conditions surrounding the accident, and to say if defendant's driver was traveling at speed which endangered life or property, even if speed of truck and trailer was less than speed limit of 40 miles an hour. Vehicle Code, §§ 510, 511, 515.

8. Automobiles $\hookrightarrow$ 245(13)

In action arising out of collision between plaintiff's "tanker", consisting of truck-tractor, semi-trailer, and trailer and defendant's cattle truck and trailer, wherein defendant filed a cross-complaint, evidence presented question for jury as to whether defendant's driver was negligent in having vehicle in middle of three-lane highway, considering all of surrounding circumstances. Vehicle Code, § 526.

9. Automobiles ☞6

Statute fixing speed limit of 40 miles per hour for any motor truck alone or with semi-trailer having a gross weight of 25,000 pounds or more included tractors with semi-trailers, and tractors with semi-trailers and trailers before 1947 amendment adding the words "truck-tractor", and was not unconstitutional on ground that it did not include truck-tractors and motor trucks. Vehicle Code, § 515.

10. New trial ☞6

Trial courts have more discretion in granting motions for new trials than non-suits, directed verdicts and judgments notwithstanding verdicts.

**11. Appeal and error ☞216(1)
Trial ☞255(1)**

In civil case it is not prejudicial error for trial judge to fail to instruct of its own motion on any subject not specified in statute. Code Civ.Proc. § 2061.

12. Appeal and error ☞1176(5)

Where judgment notwithstanding verdict is reversed, trial court will be directed to enter judgment on verdict, no good reason appearing why appellate court should grant a new trial, but upon reversal of such a judgment, the granting of a new trial is within discretion of appellate court.

13. Appeal and error ☞1175(1), 1177(1)

An appellate court may order judgment only in a proper case, and may direct a new trial where action seems to demand it.

14. Appeal and error ☞1177(1)

Where appellate court was not satisfied that all of the evidence in action arising out of collision involving four motor vehicles and evidence thereof was fully and fairly considered by jury, appellate court, in reversing judgment for defendant notwithstanding verdict, would in exercise of its discretion direct a new trial on all of the issues.

Donn B. Downen, Jr., Frank W. Woodhead, Richard T. Drukker, and Otto M. Kaus, Los Angeles, for respondents.

DRAPEAU, Justice.

Four motor vehicles were involved in an accident on the Ridge Route, the great trunk highway, U. S. No. 99, leading from southern California to the San Joaquin Valley. The accident happened as daylight was fading into night; outlines of the vehicles could be seen; they all had their lights on.

The place of the accident was a few miles south of Gorman, and 185 feet north of a level bridge. From the bridge, it was slightly upgrade in both directions. The roadway was paved and divided into three ten-foot lanes.

Plaintiff Fortier Transportation Company's vehicle was what is commonly called a "tanker." It consisted of a truck tractor, semi-trailer and trailer. The semi-trailer and trailer were tanks supported by running gear, for transportation of liquid commodities. The tanker was loaded with propane, and weighed approximately 78,000 pounds. It was going south toward Los Angeles.

Defendant Union Packing Company's vehicle was a cattle truck and trailer. This vehicle was carrying furniture in the truck and two horses in the trailer; it weighed much less than the tanker, and was going north toward Bakersfield.

As these two combination vehicles approached the bridge, each had to deal with other vehicles on the road. The Union truck swung into the center lane to pass a car going in the same direction, north. An automobile going south, in the same direction as the Fortier tanker, passed the tanker, pulled back into the right-hand lane, and abruptly slowed down. This precipitated a swift succession of events.

The driver of the tanker applied his brakes and swerved out into the middle lane. Then he saw coming toward him the four headlights of the Union truck and of the car which that truck was passing. So he swerved back toward his own right-hand lane. But he didn't quite make it.

Spray, Davis & Gould, Los Angeles, for appellant.

The tanker and the truck collided, causing extensive damage to both vehicles. Also the driver of the Union truck and a passenger who was riding with him suffered severe but not permanent personal injuries.

Fortier Transportation Company filed complaint against Union Transportation Company and Union's driver. Union, its driver, and the passenger cross-complained against Fortier. Verdict was rendered by a jury in favor of Fortier and against Union and Union's driver, both on the complaint and on the cross-complaint. Damages were fixed by the jury in the sum of \$9,750.84, the stipulated amount of Fortier's property damage.

Motion for judgment notwithstanding the verdict was granted by the court. Judgment followed, denying damages to Fortier Transportation Company, owner of the tanker, and denying damages to Union Transportation Company and its driver as against Fortier. Then a new trial was ordered as to Union and Union's driver on the cross-complaint. Trial of the issues was thus severed. Fortier is partly out of the case by a judgment against it on its complaint, but remains as defendant on the cross-complaint.

At the close of the case, and after a luncheon recess, the judge made the following statement appearing in the Reporter's transcript:

"The Court: During the noon recess, and in chambers, outside the presence of the reporter, the attorney for the defendants and cross-complainants moved for a directed verdict for the defendant and cross-complainants and against the plaintiff and cross-defendant, and the motion was denied."

[1] The Clerk's transcript is silent as to any motion for a directed verdict, or any order denying such motion. Sections 166, 657, and 663 of the Code of Civil Procedure do not authorize motions for directed verdicts to be heard in judges' chambers without a record being made thereof. Therefore, the judgment notwithstanding the verdict is without support. Code Civ. Proc. sec. 629; *Doyle v. McPherson*, 36

Cal.App.2d 81, 97 P.2d 249. However, as a new trial on all the issues must be had, this Court will continue with its opinion and pass upon all of the questions of law involved in the case. Code Civ.Proc. sec. 53.

Plaintiff appeals from the judgment and from the orders granting motions for judgment notwithstanding the verdict and for new trial. By stipulation the appeals were consolidated, and have been briefed and considered together.

It is hard to understand why judgment notwithstanding the verdict was granted, unless the matter of speed of the combination vehicles was not argued to, or considered by the trial judge. Mr. Monroe Manning, the driver of the automobile going north, which Union's truck was passing at the time of the accident, testified by deposition. He says several times in his deposition that *at the time of the passing* of his car by Union's truck he was going 45 to 50 miles per hour. Mr. Manning had good reason to vividly remember details preceding the accident. Grim-visaged death pounded up behind and alongside him, clutched crepitantly for his life, and then, relenting, let him go. For his car was struck by the truck, and when he got it stopped he saw that its left rear fender had been sheared off.

Under well-settled rules of law, if there is any substantial evidence in the record which proves negligence of Union's driver, the judgment notwithstanding the verdict must be set aside. Therefore, it is obvious that, giving to Mr. Manning's testimony the verity and effect which the law requires, Union's truck and trailer had to be going at a rate of speed in excess of that testified to by this witness—more than 45 miles an hour.

At the time of the accident, the applicable provisions of Section 515 of the California Vehicle Code were as follows:

The section was amended in 1947, by adding the words "truck tractor" in subsection (a) (2), and the section now reads:

"(a) No person shall operate upon any highway any of the following vehicles when

equipped entirely with pneumatic tires at any speed in excess of forty miles per hour:

"(1) Any motor truck and trailer.

"(2) Any motor truck alone or with semitrailer having a gross weight, of vehicle and load or of such vehicles and load of twenty-five thousand pounds or more."

The section was amended in 1947, by adding the words "truck tractor" in subsection (a) (2), and the section now reads:

"(a) No person shall operate upon any highway any of the following vehicles when equipped entirely with pneumatic tires at any speed in excess of 40 miles per hour:

"(1) Any motor truck and trailer.

"(2) Any motor truck alone or truck tractor with semitrailer having a gross weight, of vehicle and load or of such vehicles and load of 25,000 pounds or more."

[2] The driving of a loaded tractor truck and semi-trailer, weighing 25,000 pounds or more at a speed greater than 40 miles per hour is negligence *per se*. Wood v. Moore, 64 Cal.App.2d 144, 148 P.2d 91.

[3] Union's combination vehicle was a truck and trailer; substantial evidence indicates that it was exceeding the speed limit prescribed in Section 515 of the Vehicle Code; it may have been going too fast anyway; it was the function of the jury to find negligence and proximate cause; and its verdict under the facts in this case may not be set aside by judgment notwithstanding the verdict.

To escape the conclusion of negligence in driving a truck and trailer at a speed in excess of 40 miles an hour respondents contend: (1) That Mr. Manning's testimony is "demonstrably impossible"; (2) that section 511 of the Vehicle Code permits a "basic *prima facie* speed limit" of 55 miles an hour; and (3) that Section 515 of the same Code was unconstitutional before the 1947 amendment because it did not include truck tractors and motor trucks.

The first contention is untenable. Mr. Manning's testimony is not inherently improbable.

The second contention is answered by Section 511, which provides: "The speed of

any vehicle upon a highway not in excess of the limits specified in this section *or established as authorized in this code* is lawful unless clearly proved to be in violation of the basic rule declared in Section 510 hereof." (Emphasis added.)

[4] Section 515(a) establishes a maximum speed limit for trucks and trailers, and each subsection means what it says: Subsection (1) prohibits any speed of a truck and trailer in excess of 40 miles an hour. This subsection applies also to a truck tractor with semi-trailer and additional trailer behind it. Wood v. Moore, *supra*; Beck v. Azcarate, 50 Cal.App.2d 264, 122 P.2d 933. Subsection (2) provides the same speed limit for a truck without a trailer or a tractor with a semi-trailer of a gross weight of more than 25,000 pounds. If the gross weight of either type of vehicle is less than 25,000 pounds, then the *prima facie* speed limits are applicable. Vehicle Code, sec. 511.

[5, 6] In this connection two important things are always to be remembered:

First, that in addition to the maximum speed limits stated in the Code *prima facie* speed limits of less than the maximum apply to all vehicles; and

Second, that, irrespective of speed limits specified in miles per hour, the basic speed limit of this state governs all motor vehicles at all times: "No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property." Vehicle Code, sec. 510.

This case illustrates at least one of the impelling reasons for the statutory maximum speed of trucks or tractors, with trailers. Trucks and trailers and tractors and trailers do not have the same braking facilities that automobiles have to stop or to check momentum. The driver of an automobile has but two things to do when he wants to stop—he takes his foot off the power throttle and puts it on the brake pedal. The driver of a combination vehicle has three things to do—first he cuts off

his power; secondly, he brakes the trailer with a hand lever in the driver's cab; and, thirdly, he brakes the truck or tractor by applying pressure to a foot pedal in the cab like that in an automobile.

If the truck driver or the tractor driver puts on the foot brake too soon or too hard, the combination vehicle "jackknifes" and then is hurtled, a great, lumbering, uncontrolled behemoth, sidewise down the road. In the case at bar the tanker jackknifed, and the witnesses describe its progress thereafter as buckjumping and hop-skipping down the highway.

It is vital to the lives and to the safety of people on the highways of this state that the maximum speed of combination vehicles be rigidly controlled. Those who drive to any extent may wonder if the speed limit is not more honored in the breach than in the observance. But whether the law is respected and obeyed, it becomes the duty of the courts of California to apply and enforce it in the decision of cases arising out of accidents in which such vehicles are involved.

[7] In this case it was the province of the jury to apply the basic speed law to all of the conditions surrounding the accident, and to say if Union's driver was traveling at a speed which endangered life or property, even if the speed of the truck and trailer was less than 40 miles an hour.

[8] It was also the province of the jury to determine whether it was negligence for the Union truck and trailer to have been in the middle of the three-lane highway, considering all of the surrounding circumstances. This is so because it was the duty of the driver before moving into the center lane to first ascertain that such movement could be made with safety; that the roadway ahead was clearly visible; and that the center lane was clear of traffic within a safe distance. Vehicle Code, sec. 526.

The rules to be used by a reviewing court in testing the power of a trial court to grant judgment notwithstanding the verdict are stated in many California cases. It can serve no useful purpose to here repeat these oftstated rules. They are set forth,

with many supporting cases, in *Re Estate of Arnold*, 16 Cal.2d 573, 107 P.2d 25.

In this case the verdict of the jury finds substantial support from the evidence, and could have been based upon the violation of any or all of the foregoing Vehicle Code sections.

[9] Respondents' contention that Section 515 of the Vehicle Code was unconstitutional before the 1947 amendment is also untenable. Before the amendment, the section included within the wording "Any motor truck and trailer," tractors with semi-trailers, and tractors with semi-trailers and trailers. *Wood v. Moore*, supra.

Nothing in *Beck v. Azcarate*, supra, is to the contrary.

"According to the Vehicle Code, sections 33 * * * and 32.5, * * * these vehicles are defined as follows: 'A "motor truck" is a motor vehicle designed, used or maintained primarily for the transportation of property,' and, 'A "truck tractor" is a motor vehicle designed and used primarily for drawing other vehicles and not so constructed as to carry a load other than a part of the weight of the vehicle and load so drawn.' Inasmuch as both such vehicles are self-propelled and are used for property transportation, it may be considered in referring to such vehicles generally that a truck tractor and semi-trailer attached constitute a vehicle which is for general intents and purposes and in appearance a motor truck. * * *" *Beck v. Azcarate*, supra [50 Cal.App.2d 264, 122 P.2d 935].

The 1947 amendment brought California law up with technological development of transportation with combination vehicles. Supplementing, and to some extent succeeding trucks towing trailers, truck tractors are now used. A truck tractor comprises a motive-power unit only, with driver's cab and driving controls. A semi-trailer is attached to a tractor, and a tractor and semi-trailer may tow a trailer. The front end of the semi-trailer rides on the tractor. The combination tractor and semi-trailer may not exceed 60 feet in length. Vehicle Code, sec. 697. Or, providing the

combination does not exceed 60 feet in length, it may consist of a tractor and semitrailer and trailer.

A tractor may be detached from a semitrailer at any time, for loading, or for any other purpose, and attached to another semitrailer. This saves loss of use of the tractor while cargo vehicles are loaded or repaired.

The amendment, therefore, continued to limit truck tractors with semitrailers to a speed of 40 miles an hour when their gross weight and load was 25,000 pounds or more. The only change in the law was to apply the *prima facie* speed provisions of Section 511 when the weight of tractors with semitrailers is less than 25,000 pounds. Then they may, subject to the basic speed law and the *prima facie* speed laws, go faster than 40 miles an hour. This put trucks without trailers and tractors with semitrailers on a parity.

It is apparent that there is no legislative discrimination which, before the amendment of 1947, rendered Section 515 unconstitutional.

[10] This brings consideration of the unusual situation of severance of the issues by judgment notwithstanding the verdict and granting a new trial on the cross-complaint only. Trial courts have more discretion in granting motions for new trials than nonsuits, directed verdicts and judgments notwithstanding verdicts. No abuse of discretion appears, and this order will be affirmed, without, however, approving its effect of severing the issues for trial.

Finally it is necessary to determine whether the verdict shall stand and the trial court enter judgment in accord with it, or the case be retried as a whole.

Evidence is in the record of violation of the Motor Vehicle Code by the tanker as well as the truck and trailer. The tanker was equipped with a tachograph. This instrument registered and recorded the speed of that vehicle and shows that it was going about 42 miles an hour just before the accident. The driver testified that in his opinion he was going about 35 miles an hour. And it is to be remembered that the

weight of the tanker was 78,000 pounds. The gross weight of any combination vehicle is limited to 76,800 pounds. Vehicle Code, sec. 705.

Whether the speed of plaintiff's or of defendant's vehicle was the proximate cause of the damage, or was a bar to recovery because of contributory negligence of either driver, were jury questions. No instructions on speed were offered to the court, or were given to the jury. The jury should have been fully and adequately instructed relative to speed, and other provisions of the Code pertinent or relevant to the issues.

[11] In a civil case it is not prejudicial error for a trial judge to fail to instruct of its own motion on any subject not specified in Section 2061 of the Code of Civil Procedure. *Perry v. City of San Diego*, 80 Cal.App.2d 166, 181 P.2d 98. In criminal cases, it is the duty of the trial court to instruct, of its own motion, on matters vital to a proper consideration of the evidence by the jury. *People v. Holt*, 25 Cal.2d 59, 153 P.2d 21, and cases cited.

[12,13] When a judgment notwithstanding the verdict is reversed, the trial court will be directed to enter judgment on the verdict, no good reason appearing why the appellate court should grant a new trial. *Lauritsen v. Goldsmith*, 99 Cal.App. 671, 179 P. 163. But upon reversal of such a judgment, the granting of a new trial is within the discretion of the appellate court. 2 Cal.Jur. 994; *Robinson v. Muir*, 151 Cal. 118, 90 P. 521; *McNeely v. Hill*, 52 Cal. App. 184, 198 P. 427. An appellate court may order judgment only in a proper case, and may direct a new trial where the action seems to demand it. *Alden v. Mayfield*, 164 Cal. 6, 127 P. 45.

[14] This court is not satisfied that all of the evidence and the effect thereof was fully and fairly considered by the jury, and exercising its discretion, has determined to direct a new trial on all of the issues.

Having come to this conclusion it is unnecessary to determine whether it was error to grant a new trial on the cross-complaint only.

The order granting a new trial as to part of the issues is affirmed, the judgment notwithstanding the verdict is reversed, the appeal from the order granting the motion for judgment notwithstanding the verdict is dismissed, and the cause is remanded for new trial on all of the issues.

WHITE, P. J., and DORAN, J., concur.



96 Cal.App.2d 816

THOMAS et al. v. IRVIN et al.
Civ. 4013.

District Court of Appeal, Fourth District,
California.

April 5, 1950.

Rehearing Denied April 28, 1950.

Hearing Denied June 1, 1950.

Action by Diane Thomas and another, minors, by and through their guardian ad litem, Audrey Thomas, and Audrey Thomas, against Robert Lee Irvin and others, for damages for a death arising out of a collision between a truck and a railway engine. The Superior Court, Fresno County, Ernest Klette, J., rendered a judgment for the defendants, and the plaintiffs appealed. The District Court of Appeal, Mussell, J., held that there was no reversible error in the giving of instructions.

Judgment affirmed.

1. Railroads $\S$ 350(21)

In action against railroad for death of senior driver riding with relief driver who was operating truck involved in crossing collision, wherein railroad pleaded contributory negligence on part of senior driver, whether senior driver was under duty to look or listen or warn relief driver, or to take some other precaution for his own safety, were questions for the jury.

2. Railroads $\S$ 350(13)

In action against railroad for death of senior driver riding with relief driver who was operating truck involved in crossing

collision, whether senior driver had power to direct and control both truck and relief driver, and whether he did in fact exercise such control and did give directions at time of accident, were questions for the jury.

3. Trial $\S$ 296(4)

In action against railroad for death of senior driver riding with relief driver who was operating truck involved in crossing collision, instructions stating in effect that senior driver's power of control, if any, was to be considered with all other circumstances in determining question of senior driver's contributory negligence, was not objectionable as telling jury that negligence of relief driver could be imputed to the senior driver in view of another given instruction on imputed negligence.

4. Trial $\S$ 296(4)

In action against railroad for death of senior driver riding with relief driver who was operating truck involved in crossing collision, instruction stating in effect that senior driver's power of control, if any, was to be considered with all other circumstances in determining question of senior driver's contributory negligence, without mentioning what circumstances had to be shown in addition to circumstance of control to make senior driver negligent, was not objectionable as misleading in view of other instructions as to circumstances required to establish contributory negligence.

5. Appeal and error $\S$ 882(15)

In action against railroad for death of senior driver while riding with relief driver who was operating truck involved in crossing collision, where jury asked whether acts of relief driver were subject to senior driver's supervision, and counsel for both sides agreed that all instructions on negligence and contributory negligence should be and they were read to the jury, including instruction that negligence of driver could not be imputed to passenger, and no additional instruction was prepared and presented by plaintiffs, refusal to give another instruction on imputed negligence was not error.

6. Railroads ⚡351(3)

In action against railroad for death of senior driver riding with relief driver who was operating truck involved in crossing collision, charge defining contributory negligence and providing that plaintiffs could not recover if it appeared that death was caused by negligence on part of defendant unmixed with negligence on decedent's part was not objectionable as imposing upon plaintiffs the burden of proving both defendant's negligence and decedent's freedom from contributory negligence.

7. Death ⚡58(1)

In wrongful death action, burden of proving defendant's negligence is upon plaintiff; and while burden of proving contributory negligence is ordinarily on defendant, if contributory negligence appears from plaintiff's own case, defendant need not prove it.

8. Railroads ⚡350(13)

In action against railroad for death of senior driver riding with relief driver who was driving truck involved in crossing collision, instruction charging that it was incumbent upon senior driver to take such steps to protect himself and the vehicle in which he was riding as a man of ordinary prudence would take under those same circumstances was not objectionable as placing upon senior driver the burden of doing any act for protection of the vehicle that he would not have been required to do for his own protection.

9. Appeal and error ⚡1170(9)

Where review of evidence and consideration of entire case led appellate court to conclusion that instructions complained of did not result in any miscarriage of justice, errors, if any, in instructions were not ground for reversal. Code Civ.Proc. § 475; Const. art. 6, § 4½.

Frank J. Perry, John F. O'Sullivan, San Francisco, for appellants.

Stammer & McKnight, Fresno, for respondents.

MUSSELL, Justice.

Action for damages for death arising out of a collision of a truck with a railway engine.

Plaintiffs are the surviving widow and minor children of Charles Thomas, deceased. The decedent died from injuries received in a collision of a truck in which he was riding with an engine of defendant Southern Pacific Company. Defendant Robert Lee Irwin was the engineer operating the engine and defendant Ernest W. McCutchen was his fireman. The accident occurred at the Cherry Avenue crossing of the Southern Pacific Company's right of way in the city of Fresno. The truck in which the deceased was riding was a 1944 Ford motor tractor with semi-trailer attached and was being driven by one Floyd E. Lumb. Lumb and Thomas were returning to San Francisco after having delivered a load of automobiles in Los Angeles. At the time of the accident, Thomas was seated in the truck at the right of the driver and as a result of the collision, was thrown from the truck and under the wheels of the engine.

Trial was by jury and a verdict returned against the plaintiffs. A reversal is not sought on the ground of insufficiency of the evidence to support the verdict. The sole contention is that there were three erroneous instructions read to the jury and that the court erred in refusing to give one further instruction to the jury during its deliberations.

Facts

The accident occurred at approximately 5:18 A.M. on April 22, 1947, at the crossing named. Cherry Avenue runs generally north and south and the railroad tracks east and west. At the time of the collision decedent was traveling north on Cherry Avenue and the engine was traveling west. Both the engine and truck were traveling at about the same speed—15 to 20 miles per hour. Visibility was estimated at a mile. The crossing was protected by an automatic blinker system, an automatic wigwag, a reflectorized railroad warning sign and a railroad warning sign

painted on the highway where it approached the crossing. The automatic blinker system was close to the crossing and was made up of 8 red lights, which blinked on and off as the engine approached the crossing and the whole system was illuminated by flood lights. Both the automatic blinker system and the automatic wigway commenced to operate when a train entered a circuit 1021 feet from the crossing and both were operating at the time the engine crossed Cherry Avenue. The reflectorized railroad warning sign displayed the letters "R. R." and was 260 feet south of the crossing. It was 2 feet in diameter and 7 feet high and was equipped with glass reflector beads and mirrors visible in the lights of an approaching vehicle during the dark hours. At the time of the accident, the headlight on the locomotive was burning, the bell on it was ringing and the whistle had been blown intermittently to a point 20 to 40 feet east of the crossing.

Both the deceased and Floyd Lumb were employees of Michael McGovern. Thomas was the regular driver of the truck and Lumb had been employed a day or two before the accident as an "extra" or "helper" to assist the deceased on this trip. Thomas had driven from San Francisco to Los Angeles and back to within five miles of the crossing, at which point, at the direction and request of the deceased, Lumb had taken the wheel to give the deceased a rest. Thomas was the "boss" of the trip and Lumb was subject to his orders and direction. As the truck approached the crossing, Thomas was awake and smoking a cigarette. When the truck was about 250 feet south of the crossing, deceased instructed Lumb to "go slow" over the crossing because the tracks were rough and they might lose some chains which they were carrying in the trailer. Lumb slowed to about 15 miles per hour and drove on to the crossing. He failed to see the approaching locomotive, although there was nothing to obstruct his view, and the cab was truck on the right hand side. It was carried some distance beyond the crossing and decedent was thrown out before the engine was brought to a stop. Lumb

testified that he drove the truck slowly up onto the railroad track without seeing or hearing the locomotive and the first thing he knew of its presence was that he thought there was an "explosion" as the locomotive struck the truck.

The principal complaint of plaintiffs is that the court erred in giving the following instruction: "If you find from the evidence in this case that Charles Thomas and Floyd Lumb were both employees of the owner of the truck and that Charles Thomas was the superior employee, or boss, and had the power of control over the truck and over the driver, that fact must be considered by you with all other circumstances in the case in determining whether Charles Thomas was personally guilty of contributory negligence, and you may find that under such circumstances Charles Thomas was guilty of contributory negligence even though your decision would be different if Charles Thomas had simply been a guest riding in the vehicle without any right or power of control over either the driver or the vehicle."

Plaintiffs first claim that the instruction is an incorrect statement of the law in that it authorized the jury to find the decedent, Thomas, guilty of negligence simply and solely on the ground that he possessed the power to control the truck and driver.

[1,2] Defendants pleaded contributory negligence on the part of the decedent and it was for the jury to determine from the evidence whether Thomas was under a duty to look, or listen, or warn the driver, or take some other precaution for his own safety. The jury was entitled to determine from the evidence whether the decedent had the power to direct and control both the truck and the driver and to determine whether, in fact, the decedent did exercise such control and did direct the operation of the truck at the time of the accident.

In *Handley v. Lombardi*, 122 Cal.App. 22, 9 P.2d 867, 869, where the plaintiff was a superior employee of the driver of the automobile in which the plaintiff was riding, the court said: "The fact that plaintiff had the power of control over the driver was certainly a factor to be considered with all

other circumstances in determining whether he himself was personally negligent; and the jury might well find that one who had the power to control the driver would be guilty of negligence where in the same circumstances one who had no such power would not."

[3] The questioned instruction did not tell the jury that mere possession of a power of control over the truck by the deceased was sufficient to support a finding of his contributory negligence. It stated, in effect, that such power of control, if it existed, was to be considered with *all other circumstances in the case*, in determining the question of contributory negligence. It is argued that the instruction had the effect of telling the jury that the negligence of Lumb could be imputed to Thomas. However, the instruction does not state that the negligence of the driver could be imputed to the decedent and in the following instruction given, the jury was told that the negligence of the driver of a vehicle may not be imputed to a passenger in the vehicle.

[4] Plaintiffs argue that the instruction is misleading in that it makes no mention of what circumstances must be shown in addition to the circumstance of control in order to make the decedent personally guilty of negligence, but the jury was fully instructed as to the circumstances required to establish contributory negligence and at plaintiffs' request, the jury was told that: "The test of contributory negligence is: What would a reasonable person have done in decedent's position, seeing what he saw, knowing what he knew, in the light of the circumstances of his situation, and affected by the human propensities or elements which ordinarily enter into the formation of and influence the judgment?"

We are unable to find reversible error in the criticized instruction when considered in connection with the evidence before us.

[5] Plaintiffs next complain that the trial court erred in refusing to give an instruction on imputed negligence when the jury returned to the court room and the foreman asked the following question: "Was, in this case, the acts of Mr. Lumb subject to Mr. Thomas' supervision and any

act that he committed?" Plaintiffs counsel offered to submit an instruction on imputed negligence but the court refused to give any additional instructions. Thereafter counsel for both parties agreed that all the instructions on negligence and contributory negligence should be and they were read to the jury, including an instruction stating the rule that the negligence of the driver could not be imputed to the passenger and the rules under which Charles Thomas could himself be guilty of contributory negligence. No additional instruction was prepared and presented to the court by plaintiffs. Furthermore, the question by the jury seems to us to have been a request for advice on a question of fact rather than law.

Plaintiffs also complain of the following instruction: "Contributory negligence means negligence on the part of Charles Thomas which proximately contributed to the accident and to his death. In this connection, you are instructed that before the plaintiffs can recover in this action, it must appear that the death of Charles Thomas was caused by negligence on the part of the defendants unmixed with any negligence on his own part, and if negligence on the part of Charles Thomas contributed in any manner or in any degree, however slight, directly and proximately to his own death, then there can be no recovery on the part of these plaintiffs and your verdict must be for the defendants. Therefore, if you find from the evidence in this case that both the defendants and Charles Thomas were negligent and that the negligence of both of them proximately caused and contributed to the accident and to the death of Charles Thomas, then you are instructed that under the laws of California, which you must apply in this case, the plaintiffs are not entitled to recover and your verdict must be for the defendants."

[6] Plaintiffs claim that this instruction placed upon them the burden of proving both the defendants' negligence and the decedent's freedom from contributory negligence. We find no merit in this contention.

[7] The trial court instructed the jury as follows: "Contributory negligence is an affirmative defense and must be established

by a preponderance of the evidence, in order to defeat plaintiffs' right to recover", and that: "If the defendant Southern Pacific Company, a corporation, its agents and employees were negligent, and the negligence was a proximate cause of the death of the decedent Charles Thomas, then defendants are liable unless the defendants have satisfied you by the greater weight of all the evidence in the case that the decedent Charles Thomas contributed proximately by his own negligence to his own death." These were specific instructions upon the burden of proof and the instruction complained of does not purport to be an instruction upon that subject. The burden of proving defendants' negligence is upon the plaintiff and while the burden of proving contributory negligence is ordinarily on the defendants, if contributory negligence appears from plaintiffs' own case, it is not necessary for the defendants to prove it. *Rush v. Lagomarsino*, 196 Cal. 308, 318, 237 P. 1066; *Quill v. Southern Pacific Company*, 140 Cal. 268, 73 P. 991; *Oliphant v. Brown*, 7 Cal. App.2d 584, 585, 586, 46 P.2d 790.

Finally, plaintiffs complain of the following instruction: "Although it is true that the negligence of the driver of a vehicle may not be imputed to a passenger who is riding in the vehicle, still the passenger under such circumstances is under a legal duty to use ordinary care for his own safety. Such a passenger cannot rely completely and alone upon the driver of the vehicle when approaching a railroad crossing which he knows is there, and if he is in a position to do so, and if ordinary care requires it, he must look and listen in the same manner as the operator of the vehicle for the purpose of ascertaining the approach of a train or locomotive engine. Likewise, if such passenger is aware that the driver is not looking for trains, or is operating the vehicle in a negligent manner, or is violating the law, or is driving into danger, or that a train or engine is approaching at a place which constitutes a danger, it is incumbent upon the passenger to take such steps to protect himself and the vehicle in which he is riding as a man of ordinary prudence would take under those same circumstances. In other words, such a passenger cannot shut his

eyes to danger in blind reliance upon the driver of the vehicle.

"Therefore, a passenger in a vehicle approaching a railroad track under the circumstances above set forth who fails to look or listen for approaching trains or to protest against the negligent operation of the vehicle by the driver or to warn the driver of the approach of a train or engine when ordinary care requires such action or such protest or such warning is guilty of negligence, and if such negligence proximately contributes to his death, it bars any recovery on account thereof."

The part of this instruction to which the appellants object is that in which the jury was told "It is incumbent upon the passenger to take such steps to protect himself and the vehicle in which he is riding as a man of ordinary prudence would take under those same circumstances."

[8] Plaintiffs contend that the passenger's only duty is to exercise ordinary care for his own safety and that he is not under any duty to exercise ordinary care for the vehicle. However, in the instant case, it is conceded that the decedent was under the duty to exercise ordinary care for his own safety and the instruction did not place upon him the burden of doing any act for the protection of the vehicle that he would not have been required to do for his own protection. In either case, his only obligation was to exercise ordinary care to avoid the accident.

[9] A review of the evidence and consideration of the entire case leads us to the conclusion that the instructions complained of did not result in any miscarriage of justice and under such circumstances, do not call for a reversal of the judgment. Sec. 475, Code Civ.Proc.; Sec. 4½, Art. VI, Const. of Cal.; *Caminetti v. Imperial Mut. Life Ins. Co.*, 59 Cal.App.2d 476, 488, 139 P.2d 681.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; CARTER, J., dissenting.

QUINDT et al. v. KILPATRICK et al.

Civ. 4016.

District Court of Appeal, Fourth District,
California.

April 5, 1950.

Rehearing Denied April 28, 1950.

Hearing Denied June 1, 1950.

Action by A. J. Quindt and Florence Quindt, purchasers, against H. J. Kilpatrick and Jennie Kilpatrick for rescission of contract to purchase realty and personalty. The Superior Court, Fresno County, Philip Conley, J., rendered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Mussell, J., held that since land was sold by metes and bounds and acreage involved was not stated in contract, and property contained approximately 3.5 acres, purchasers were not entitled to rescission even though deposit slip receipt stated that property was of approximately four acres.

Judgment affirmed.

1. Appeal and error $\S$ 994(3), 996, 1012(1)

The weight and sufficiency of the evidence, construction to be put upon it and inferences to be drawn therefrom, as well as question as to credibility of witnesses and determination of conflicts and inconsistencies in the testimony are matters for determination of trial court.

2. Vendor and purchaser $\S$ 44

In purchasers' action for rescission of contract to purchase realty and personalty, trial court was authorized to believe testimony of vendors as to their statements concerning acreage involved in property.

3. Vendor and purchaser $\S$ 44

In purchasers' action for rescission of contract to purchase realty and personalty, burden of proving false representations was on purchasers, and the presumption is always against fraud.

4. Vendor and purchaser $\S$ 44

In purchasers' action for rescission of contract to purchase realty and personalty, evidence sustained finding that purchasers inspected property, were shown its boundaries, and were not induced to buy by any statement as to possible acreage.

5. Vendor and purchaser $\S$ 113

Where land was sold by metes and bounds and acreage involved was not stated in contract, and property contained approximately 3.5 acres, purchasers were not entitled to rescission, even though deposit slip receipt stated that property was of approximately four acres.

6. Vendor and purchaser $\S$ 123

In action for rescission of contract to purchase realty and personalty, evidence sustained finding that property in question contained approximately 3.5 acres.

Lawrence W. Young, Fresno, for appellants.

W. A. McGugin, Fresno, for respondents.

MUSSELL, Justice.

Action for rescission of contract to purchase real and personal property. The property involved in this action was owned by the defendants and situated on state highway 180, between the city of Fresno and General Grant National Park. The property was listed for sale with a real estate broker and on January 26, 1948, defendants, as sellers, and Albert A. Alloro, and plaintiff Florence Quindt, as buyers, signed a real estate deposit receipt for the purchase of the real estate and personal property thereon for the total purchase price of \$17,000. Mr. Alloro declined to proceed with the contract of purchase, and by agreement of the parties, was relieved therefrom.

Before signing the escrow instructions, plaintiffs visited the property and were shown some eleven buildings located on it and the boundaries as marked on the ground by fences which had been erected by the defendants. On February 13, 1948, as alleged in plaintiffs' complaint, the agreement was reduced to writing and contained in escrow instructions signed by the plaintiffs and defendants.

The plaintiffs, upon inspecting the premises prior to the escrow, stated that they expected to use the property for an auto court, grocery store and service station and

were satisfied from their inspection that the property was sufficiently large for their purposes. Plaintiffs asked defendant H. J. Kilpatrick what the acreage was and were informed by him that the property contained approximately three and one-half or four acres. Mr. Kilpatrick stated that he did not know exactly how much land there was but thought that there was between three to four acres. The escrow instructions contained no statement as to the acreage, but contained an accurate dimensional description of the property. The plaintiffs admittedly read the correct description of the property as contained in the escrow instructions before signing the document.

Plaintiffs deposited \$5,000 in escrow as a portion of the down payment agreed upon and subsequently \$3,000 of this payment was released to defendants to enable them to build an additional store building on the property. The plaintiffs then operated and assisted in the operation of the property for several weeks and then decided not to proceed any further with their agreement to buy and brought this action for a cancellation of the escrow agreement on the ground that the defendants had falsely represented to them that the property contained four acres. A trial was had by the court without a jury and judgment entered in favor of the defendants. This appeal followed.

The trial court found that the allegations of fraud and misrepresentations contained in plaintiffs' complaint were untrue; that the parties entered into the written contract as alleged in plaintiffs' complaint and on February 13, 1948, signed the escrow instructions; that only \$5,000 was paid on account of the purchase price and that plaintiffs were in default; that plaintiffs knew the correct dimensions of the property at all times and had been informed that it contained between three and four acres; that plaintiffs did not rely upon any representations that there were four acres in the property.

The only question involved on this appeal is whether there was any substantial evidence to support the findings and judgment.

[1] The weight and sufficiency of the evidence, the construction to be put upon it and the inferences to be drawn therefrom, as well as the question as to the credibility of witnesses and determination of conflicts and inconsistencies in the testimony were matters for the determination of the trial court. *Dillard v. McKnight*, 34 Cal.2d 209, 209 P.2d 387.

[2-4] In the instant case the trial court evidently believed and accepted the testimony of the defendants as to their statements concerning the acreage involved in the property which the plaintiffs agreed to buy. This the trial court was authorized to do. *Bechtold v. Bishop & Co., Inc.*, 16 Cal.2d 285, 291, 105 P.2d 984. The burden of proving false representations was upon the plaintiffs, *Fares v. Morrison*, 54 Cal.App.2d 773, 776, 129 P.2d 735, and the presumption is always against fraud. *Gundelfinger v. Mariposa Commercial & Mining Co.*, 72 Cal.App.2d 540, 544, 165 P.2d 57. In view of the evidence and the presumption, we are not impressed with plaintiffs' contention that there was no substantial evidence to support the findings of the court. Plaintiffs inspected the property, they were shown its boundaries, they admitted that there was sufficient area to serve their purposes and the trial court concluded that they were not induced to buy by any statement as to possible acreage. Furthermore, as admitted by them, they were informed of the correct dimensions of the property and read the description in the escrow instructions, which constituted the written contract of sale.

[5] The real estate deposit receipt contained a statement that the property was of approximately four acres without the road, but the land was sold by metes and bounds and the acreage involved was not stated in the contract relied upon as one of the principal conditions of the contract. *Board of Commissioners v. Younger*, 29 Cal. 172, 178.

As defined in *Ross v. Keaton Tire & Rubber Co.*, 57 Cal.App. 50, 52, 206 P. 645, the word "approximately" means "about" and is used in the sense of an es-

timate merely, meaning more or less, about and near the amount, quantity or distance specified.

[6] The trial court found that the property in question contained approximately 3.5 acres and this finding is supported by evidence that the property actually situated within the boundaries of the fences and agreed to be sold by defendants constituted more than the acreage described in the escrow instructions.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J.,
concur.



96 Cal.App.2d 909

RECOVERY OIL CO. v. VAN ACKER et al.
Civ. 4024.

District Court of Appeal, Fourth District,
California.

April 10, 1950.

Hearing Denied June 8, 1950.

Action by Recovery Oil Company, a corporation, against Ada M. Crawford, R. E. Van Acker, and others, to quiet title to an oil and gas lease. The Superior Court for Kern County, W. L. Bradshaw, J., rendered an adverse judgment, and the plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that the production interest held by defendant Crawford under a prior assignment was superior to the interest of plaintiff under its lease.

Judgment affirmed.

1. Appeal and error ⇨909(1)

Where proceeds of 15 per cent of oil production were assigned until assignee received \$20,000, and assignee further assigned one-half interest, and court in quiet title action found that subsequent lease was subject to rights of last assignee as owner of 15 per cent of proceeds until she received \$10,000, District Court of Appeal would assume that original half interest

had been paid, and that last assignee was entitled to be paid from full 15 per cent of production.

2. Appeal and error ⇨768

Where appellant contended that discussion of certain statute of limitations which appeared in opinion on a prior appeal did not constitute law of the case on that issue and no contention was made to the contrary, District Court of Appeal would accept contention as true.

3. Mines and minerals ⇨5, 109

Where proceeds of 15 per cent of oil production were assigned until assignee received \$20,000, and assignee further assigned one-half of his interest, and assignments were recorded, and thereafter lease was issued by the United States covering the land involved, the final assignee of the production interest received a vested interest which terminated only when she received full amount, and subsequent holders of lease took subject to rights under the assignment.

4. Limitation of actions ⇨62

Mines and minerals ⇨109

Where interest in proceeds of percentage of oil production was assigned in 1929, and termination of interest was not conditioned upon expiration of any stated date but was conditioned upon receipt by assignee of a stated amount of money, and before 1941 production was sufficient at market prices to have enabled claim under assignment to have been paid in full, assignee's interest was vested as an estate, and assignee was not barred by limitations or by laches from asserting her rights in 1945 as defense to a quiet title action brought by a subsequent government leaseholder with constructive notice of the assignment.

H. H. Bell and Walter H. Hewicker,
Bakersfield, for appellant.

Franklin B. Hansen, Los Angeles, for
respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment in a quiet title action.

The land involved consists of 160 acres which belongs to the United States. In 1923, a permit to prospect for oil and gas was issued to M. A. Knapp covering the property in question and other lands. In May, 1928, Knapp entered into an operating agreement with A. Bruce Frame under which Frame was to drill on the property and under which he acquired an interest in the production. In November, 1928, Frame executed a written assignment by which he assigned to N. E. Grable the "proceeds of Fifteen per cent (15%) of the oil" (saved and sold from the premises covered by this operating agreement) "until such time as said assignee shall have received the sum of Twenty Thousand Dollars (\$20,000.00) and no more; and upon the full payment of said sum this assignment shall terminate and be at an end." In 1929, Grable assigned to Ada M. Crawford one half of the interest he had acquired under the assignment given to him by Frame. These assignments were duly recorded prior to the time the plaintiff acquired any interest in the property. In 1930, a lease was issued to Knapp by the Secretary of the Interior covering all the property described in the original prospecting permit. Various partial assignments of said lease were made to others and, in 1938, the plaintiff became the owner of Knapp's remaining interest in this lease insofar as it pertained to the land here involved.

This action was filed on August 13, 1945. By his complaint, which was in the usual form, the plaintiff sought to quiet his title as the sole and exclusive owner of this lease with all rights arising thereunder, and to bar the defendants from asserting any claims in relation thereto. By her answer, the defendant Crawford alleged that the plaintiff's right and title under this lease is subject to her right, by assignment, to the sum of \$10,000 payable out of the proceeds from 15% of the oil etc. produced, saved and sold from the premises. A judgment in favor of the plaintiff was reversed on appeal, *Recovery Oil Co. v. Van Acker*, 79 Cal.App.2d 639, 180 P.2d 436, for reasons not involved here. After a retrial the court found, so far as material here, that the oil and gas lease given to Knapp

in 1930 was subject to the operating agreement between Knapp and Frame, and to the assignments above referred to from Frame to Grable and from Grable to Ada M. Crawford; that the plaintiff became the owner of so much of Knapp's interest in the property as remained after these transfers and assignments; that each of these transfers and assignments were duly recorded and plaintiff had constructive notice thereof; and as a conclusion of law, that the plaintiff's lease, insofar as this property is concerned, is subject to a valid assignment now held and owned by Ada M. Crawford whereby she is the owner of 15% of the proceeds of the oil etc. saved and sold from the premises until such time as she shall have received \$10,000, whereupon her interest shall terminate and be at an end. Judgment was entered accordingly. The plaintiff appealed from the entire judgment, but prosecutes this appeal only from that portion thereof which sustains the claim of Ada M. Crawford.

[1] The appellant first contends that the judgment is erroneous in that it makes the lease subject to respondent's assignment making her the owner of 15% of the proceeds from the oil produced on this land until she shall have received \$10,000. It is argued that since the assignment to Grable was for \$20,000 payable out of 15% of the production, the assignment of one-half of his interest to the respondent would entitle her to \$10,000 out of 7½% of the production. The assignment to Grable covered a 15% interest and was by its terms to remain in force until the full amount of \$20,000 was paid. It must be assumed, in support of the judgment, that Grable's half has been paid. The assignment to respondent of one-half of Grable's interest would entitle her to receive half of the money, from the full 15% of the production, and would remain in force until that amount has been paid.

[2] The second contention is that the discussion of the statute of limitations which appears in the opinion on the prior appeal, *Recovery Oil Co. v. Van Acker*, 79 Cal.App.2d 639, 180 P.2d 436, does not constitute the law of the case on that issue.

No contention is made to the contrary, and this may be accepted as true.

Finally, the appellant contends that the court erred in refusing to permit it to prove, by the testimony of a supervisor of the State Division of Oil and Gas, that the production of oil on the leased premises prior to four years before this action was filed was sufficient, at market prices, to have enabled respondent's claim to have been paid in full. It is argued that while such records were confidential and privileged the privilege was waived by the persons for whose benefit it was intended, and the testimony was, therefore, admissible; that it would have established that the respondent could have been paid prior to 1941; that it follows that her claim was barred by the statute of limitations; and that she was guilty of laches.

[3,4] The interest of the respondent was an interest in real property. La Laguna Ranch Company v. Dodge, 18 Cal.2d 132, 114 P.2d 351, 135 A.L.R. 546. The appellant acquired certain other interests in the lease, but never acquired the interest held by the respondent. Its assignors could not convey to it more than they owned and the appellant took with notice of, and subject to, the rights and interests of the respondent. The assignments by which the respondent acquired her interest assigned to her a certain share in the production from the land until such time as she received \$10,000. Her interest was to terminate when she received this amount, otherwise it would run for the full term of the lease. No date was fixed for the termination of her interest and it was conditioned upon her receiving the money, and not upon the production of an amount sufficient to pay the money. Any obligation to pay was not only a continuing one but she had an interest in the land which did not terminate until she actually received that amount of money. Her interest was vested as an estate, and not as a lien. Her position was similar to that of the holder of a trust deed. The appellant, taking with notice, was in no position to demand relief in a court of equity, as against the respondent, without recognizing and assuming the obligation which thus continued to

exist. Under these circumstances, the rights of the respondent were not barred by any statute of limitations or by laches. Whether or not the proffered testimony was admissible, and whether or not it would have shown that the \$10,000 might have been previously paid out of the production, is immaterial.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



96 Cal.App.2d 600

In re CLAUSSENIUS' ESTATE.
CLAUSSENIUS v. MUSSER et al.
(two cases).

Civ. 17215, 17216.

District Court of Appeal, Second District.
Division 2, California.
March 24, 1950.

Proceeding in the matter of the estate of Lee Ellen Claussenius, deceased. The Superior Court, Los Angeles County, Kurtz Kauffman, J., entered a judgment rejecting certain claims of Carl Claussenius, surviving husband, and entered an order setting aside a probate homestead for Carl Claussenius following his controversy with Penrod Otis Musser and Ralph C. Musser, sons of the decedent, and the surviving husband appealed from portions of the judgment rejecting his claims, and the sons of the decedent appealed from the order setting aside the probate homestead for the surviving husband. The District Court of Appeal, Moore, P. J., held that evidence supported finding that the husband conveyed two parcels of realty to decedent as her separate property, and that she did not hold the parcels in trust for husband.

Both judgments affirmed.

McComb, J., dissented in part.

1. Deeds 73

Property, regardless of whether conveyed for illegal consideration, is still con-

veyed, since no consideration is necessary to validity of the voluntary transfer of property by deed. Civ.Code, § 1040.

2. Deeds ⇨19

Where there has been a total failure of consideration for deed, grantor cannot recover the property. Civ.Code, § 1040.

3. Trusts ⇨82

Where husband voluntarily conveyed title of two lots to his wife, husband could not after wife's death seek to have property impressed with a resulting trust in his favor on ground of want of or failure of consideration. Civ.Code, § 1040.

4. Appeal and error ⇨882(3)

Where case is tried on theory that a material issue is raised by pleadings and evidence is introduced thereon without objection, unsuccessful party will not be permitted later to contend that such issue was not raised.

5. Trusts ⇨86

Husband seeking to establish resulting trust in property which he conveyed to wife, after wife's death, on ground of want of or failure of consideration had burden of proving that he did not by his deed intend to make a gift of the property to his wife.

6. Deeds ⇨196(3)

Persons claiming title to property under deed had burden of proving that deed was not obtained by undue influence. Civ. Code, §§ 158, 2235.

7. Trusts ⇨89(1)

Evidence supported finding that husband, in conveying two lots to wife, since deceased, intended that lots should be separate property of wife and that wife did not hold the lots in trust for husband. Civ. Code, § 164.

8. Husband and wife ⇨266

The form of a deed conveying property from husband to wife may alone support finding that husband intended property to be a separate property of wife.

9. Deeds ⇨196(2, 3)

Mere existence of marital relations does not raise presumption of fraud or un-

due influence in conveyances from husband to wife.

10. Deeds ⇨211(4)

Evidence supported finding that deed executed by husband conveying property to wife, since deceased, to be held as her separate property was not obtained by undue influence of wife. Civ.Code, §§ 158, 2235.

11. Husband and wife ⇨264

Evidence supported finding that diamond rings given to wife, since deceased, by husband were wife's separate property. Civ.Code, § 162.

12. Husband and wife ⇨250

Everything acquired by wife after marriage as a gift is her "separate property". Civ.Code, § 162.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Separate Property".

13. Limitation of actions ⇨197(1)

Evidence supported finding that husband's claim against estate of his deceased wife for \$5,000 based upon wife's receipt for that sum and her agreement to repay him was barred under five year statute of limitations. Code Civ.Proc. § 337, subd. 1.

14. Executors and administrators ⇨221(7)

Evidence supported finding that wife, since deceased, did not breach agreement not to mortgage, sell, or otherwise encumber or dispose of real property conveyed to her by husband without husband's prior written consent, either by executing trust deed on a portion of the property to secure a loan or by execution of her will devising a one-half interest in the property to her sons by a prior marriage, where it appeared that both loan and will were made with husband's full knowledge and consent.

15. Evidence ⇨185(1)

Where husband denied ever having written letter to wife, since deceased, in which he gave his consent to her executing a trust deed on portion of property which he had conveyed to her, subject to provision that property should not be sold or encumbered without his written consent, testimony of wife's son by prior marriage as to contents of purported letter from hus-

band to wife giving his consent to execution of proposed trust deed was properly admitted without first serving notice on husband to produce the letter.

16. Wills ⇨837

Wife's covenant to support husband out of income from real property conveyed by husband to wife would not be enforced after wife's death against wife's sons by prior marriage to whom a one-half interest in the property was devised, where wife willed the other one-half interest in the property to husband for purpose of providing for his support after her death.

17. Homestead ⇨150(1)

In selection of a homestead, court must be governed by sound discretion, value of the homestead, financial condition of the estate and rights of creditors, but the demands of the family are paramount. Probate Code, § 661.

18. Courts ⇨202(5)

Homestead ⇨150(1)

Duration of a homestead is committed to probate court's discretion and the term will not be disturbed in absence of showing of discretion abused. Probate Code, § 661.

19. Executors and administrators ⇨53

Homestead ⇨144

Aside from exercise of reasonableness in selecting homestead the only restriction imposed is that if homestead be selected from separate property of decedent its duration must be for a limited period to be named in the order but the designated parcel remains subject to administration. Probate Code, § 661.

20. Homestead ⇨142(1)

If probate homestead may be carved out of estate of a decedent and if it cannot be defeated by an act of testator, it cannot be defeated by heirs of the decedent. Probate Code, § 661.

21. Homestead ⇨134

It is policy underlying all homestead legislation to provide place for the family and its surviving members where they may dwell in peace and serenity, conscious that it cannot be taken from them "either by reason of their own necessity or improvi-

dence, or from the importunity of their creditors". Probate Code, § 661.

22. Homestead ⇨150(1)

Upon filing of the petition for a homestead and posting of notices the court acquires jurisdiction. Probate Code, § 661.

23. Homestead ⇨145

Fact that husband, as executor of estate of deceased wife, had listed certain parcels of realty as his own separate property and as not belonging to wife's estate, did not preclude husband from seeking to have a probate homestead in the property awarded to him upon court's deciding his claim to ownership of the property adversely to him. Probate Code, § 661.

24. Homestead ⇨150(1)

Where, on hearing on husband's petition to set aside probate homestead out of deceased wife's separate property, the court found that certain realty was separate property of decedent during her lifetime, that no homestead had been selected and recorded by either decedent or husband during decedent's lifetime, and that there was no community property from which a homestead could be selected, all requirements for designating a probate homestead were met. Probate Code, § 661.

25. Homestead ⇨145

The statutory right of probate homestead will not be held to have been surrendered by agreement of spouses except by clear and explicit language. Probate Code, § 661.

26. Frauds, statute of ⇨75, 128

Asserted oral agreement on part of deceased wife during her lifetime to devise two lots which were her separate property and to make provisions for husband by will was invalid under statute of frauds, and could not become a consideration to support husband's promise to waive his probate homestead. Probate Code, § 661; Civ.Code, § 1624, subd. 6.

27. Evidence ⇨417(9)

Parol evidence cannot add another term to an agreement if the writing contains nothing relating to the matter proposed by the offered parol proof.

28. Frauds, statute of *↪*158(2)

Attorney's testimony as to conversation between decedent and her husband wherein husband agreed that in consideration of decedent's execution of will he would take the property rights and interest provided for him therein in lieu of all other rights or interest which he might at any time after decedent's death have with respect to certain real property was inadmissible under statute of frauds. Probate Code, § 661; Civ.Code, § 1624, subd. 6.

29. Wills *↪*781

Testator's intention to require beneficiary to elect whether to take under will or under statute must appear from the will itself.

30. Homestead *↪*142(1)

The right to a probate homestead is superior to right to inherit since the right of inheritance is subject to right to a probate homestead. Probate Code, § 661.

31. Specific performance *↪*49(2)

Husband's alleged agreement to waive statutory right of probate homestead in wife's separate property, if established, would not be specifically enforced for lack of adequate consideration, where alleged agreement taken at its face value, was to part with 100 per cent interest in the property in consideration of wife's promise to return to husband at a subsequent time by her will only 50 per cent interest in the property. Probate Code, § 661.

32. Frauds, statute of *↪*144

Husband was not estopped from asserting that his alleged waiver of probate homestead was invalid for failure to comply with statute of frauds, in absence of showing of prejudice as result thereof. Probate Code, § 661; Civ.Code, § 1624, subd. 6.

33. Wills *↪*783

Omission in wife's will of provision requiring husband to elect whether he would take under will or claim statutory right to probate homestead in wife's separate property would be deemed to be wife's deliberate act, and, precluded enforcement of husband's alleged promise to waive statutory right to probate homestead as a part

of wife's agreement to make will. Probate Code, § 661.

34. Homestead *↪*151

Husband's gift of parcel of realty to wife during her lifetime as her separate property did not preclude his subsequent enjoyment thereof as a probate homestead. Probate Code, §§ 660 et seq., 661.

35. Homestead *↪*145

Neither fact that husband made wife during her lifetime a gift of real property as her separate property or qualified as executor of her estate served as a waiver of his right to a probate homestead in wife's property. Probate Code, §§ 660 et seq., 661.

36. Homestead *↪*140

Award to husband of probate homestead for life in one of two parcels of real property owned by wife as her separate property at time of her death was not abuse of discretion, in view of husband's gift of the parcels to wife and his advanced years. Probate Code, §§ 660 et seq., 661.

37. Courts *↪*202(5)

Award of probate homestead to husband in deceased wife's separate property would not be reversed because of improper rejection of evidence, if established, where record disclosed that asserted error did not result in miscarriage of justice. Probate Code, §§ 660 et seq., 661; Const. art. 6, § 41½.

Homer C. Compton, Rollin L. McNitt, Los Angeles, Edythe Jacobs, Los Angeles, of counsel, for Carl H. Claussenius.

Dora R. Hyman, Don M. Kitzmiller, Norman Newmark, Los Angeles, for Penrod Otis Musser and Ralph C. Musser.

MOORE, Presiding Justice.

Two appeals are presented together. The first (Civil No. 17215) is from portions of a judgment rejecting certain claims and contentions of Carl Claussenius, surviving husband, herein referred to as "Carl" or "executor." The second is from an order setting aside a probate homestead for Carl following his controversy with Penrod and Ralph Musser, sons of decedent, herein re-

ferred to as "the Mussers." The first judgment resulted from the Mussers contest of and objections to the first account of executor wherein he claimed that "all the property" described in the inventory was purchased by him "with his separate money, which was derived from the estate of his sister * * * on the 8th of November, 1936, from which estate he received approximately \$200,000." He followed this with a declaration of separate ownership as to each of the several items he designated, excepting certain articles belonging to decedent at the time of her marriage. Also, he filed a creditor's claim for \$5000 and interest which was disallowed.

Carl and decedent were married April 28, 1937. On February 22 of the same year they executed an agreement wherein it was provided that in the event of divorce, decedent would make no claim against Carl for alimony or maintenance, but in lieu thereof would accept a settled estate consisting of securities of the approximate value of \$25,000 to be provided by Carl out of his separate funds and to be vested by him in specified trustees for the purposes stated in the agreement. In December, 1937, Carl acquired two parcels of real property, herein referred to as lots 48 and 49. In January following, decedent executed a deed quitclaiming her interest in such realty. In the following month they made another contract cancelling their prenuptial agreement. But in May (three months later) they executed another agreement providing that all property acquired by either of them prior to their marriage should continue to be the separate property of the owner at marriage and in the event of a separation or divorce neither should be entitled to receive out of such property any sums for alimony or support and maintenance. Simultaneously with such agreement Carl transferred certain corporate stocks to his wife.

In August, 1941, Carl placed the title to lots 48 and 49 in joint tenancy with decedent and one month later they executed still another contract wherein it was recited that Carl had not delivered the stocks specified in the agreement of May, 1938, that he

should convey to decedent by grant deed his interest in all the properties then owned by the parties in joint tenancy but that decedent would provide for Carl's interest from the income derived from such property and that decedent should in no way encumber or dispose of any part of such property without prior written consent of Carl. On the same day the latter executed a grant deed conveying to decedent all his real property and both executed their last wills. Decedent's will devised one-half of the real property to her sons. Contrary to the eager contentions of Carl following a trial of the objections to his first account the court found that parcels 48 and 49 as well as the income therefrom were the separate property of decedent at the time of her death. Still claiming that it was his separate property, Carl now demands a reversal of the judgment.

Carl's first contention is that the probate court has power to apply equitable principles. In *re Reade's Estate*, 31 Cal.2d 669, 672, 19 P.2d 745; In *re Evans' Estate*, 62 Cal.App.2d 249, 256, 144 P.2d 625, and that notwithstanding its possession of such power the court below failed to apply those principles in determining title to parcels 48 and 49 but based its determination purely on the basis of legal presumptions arising from the deed conveying the property to decedent. The answer to that contention is that the court followed its findings of fact and its judgment was the necessary sequitur.

[1-3] Basing his argument on the finding that the consideration for the transfer of the two parcels of realty was the satisfaction and discharge of his obligation under the 1938 agreement Carl contends that the latter document is void as contrary to public policy and that therefore he is entitled to have the property impressed with a resulting trust in his favor or to recover the property transferred. Notwithstanding the numerous arguments made by the parties to this appeal as to the validity or invalidity of the 1938 contract, its legality is of no vital consequence to a determination of this appeal. Assuming the contract to be void and that there was consequently

no consideration for Carl's transfer, he cannot prevail. If that document alone had been made, decedent would have been unable to enforce it by reason of the fact that the promise to convey the property was founded upon an illegal consideration. But such is not the fact. Here a deed was executed and the title of the property was vested in decedent. Therefore, it is the deed conveying the property that constitutes the contract behind which the estate of decedent is barricaded. When property is conveyed for an illegal consideration it is still conveyed. No consideration is necessary to the validity of a voluntary transfer of property by deed. Civil Code, section 1040. Where there has been a total failure of consideration the grantor cannot recover the property. *Lavelly v. Nonemaker*, 212 Cal. 380, 383, 298 P. 976; *Lawrence v. Gayetty*, 78 Cal. 126, 133, 20 P. 382, 12 Am. St.Rep. 29.

No authority has been cited and none is known to support Carl's contention that he is entitled to have the property impressed with a resulting trust in his favor. He himself made the conveyance. The want or failure of consideration does not raise a resulting trust. The voluntary deed made deliberately and without mistake or contrivance is none the less binding upon the grantor. *Tillaux v. Tillaux*, 115 Cal. 663, 668, 47 P. 691, *Tiffany on real property*, Third Edition, sec. 262.

[4] Carl contends that the conveyance of the real property was procured by the fraud of decedent and her undue influence. He bases such contention primarily upon the confidential relationship of husband and wife with the resulting presumptions of undue influence. This he argues is sufficient to warrant the conclusion of a constructive trust as against decedent who took advantage of the relationship. The *Mussers* urge that this theory is raised for the first time and should not be considered. When a case is tried on the theory that a material issue is raised by the pleadings and evidence is introduced thereon without objection the unsuccessful party will not be permitted later to contend that such issue was not raised. *Priebe v. Sinclair*,

90 Cal.App.2d 79, 86, 202 P.2d 577; *Lande v. Southern Cal. Freight Lines*, 85 Cal.App. 2d 416, 419, 193 P.2d 144; *McClure v. Donovan*, 33 Cal.2d 717, 731, 205 P.2d 17. The case was apparently tried on the theory that fraud was effectively pleaded by the allegations in the executor's first account that decedent "further represented to petitioner that she would reconvey said property to decedent [sic] upon his request; that relying upon said statements, petitioner was induced by decedent to, and did, execute and [sic] additional agreement dated September 11, 1941 * * * that decedent held said property in trust for petitioner."

While recognizing the presumption that any property conveyed to a wife by the deed of her husband is her separate property, Civ.Code, sec. 164, he contends that such presumption is rebuttable. *Horsman v. Maden*, 48 Cal.App.2d 635, 640, 120 P.2d 92. It may be, but the trial court did not find that such presumption was rebutted.

[5-10] It is the rule that the burden is on the husband to establish a resulting trust in his favor by proving that he did not by his deed intend to make a gift to his wife. *Altramano v. Swan*, 20 Cal.2d 622, 628, 128 P.2d 353. Carl relies upon the finding that the consideration for the conveyance was the discharge of his obligation under the 1938 contract and therefore asserts that notwithstanding the recital that the lots are conveyed to the wife as her separate property, evidence was admissible to establish the true nature of the transaction. *Huber v. Huber*, 27 Cal.2d 784, 788, 167 P.2d 708; *Tomaier v. Tomaier*, 23 Cal.2d 754, 757, 146 P.2d 905; *Cox v. Cox*, 82 Cal.App.2d 867, 870, 187 P.2d 23. But despite Carl's evidence and the rule that required the *Mussers* to prove that the deed was not obtained by undue influence, Civil Code, secs. 158, 2235; *Dale v. Dale*, 87 Cal.App. 359, 364, 262 P. 339, the court found (1) that Carl intended that the two lots should after September 11, 1941, be the separate property of his wife and (2) that she never held them in trust for Carl. Such finding is supported by Civil Code section 164. The language of the deed makes an absolute conveyance and the agreement made six

months subsequently modified the terms of the loans and recited decedent to be the owner. The form of a deed may alone support a finding, *Cox v. Cox*, supra, and the mere existence of the marital relation does not raise a presumption of fraud or undue influence in conveyances from a husband to his wife. *Kopner v. Fread*, 58 Cal.App. 2d 114, 119, 135 P.2d 634. In *Lyttle v. Fickling*, 72 Cal.App.2d 383, 164 P.2d 842, cited by Carl, while a trust was imposed on the wife's property for the grantor's benefit, the court found the wife to have expressly agreed to reconvey the property on demand.

Carl attacks the finding that he intended to convey the lots to decedent as her separate property, that there was no promise to reconvey them on Carl's request, and that they were not conveyed on a representation of decedent that the conveyance was to be made for the reason that Carl's mining activities might result in losses not covered by insurance which would imperil Carl's ownership of the two lots. Such findings are abundantly supported not only by the presumptions arising from the deed but also by the testimony of attorney Irwin which proved the probative facts contained in the findings.

[11, 12] Carl attacks the finding that the diamond rings were the separate property of decedent. He alleged in his first account that they were formerly his own, that he had given them to his wife and that thereupon they became community property. In support of his claim he cites section 164 of the Civil Code and *In re Walsh's Estate*, 66 Cal.App.2d 704, 152 P.2d 750. Both authorities bear out his thesis in the abstract. But the court was privileged to infer from the nature of the chattels, the relationship of the parties, and the circumstances of the delivery the reasonable deduction that a gift was intended. Such conclusion finds support in Carl's pleading which admits that he had "given" the rings to decedent and in his testimony

that he "gave" the rings to her in view of section 162 of the Civil Code.¹ Support is also found in the statement of Carl's counsel, to wit, "We feel that the diamond rings with the exception of the engagement ring are community property." That utterance clearly implied that the last above mentioned ring was considered decedent's separate property. Carl's contention that because he gave the rings to his wife they were community property is supported by no authority. It is statutory law that everything acquired by a wife after marriage as a gift is her separate property.

The \$5000 Claim Was Barred.

[13] The court found that Carl's claim for \$5000 was based upon decedent's receipt for that sum and her agreement to repay "the same in a manner agreeable to said Carl" at the time the stocks mentioned in the agreement of May 25, 1938, "shall be released and ready for delivery to me"; none of such securities was ever delivered to decedent; under the agreement of September 11, 1941, Carl's obligation to convey his interest in the lots was substituted for his promise to deliver such securities; the lots were conveyed to decedent September 11, 1941, and the latter's obligation to repay the \$5000 became due and matured on that day; therefore, Carl's claim became barred under subdivision 1 of section 337 of the Code of Civil Procedure. By virtue of such finding the court was obliged to disallow the claim. The extended arguments attacking and supporting such finding are unavailing in view of the writings and the inferences reasonably drawn from all the transactions. *Aronson & Co. v. Pearson*, 199 Cal. 295, 303, 249 P. 191. It was not an unreasonable inference that the conveyance of the two lots was a substitution for the corporate stocks.

Loans on Lots 48 and 49.

[14, 15] Carl attacks findings 12 and 13 as being without evidentiary support. The findings are that decedent did not breach

1. "All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits there-

of, is her separate property. The wife may, without the consent of her husband, convey her separate property."

the agreement of September 11, 1941, by executing a trust deed on a portion of the property to secure a loan in the principal sum of \$7000 and that the loan was made with Carl's full knowledge and consent in writing; that the agreement of September 11, 1941, was not breached by decedent's executed with Carl's full knowledge and consent. It will be remembered that by execution of her will which was likewise the contract of September 11, 1941,² Mrs. Claussenius agreed that she would not mortgage, sell or otherwise encumber or dispose of any part of the real property without prior written consent of her husband. To show a compliance with such consent the Mussers offered to prove by

Ralph Musser the contents of the purported letter from Carl to his wife. Before offering the testimony of Ralph, they introduced Carl's testimony to the effect that he had never written any such letter and therefore did not have the letter which Ralph claimed to have seen.³ The objection to Ralph's testimony on the ground that notice to produce had not been served on Carl is without merit. It follows as a matter of course that if Carl had never written the document, service of notice to produce would have been an empty ceremony. There was no error in admitting Ralph's testimony as to the contents of a letter which he testified he had seen. *Jones v. Jones*, 38 Cal. 584, 586.

2. (Clerk's Transcript, Civ.No.17215, p. 21)

"Whereas, First Party has been and is unable to assign, transfer and set over to Second Party the corporation stocks specified in subdivision 2 of that certain Property Settlement Contract executed by said parties, dated May 25, 1938; and

"Whereas First Party and Second Party are now the owners, as joint tenants, of the real property hereinafter particularly described:

"Now, Therefore, the parties hereto mutually covenant and agree as follows:

"1. First Party shall concurrently with the execution hereof, execute and deliver to Second Party a grant deed conveying to Second Party all of his rights, title and interest in and to the real property now owned as aforesaid by First Party and Second Party, as joint tenants, so that thereby Second Party shall become and be henceforth the sole owner thereof as her separate property.

"2. Second Party shall be entitled at all times to reside in the one of the aforesaid real property which shall be agreed upon and selected by the parties hereto as their home, and, in addition thereto, Second Party shall provide and pay from the net income derived by her from said properties the amount of money required to provide First Party with all reasonable necessities for his comfortable support; it being understood and agreed, however, that the amount which Second Party shall be required to provide and pay as aforesaid shall not in any event exceed one-half (½) of said net income.

"3. In order to assure the faithful performance by Second Party of her

obligations hereunder, and solely as security to First Party therefor, Second Party shall not mortgage, sell or otherwise encumber or dispose of any part of the aforesaid real property without the prior written consent of First Party thereto.

"Said real property is particularly described as follows:

"All that real property in the City of Los Angeles, County of Los Angeles, State of California, described as: * * *

"Lots Forty-eight (48) Forty-nine (49) and Sixty-six (66), Tract 4588

"In Witness Whereof said parties hereto have hereunto affixed their signatures."

3. The following proceedings occurred while Mr. Claussenius was on the stand:

"Redirect Examination

"By Mr. Kitzmiller:

"Q. Have you the original of the letter written by yourself to your wife in 1946, which letter, among other things, referred to the boys coming up to the mine and working, and also referring to the financing of the repairs on the house?"

Objection was made that notice to produce the letter had not been served, etc.

"The Court: Of course, it would have been better if you had served a written demand prior to trial, but I think it is proper to inquire whether he has such a letter.

"The Witness: I do not have such a letter. I never had such a letter. I never wrote such a letter.

"Q. By Mr. Kitzmiller: You never wrote such a letter?

"A. No."

Carl's Support From the Real Property

[16] Carl contends that decedent's covenant to support him out of the income from the real property should be enforced against respondents. No good reason is advanced why the court should have made such ruling. However, Carl cites and relies upon *Marra v. Aetna Construction Co.*, 15 Cal. 2d 375, 378, 101 P.2d 490, and *Thew v. Thew*, 35 Cal.App.2d 691, 96 P.2d 826. In those authorities covenants not running with the land were enforced against a transferee of the covenantor who took with knowledge of the covenant. But in those cases the nature of the covenant coupled with the intention of the parties and the result of the covenants not being enforced was considered such that equity could not in good conscience withhold relief. In the instant situation, however, decedent willed one-half interest in the property to her husband for the very purpose of providing for his support after her death.

Miscellaneous other findings are attacked by Carl as being unsupported by the evidence. For illustration: finding 6 that it was not true that appellant had received \$200,000 from his sister's estate; finding 5 that the real property was purchased in part with the separate monies of appellant; finding 8 that the agreements of May 25, 1938, and September 11, 1941, are valid and binding and each was made for an adequate consideration; finding 14 that prior to the deed of September 11, 1941, decedent was the absolute owner of an undivided one-half interest in the real property described in the deed; finding 9 that there were no representations or reasons for transferring parcels 48 and 49 to decedent—these findings are attacked as being without substantial support. But even if they were all stricken or contrary findings substituted in lieu thereof the product would make no difference in the over-all result.

No Error in Order Awarding a Probate Homestead to Defendant

After the inventory had been filed Carl filed his petition for an order designating lot 48 as a probate homestead for his use during his lifetime. Objections by the

Mussers to the petition were overruled and the court set aside the homestead. The Mussers now contend that error was committed by the court in each of the following acts: (1) concluding that Carl was entitled to a homestead on lot 48 for his lifetime or at all; (2) refusing to reopen the probate proceeding in order that the Mussers might prove the value of Carl's mine; (3) excluding testimony offered by the Mussers to prove that Carl agreed that in consideration for decedent's executing her will of September 11, 1941, he would take his property rights or interests provided for him in such will in lieu of all other rights or interests which he might have after decedent's death with respect to real property including lot 48; (4) overruling of objections to the petition for probate homestead.

[17-20] The order was in all respects valid. It is mandatory upon proper application of a surviving spouse for the court to "select, designate and set apart" a homestead for the survivor, where the deceased was in possession of the property at the time of death. Probate Code, sec. 661. There is no rule to control the court in the selection of a homestead. It must be governed by a sound discretion, the value of the homestead, the financial condition of the estate and the rights of creditors. But the demands of the family are paramount. In *re Barkley's Estate*, 91 Cal.App. 388, 392, 267 P. 148. The duration of the homestead is committed to the sound discretion of the court and the term will not be disturbed in the absence of a showing of discretion abused. In *re Firth's Estate*, 145 Cal. 236, 238, 78 P. 643. Aside from the exercise of reasonableness in selecting a homestead the only restriction imposed is that if the homestead be selected from the separate property of decedent its duration must be for a limited period to be named in the order but the designated parcel remains subject to administration. In *re Barkley's Estate*, *supra*, 91 Cal.App. 391, 267 P. 148. If the probate homestead may be carved out of the estate of the decedent *Robson v. Meder*, 66 Cal.App.2d 47, 49, 151 P.2d 662, and if it cannot be defeated by an act of

a testator In re Ettlinger's Estate, 56 Cal. App.2d 603, 606, 132 P.2d 895, than it cannot be defeated by the heirs of the decedent.

[21] It is a policy underlying all homestead legislation to provide a place for the family and its surviving members where they may dwell in peace and serenity, conscious that it cannot be taken from them "either by reason of their own necessity or improvidence, or from the importunity of their creditors." In re Kachigian's Estate, 20 Cal.2d 787, 791, 128 P.2d 865, 867.

[22-24] Upon filing of the petition for a homestead and posting of notices the court acquires jurisdiction. Stiebel v. Roberts, 42 Cal.App.2d 434, 438, 109 P.2d 22. Since there was no community estate of Carl and decedent, the homestead had to be selected from decedent's separate property. She had none other than lots 48 and 49 which Carl out of his separate estate had conveyed to her by deed on September 11, 1941. In his account as her executor he had listed such realty not as parcels belonging to her estate but as his own separate property. The court having decided his claim adversely he found himself in the position of requesting the court to designate as a homestead for himself the very property he had already declared was his own. By reason of the resulting dilemma, the Mussers contend that the petition is defective. This affords no cause for confusion. Carl was entitled to select a homestead out of decedent's separate property since there was no community estate. The court having determined that lot 48 was decedent's separate property in her lifetime, Carl was privileged to base his petition on the facts as determined by the court. After a hearing on the petition to set aside a homestead the court found that (1) after its determination on the objections to the executor's account that lots 48 and 49 were the separate property of decedent in her lifetime the trial judge announced his intention of holding that lot 48 was the separate property of decedent at her death; (2) no homestead had been selected and recorded by either during decedent's lifetime; and (3) there was no

community property from which a homestead could be selected. Such facts met all the requirements for designating a probate homestead and the allegations thereof furnished basis for the jurisdiction of the court.

No Waiver of Homestead

[25-27] The Mussers contend that Carl waived his right to a probate homestead. They undertook to prove that he did so by the testimony of attorney Irwin who allegedly would have testified that in the course of a conversation with Carl and his wife it was agreed that in consideration of decedent's execution of her will (admitted to probate) he would take the property rights and interests provided for him in that instrument in lieu of all other rights or interests which he might at any time after decedent's death have with respect to certain real property including lot 48 described in the deed and in the September, 1941, agreement. It is the rule of long-established usage that a statutory right such as a probate homestead should not be held to have been surrendered by an agreement of the spouses "except by clear and explicit language." Warner v. Warner, 144 Cal. 615, 618, 78 P. 24, 25; In re Whitney's Estate, 171 Cal. 750, 756, 154 P. 855; In re Schwartz's Estate, 79 Cal.App.2d 308, 309, 179 P.2d 868. Where it is established that for a definite consideration paid for a surrender of one's statutory rights as the survivor of a marital partnership, the court will find no difficulty in concluding that such rights were waived, as in Estate of Schwartz, supra. But no such situation is found in the case at bar. There was here no equivalent of a homestead waiver in "clear and explicit language." In the first place there was no written waiver by him. How could proof be made of Carl's waiver of his homestead right without a writing? The asserted agreement on the part of decedent to devise the two lots and to make provision for Carl by will is rendered invalid by subdivision 6 of section 1624. If decedent's promise was a nullity it could not become a consideration to support Carl's promise to waive his probate homestead. It has been removed from the ban of the cited

statute only to the extent of its performance, to wit, the execution of the deed and the will. Considering those instruments as forming one agreement in writing then all prior oral negotiations are presumed to have been merged in it and oral evidence is inadmissible to add to or vary its terms. Parol evidence cannot add another term to an agreement if the writing contains nothing relating to the matter proposed by the offered parol proof. *Hotchkiss v. Nelson R. Thomas Agency*, 96 Cal.App.2d 154, 214 P.2d 568.

[28, 29] Not only was the Irwin testimony inadmissible under the statute of frauds but it is the law that the intention of the testator to require his beneficiary to elect whether to take under will or under statute must appear from the will itself. The terms of the will must clearly manifest the testator's intention to make the testamentary gift stand in lieu of the beneficiary's legal rights. *In re Ettlinger's Estate*, 73 Cal.App.2d 967, 970, 167 P.2d 738.

[30] The right to inherit is of statutory origin. No more can be said of the right to a probate homestead; but the latter right is superior to the right to inherit because the right of inheritance is subject to the right to a probate homestead. *In re Whitney's Estate*, 171 Cal. 750, 154 P. 855; *In re Baine's Estate*, 137 Cal.App. 547, 31 P.2d 211.

[31] There is another reason why the conversation witnessed by the attorney should not have been admitted. The offer of such proof is in its essence an effort to compel specific performance of an agreement on the part of Carl to waive a statutory right. Prior to the conversation he owned the property conveyed by his deed as his separate estate. Taking his alleged agreement at its face value it was to part with 100 per cent interest in the two lots in consideration of a promise by his donee to return to him at a subsequent time by her will only 50 per cent interest in the property. Such consideration must be measured as of the date of the purported agreement. So considered, no doubt could

remain that it was inadequate to support specific performance. *O'Connell v. Lampe*, 206 Cal. 282, 285, 274 P. 336; *Drullinger v. Erskine*, 71 Cal.App.2d 492, 495, 163 P.2d 48.

[32] The Mussers contend that Carl would be estopped from asserting the statute of frauds even if the waiver of a probate homestead were required to be in writing. There is here no basis for such claim. Carl could have conveyed or bequeathed all his property to a stranger even without a consideration. Neither decedent nor her children paid anything for the deed. All of them profited thereby, the wife directly, the sons, indirectly through decedent's will of one-half of the property to them. Inasmuch as no prejudice has been suffered no estoppel could arise.

[33] Carl's alleged promise to waive the statutory right to a probate homestead as a part of the proposal did not have to be accepted by his wife. Of course, she could have accepted and enforced it had she written into her will a provision requiring him to elect whether he would take under the statute or the will. But conceding such conversation to have occurred, she may have decided that such requirement would be unfair to Carl and for that reason made no such demand in her will. Also, she and her attorney are presumed to have known the law, and knowing it the omission from the will of a requirement that Carl elect must be deemed her deliberate act. She wrote only those things she was obligated to include in her will, namely, devised one-half to Carl and one-half to her children. From the foregoing considerations it is inescapable that the court's exclusion of the attorney's testimony was based upon solid ground. To have admitted it and possibly to have found in accordance therewith would have resulted in a gross injustice.

[34] Carl was awarded a probate homestead on lot 48 pursuant to statute. Probate Code, sec. 660 et seq. His gift of the lot to his wife does not preclude his enjoyment thereof as a probate homestead. *In re Woodburn's Estate*, 212 Cal. 683,

687, 300 P. 22. He inserted no provision in the gift deed indicating that he would never occupy it, nor did he by act or word evince an intention merely to take under decedent's will. Since he could not be required to elect between the devise and his statutory right without her having so stipulated in her will, *In re Ettlinger's Estate*, supra, the record is destitute of any proof or principal to the effect that an award of the homestead was error. Moreover, her very knowledge that her power of testamentary disposition was subordinate to the court's power to order a probate homestead pursuant to section 660 was ever present with her and may be deemed to be evidence of her acquiescence, if not her manifest wish, that her husband have the homestead.

[35] The Mussers contend that decedent relied upon her husband's waiver of his homestead rights at the time of making her will. If Carl were some casual friend or a distant relative and as such had been made a devise to the extent of half interest in her estate there might be some basis for such contention. But he was her husband; he had property and had yielded to her wishes until he finally made a gift to her of all the properties which constitute her estate. No fact, not even a reasonable theory is suggested in support of the claim that she relied upon his waiver of the homestead. Neither the fact that he made her a gift or qualified as executor of her estate serves as a waiver of his right to a probate homestead, *In re Firth's Estate*, 145 Cal. 236, 238, 239, 78 P. 643, and there is no reasonable basis for decedent to have relied upon either as Carl's waiver. But if she had, such reliance would furnish no basis for a contract between the two that he waived his rights. She lost nothing by relying upon her understanding of his waiver. The substance of their contract is evidenced by the deed and the will. She

took all his property; she in turn bequeathed him one-half. If she relied upon anything tangible, it was his agreement to give her his two lots and in that she was not disappointed.

[36] The Mussers contend that the award of the probate homestead for life was an abuse of discretion. There is no basis for such contention. Because of the gift of the lots and other gifts by Carl to decedent and because of his advanced years it was not an abuse of discretion for the court to set aside the homestead to Carl during his lifetime. *In re Rosland's Estate*, 76 Cal.App.2d 709, 712, 173 P.2d 830. No one is in position to determine that issue so well as the trial judge.

[37] Finally, conceding it to have been error for the court to exclude the testimony of the attorney, no prejudice was caused thereby. All the estate of decedent had come as gifts from her husband. They had cost nothing to decedent. To allow him the use thereof for life was no more than should have been awarded. To deny him would have been to heap disappointment and possible suffering upon the Santa Claus of decedent's life. By reason of the court's order no injustice has been done. Under such circumstances the order should not be set aside because of the improper rejection of evidence since the record discloses that the asserted error has not resulted in a miscarriage of justice. Constitution, Article VI, section 4½.

Both judgments are affirmed.

WILSON, J., concurs.

McCOMB, Justice.

I concur as to affirmance of the judgment in action #17215 but I dissent from the affirmance of the judgment in action #17216 [awarding probate homestead].

96 Cal.App.2d 787

In re RYAN'S ESTATE.

Civ. 4015.

District Court of Appeal, Fourth District,
California.

April 3, 1950.

Proceeding in the matter of the estate of James P. Ryan, deceased, wherein Jack Ryan petitioned for an order decreeing that the trust created by the will terminated on February 22, 1949 and instructing trustees to convey to him all trust property, opposed by Tess Felton. The Superior Court, Fresno County, Arthur C. Shepard, J., entered an order decreeing that the trust terminated on that date, that Tess Felton had no interest in the trust property or income therefrom after February 22, 1949 and that petitioner was entitled to all of the trust property and Tess Felton appealed. The District Court of Appeal, Barnard, P. J., held that the construction adopted by the trial court was that which appeared to have been what testator intended by the terms of the trust created by the will.

Order and judgment affirmed.

1. Wills ☞686(2)

Where one paragraph of will directed trustees to pay income from one piece of realty to testator's wife during her lifetime and on her death one-half of that income to wife's sister during her lifetime or until she remarried, and another paragraph directed trustees to close trust estate and distribute all property to survivor of four named parties, and on February 22, 1949, only one of four named survived, trust terminated on that date and survivor was entitled to all property and income. Civ.Code, §§ 1636, 1641, 1650, 1652, 1653.

2. Executors and administrators ☞315(5)

Where intent and meaning of decree of distribution must be found by construing the will, usual rules for interpreting will should be applied for that purpose and decree cannot be given a different or broader meaning than the will.

3. Executors and administrators ☞315(5)

An erroneous provision of a decree of distribution which has become final prevails over an inconsistent provision in the will.

4. Judgment ☞524

In considering meaning and effect of a judgment, individual clauses or provisions of judgment are not to be separately considered and construed, but document is to be construed as a whole in order to give effect to what was actually intended.

Lawrence W. Young, Fresno, for appellant.

Stammer & McKnight, Fresno, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order decreeing that a testamentary trust terminated on February 22, 1949. The trust provisions of the will, which was admitted to probate on January 21, 1941, are set forth in six paragraphs, only a part of which are material here.

The Fourth paragraph leaves the bulk of the estate to two trustees under the conditions which follow. It then directs the trustees to pay the net income from one piece of real property to the testator's wife during her lifetime, and in the event of her death to pay one-half of that income to the wife's sister "Tess Felton, during the lifetime of said Tess Felton or until she remarries" and the other half to his brother and sisters as hereafter directed. It then provides that if "Tess Felton should die or remarry during the continuance of this trust" all of this income shall be paid as thereafter directed.

The Fifth paragraph directs the trustees to pay the net income from the remaining real property to his brother and his two sisters; that if his wife should die the other half of the income provided for her in paragraph Four shall be paid to his brother and two sisters; that in the event of the death or remarriage of Tess Felton all of the net income mentioned in paragraph Four shall be paid to the brother and two sisters; and that, if necessary, all of the income from all of the properties should be used to insure that his wife receive at least \$250 per month.

The Ninth paragraph reads as follows: "My trustees are herewith directed to carry on said trust until such time as there is only one survivor left of either of the following, to wit: My wife, Genevieve J. Ryan; my brother, Jack Ryan; my sister, Josephine Ryan; and my sister, Nellie Waggott; and when there is only one survivor of said four left, my trustees are directed to close my said trust estate and distribute all of the real and personal property to said survivor, and I hereby give, devise and bequeath all of said real and personal property remaining in my said trust estate to the survivor of the four above-named parties."

The decree of distribution entered on December 14, 1942, distributed the trust property to the trustees "subject to the trust expressed in the last will" of the deceased. One of the sisters named in paragraphs Five and Nine died in November, 1943. The widow of the testator died in October, 1946. One half of the income previously paid to her was thereafter paid to Tess Felton until February 22, 1949, on which date the other sister died, leaving the brother, Jack Ryan, as the survivor of the four persons named in the Ninth paragraph.

On February 24, 1949, this brother demanded in writing that the trustees deliver the trust property to him. This demand was refused because of Tess Felton's claim that the trust had not terminated and that she was still entitled to a part of the income therefrom. The brother then filed a petition for an order decreeing that the trust terminated on February 22, 1949, and instructing the trustees to convey to him all of the trust property with the income accruing after that date. Tess Felton answered, and the trustees also answered requesting appropriate instructions. The court found that it was the intention of the testator, as expressed in his will, that this trust should continue only until such time as there should be but one survivor of the persons named in paragraph Nine; that the trust should then terminate and the remaining trust property be distributed to this survivor; and that Tess Felton should receive the income provided

for her in paragraph Four only during the continuance of the trust and not thereafter. It was further found that Tess Felton had no interest in the trust property or the income therefrom after February 22, 1949, that the trust terminated on that date, and that the surviving brother was entitled to all of the trust property with the income from that date. An order and decree was entered accordingly, from which Tess Felton has appealed.

The appellant contends that the testator, in effect, created two trusts, one as to the property mentioned in paragraph Four and one as to the property mentioned in paragraph Five; that paragraph Nine can only apply to the property mentioned in paragraph Five, as otherwise the provision for her made in paragraph Four would have no effect; that paragraph Four is specific and does not refer to any other provision of the will; that the income from the property mentioned in paragraph Four is set apart from the rest of the trust; that her interest therein vested on the death of the testator's wife and can only be divested by her remarriage or death; that the will did not provide that her right would terminate on the conditions set forth in paragraph Nine; and that although one of the trusts has terminated the other trust should continue. It is also argued that the rights of the parties must be determined by the decree of distribution and not by the will; that while the court must consider the will adopted in the decree in determining the intention of the testator, the decree is a judgment which must be treated and construed as a contract; that paragraph Four of the will is irreconcilable with paragraph Nine; and that paragraph Four must prevail because it is specific rather than general, and because under contract rules the first of two conflicting provisions must prevail over the second.

It clearly appears that this will created a single trust for the dominant purpose of providing adequate incomes for the wife, brother and sisters until such time as only one of them survived. This purpose is expressed as to the wife in paragraph Four, is expressed as to the brother and sisters and repeated as to the wife in paragraph

Five, and is confirmed in paragraph Six which states that the "express intention" is that the trustees shall pay the wife \$250 monthly during her life and pay the brother and sisters enough to live on, and then directs the trustees to sell any or all of the "principal" or any of the real property, if necessary, and use the proceeds for this purpose. It also seems clear that the testator intended that the remaining trust estate should go immediately to the survivor of these four persons, when ascertained, since he directed the trustees to carry on the trust until such time, and not only directed them to then close the trust and distribute it all to this survivor, but specifically devised and bequeathed the remaining trust property to that survivor.

The contingent provision for the appellant in paragraph Four is not only incidental to the main purpose of the trust, but it is a part of the trust itself and subject to the trust provisions as a whole. Paragraph Four twice refers to provisions which follow, and paragraph Five repeatedly refers to paragraph Four. Paragraph Nine refers to the entire trust estate and necessarily applies to the property mentioned in both paragraphs Four and Five, and not merely to the latter.

[1] The will does not directly provide that the appellant shall receive a part of the income as long as she lives. As a part of the trust created it directs the trustees, after the death of the wife, to pay her a part of the income during her lifetime or until she remarries. This is to be paid from the trust and no method of payment, apart from the trust, is anywhere provided. While it provides what shall be done with that part of the income if she dies or remarries during the continuance of the trust, no attempt is made to dispose of it if she lives longer, except through a termination of the trust. Under her contention, a partial intestacy would result. The entire trust, of which the appellant's right was a part, was subject to definite conditions one of which was that it should terminate, and the entire remainder be otherwise disposed of, upon the happening of a certain event. This event having occurred, no trust remained from which any resulting income

could be paid to the appellant. Her right was necessarily limited by the existence of the trust itself, and by the time during which the trustees were authorized to act at all. In re Estate of Painter, 150 Cal. 498, 89 P. 98, 11 Ann.Cas. 760. Thus construed, the provisions for the appellant in paragraph Four may be reconciled with those of paragraph Nine, and each given effect in accordance with the intentions of the testator as disclosed by the entire will.

[2-4] While the appellant contends that her rights are determined by the decree of distribution and not by the will she also concedes, as she must, that the will must be considered in determining the intent of the testator, since the decree of distribution merely follows its terms. It should logically follow, where the intent and meaning of the decree of distribution must be found by construing the will, that the usual rules for interpreting wills should be applied for that purpose. Under such circumstances, the decree cannot be given a different or broader meaning than the will. *Manning v. Bank of California Nat. Ass'n*, 216 Cal. 629, 15 P.2d 746; *Canfield v. Security-First Nat. Bank*, 13 Cal.2d 1, 87 P.2d 830. While an erroneous provision of a decree which has become final prevails over an inconsistent provision in the will, *Keating v. Smith*, 154 Cal. 186, 97 P. 300; In re Estate of Loring, 29 Cal.2d 423, 175 P.2d 524, no such a situation here appears as the terms of the two instruments are identical. In considering the meaning and effect of a judgment, just as in a contract, the individual clauses or provisions of the judgment are not to be separately considered and construed, but the entire document is to be construed as a whole in order to give effect to what was actually intended. In re Carr, 65 Cal.App.2d 681, 151 P.2d 164; *Lazar v. Superior Court*, 16 Cal.2d 617, 107 P.2d 249. The application of the rules for interpreting contracts, for which the appellant here contends, would lead to no different result. The rules thus contended for are to be applied when the provisions in question are so inconsistent that they cannot be reconciled or given effect under the usual rules. Section 1636 of the Civil Code provides that a contract must be so interpreted

as to give it the effect intended, if this can be done. Section 1641 provides that each part of a contract shall be given effect, each clause helping to interpret the other. Section 1650 provides that particular clauses of a contract are subordinate to its general intent. Section 1652 provides that repugnancy in a contract must be reconciled, if possible, by an interpretation which will give some effect to both clauses, consistent with the intent and purpose of the entire contract. And section 1653 provides that "Words in a contract which are wholly inconsistent with its nature, or with the main intention of the parties, are to be rejected."

Paragraph Nine of the will is not irreconcilable with the provision for the appellant in paragraph Four, and each may be given an effect consistent with the other. Both are given such an effect under the construction adopted by the trial court, which rather clearly appears to have been what the testator intended.

The order and judgment appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



HOLLYWOOD TURF CLUB v. DAUGHERTY, Commissioner of Corporations.
Civ. 17330.

District Court of Appeal, Second District,
Division 2, California.

March 31, 1950.

Hearing Granted May 25, 1950.*

The Hollywood Turf Club brought action for a writ of mandate to compel Edwin M. Daugherty, as Commissioner of Corporations of and for the State of California, to issue a permit authorizing the petitioner to declare a stock dividend and shares having a par value of \$100 each. A judgment in favor of the petitioner was entered by the Superior Court of Los Angeles, Clarence M. Hanson, J., and the Commissioner of Corporations appealed. The District Court of Appeal, McComb, J., held that provision of corporate

securities act requiring that par value of securities proposed to be sold by corporation for purpose of raising funds in which to finance horse racing enterprises must not exceed \$1000 per share is unconstitutional as being special legislation and illegally discriminatory.

Judgment affirmed.

Wilson, J., dissented.

1. Administrative law and procedure ⇨722
Corporations ⇨394

Where hearings before Commissioner of Corporations on application by corporation for permit authorizing corporation to declare a stock dividend was conducted in accordance with provisions of chapter 5 of part 1 of division 3 of title 2 of the Government Code, corporation's petition in Superior Court to review commissioner's denial of the application was not subject to the 60 day limitations set forth in Corporate Securities Act. St.1945, p. 1679, § 15; Government Code, § 11523.

2. Statutes ⇨190

Where statute is free from ambiguity there is no room for construction by the court.

3. Administrative law and procedure ⇨722
Corporations ⇨394

Where corporation after denial of its application for permit authorizing declaration of stock dividend by Commissioner of Corporations requested Commissioner to prepare a record within 10 days after last day on which reconsideration could be ordered, and corporation thereafter filed application in Superior Court for writ of mandate and review of Commissioner's order within 5 days after record was delivered to it, corporation's application was timely. Government Code, §§ 11521, 11523.

4. Constitutional law ⇨240(1), 296(1)
Corporations ⇨394

Provision of Corporate Securities Act that par value of securities proposed to be sold by corporation for purpose of raising funds with which to finance horse racing enterprises must not exceed \$1000 per share is invalid as being special legislation and illegally discriminatory. St.1947, p. 2561, § 5; Const.Cal. Art. 1, § 11; U.S. C.A.Const. Amend. 14.

* Subsequent opinion 224 P.2d 359.

5. Mandamus Ⓒ3(8)

Corporation's petition for writ of mandate to review order of Commissioner of Corporations denying corporation's application for permit authorizing declaration of stock dividend was not improperly granted on ground that corporation had a plain, speedy or adequate remedy at law, even if established that provisions of Government Code were available to corporation for review of Commissioner's order, since such relief was an equitable relief and not a legal remedy. St.1947, p. 2561, § 5; Government Code, § 11440.

6. Mandamus Ⓒ3(2)

A legal remedy is not adequate, so as to preclude grant of writ of mandamus, which does not afford applicant the very relief which he seeks, and which is equally convenient, beneficial and effective.

7. Administrative law and procedure Ⓒ208

An administrative officer's power to prescribe rules and regulations is not the power to make law but merely to adopt regulations to carry out will of legislature as expressed in language of statute.

8. Corporations Ⓒ394

Commissioner of Corporations exceeded his jurisdiction by adopting rule requiring that stock dividend shares of horse racing corporation should be not less than \$1000 par value. St.1947, p. 2561, § 5.

9. Corporations Ⓒ394

Finding that evidence did not disclose that proposed stock dividend by horse racing corporation would double or otherwise aggravate the condition of shareholdings below \$1000 per person was properly sustained by evidence, where it appeared that there was no scheme, conspiracy or plan to trade improperly in shares of corporation's stock, and that even though on two previous occasions, stock dividends similar in nature had been permitted by Commissioner of Corporations and declared by the corporation such shares had not been improperly traded. St.1947, p. 2561, § 5.

10. Corporations Ⓒ394

Evidence supported finding that issuance of proposed stock dividend by horse racing corporation pursuant to permit is-

sued by Commissioner of Corporations properly restricting the issuance would cause such stock dividend to reach hands of those legally entitled thereto. St.1947, p. 2561, § 5.

11. Appeal and error Ⓒ1170(10)

Where error in trial court's finding of fact, even if established, was not prejudicial, such error must be disregarded pursuant to mandate of constitution. Const. Art. 6, § 4½.

Fred N. Howser, Attorney General,
James A. Doherty, Deputy Attorney General, for appellant.

Desmond & Desmond, Long Beach, for respondent.

McCOMB, Justice.

From a judgment in favor of respondent in an action to compel appellant (Commissioner of Corporations for the State of California) to issue a permit authorizing respondent (Hollywood Turf Club) to declare a stock dividend in shares having a par value of \$100.00 each, the Commissioner of Corporations appeals.

Respondent was incorporated in 1935 with an authorized capital of 5000 shares of common stock without par value, and 5000 shares of preferred stock of \$100.00 par value. Its articles of incorporation were amended in 1936 to authorize 12,500 shares of common stock with a par value of \$100.00 each. In 1937 its articles of incorporation were again amended to permit an increase of capital stock to 22,500 shares of the par value of \$100.00, and in 1938 by further amendment there was authorized the issuance of 30,000 shares of the par value of \$100.00 per share. In 1947 the articles of incorporation were amended increasing the total number of shares authorized to 60,000 with a par value of \$100.00 per share. In 1947 the Legislature amended section 5 of the Corporate Securities Act by adding thereto the following: "The commissioner shall have authority to prescribe by rules and regulations adopted after reasonable notice and a public hearing, the rights, preferences, privileges, re-

stictions, and par value of securities proposed to be sold for the purpose of raising funds with which to finance racing enterprises authorized by law; provided that, any par value so prescribed shall not exceed one thousand dollars (\$1,000) per share." St.1947, p. 2561.

Effective as of October 10, 1947, appellant adopted the following emergency regulation as section 666 of Title 10, California Administrative Code: "The rights, preferences, privileges, restrictions and par value of securities proposed to be sold for the purpose of raising funds with which to finance a horse racing enterprise shall be as follows:

"(a) The securities shall be of only one class, without distinction.

"(b) The securities shall have a par value of at least \$1,000.

"(c) Fractional shares shall not be issued except under specific authorization of the Corporation Commissioner based on a showing of unusual circumstances justifying the issuance of fractional shares.

"This rule shall apply to the original and any subsequent financing of a horse racing establishment, whether by the sale of securities for cash, the issuance of securities in the capitalization of surplus or by the issuance of securities in any other manner."

Thereafter effective as of December 26, 1947, appellant adopted as a new section 666 of Title 10 of the California Administrative Code the following:

"The rights, preferences, privileges, restrictions and par value of securities proposed to be sold for the purpose of raising funds with which to finance a horse racing enterprise shall be as follows:

"(a) The securities shall be of only one class, without distinction.

"(b) The securities shall have a par value of at least \$1,000.

"(c) Fractional shares shall not be issued except under specific authorization of the Corporation Commissioner based on a showing of unusual circumstances justifying the issuance of fractional shares. In

exceptional circumstances the issuance of script may be authorized in the discretion of the Commissioner to equalize share dividends.

"This rule shall apply to the original and any subsequent financing of a horse racing establishment, whether by the sale of securities for cash, the issuance of securities in the capitalization of surplus or by the issuance of securities in any other manner."

On December 9, 1947, the board of directors of respondent passed this resolution:

"* * * Resolved, * * * (1) That a dividend of 29,997 shares of the capital stock of this corporation, of the par value of \$100.00 per share, be, and the same is hereby declared on the basis of one share, or fractional part of one share of capital stock for each share, or fractional part of each share of the 29,997 shares of the capital stock of the corporation now issued and outstanding, of the aggregate par value of \$2,999,700.00, said dividend to be payable, on the basis aforesaid, in shares of stock only, to shareholders of record of this corporation on March 10, 1948, such stock to be issued on March 24, 1948, or as soon thereafter as this corporation shall have received the Permit of the Division of Corporations, Department of Investment, of the State of California, authorizing it so to do; * * *."

On February 20, 1948, respondent filed with appellant an application for a permit to issue as a stock dividend 29,997 shares of its common stock having a par value of \$100.00 per share. Appellant held a hearing on such application pursuant to the provisions of chapter 5, part 1, division 3, title 2 of the Government Code. This application was denied for the reason that the proposed issue of stock did not conform to the provisions of section 666, title 10 of the Administrative Code in that permission was sought to issue securities of a par value of less than \$1000 per share.

Respondent filed the present petition for a writ of mandate and review of the order of appellant on November 9, 1948.

Questions

[1,2] First: *Was the petition filed by respondent in the superior court beyond the period of limitations permitted by section 15 of the Corporate Securities Act?*

This question must be answered in the negative. Section 15 of the Corporate Securities Act reads as follows:

"Every order, decision, license or other official act of the commissioner shall be subject to review in accordance with law.

"Except for review of proceedings conducted in accordance with Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code, a written petition praying that the order, decision, permit or evidence of other official act be issued, modified or set aside in whole or in part may be filed in the superior court of the State of California, within 60 days after the issue of such order, decision, permit or evidence of other official act of the commissioner or after completion of application to the commissioner and failure or refusal of the commissioner to act upon said application." St. 1945, p. 1679.

The hearing in the instant case before appellant as commissioner of corporations was conducted in accordance with the provisions of Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code. Therefore the hearing in the superior court to review appellant's denial of respondent's application fell within the exception mentioned in section 15 of the Corporate Securities Act, *supra*, and was not subject to the 60 day limitation set forth therein. Since the statute is free from ambiguity there is no room for construction by the court. (*People v. Pacific Guano Co.*, 55 Cal.App.2d 845, 848, 132 P.2d 254.)

The review here in question was held in accordance with section 11523 of the Government Code, which provides:

"Judicial review may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure. *Except as otherwise provided in this section* any such petition shall be filed within 30 days after the last day on which reconsideration can be ordered.

The right to petition shall not be affected by the failure to seek reconsideration before the agency. The complete record of the proceedings, or such parts thereof as are designated by the petitioner, shall be prepared by the agency and shall be delivered to petitioner, within 30 days after a request therefor by him, upon the payment of the expense of preparation and certification thereof. The complete record includes the pleadings, all notices and orders issued by the agency, any proposed decision by a hearing officer, the final decision, a transcript of all proceedings, the exhibits admitted or rejected, the written evidence and any other papers in the case. *Where petitioner, within 10 days after the last day on which reconsideration can be ordered, requests the agency to prepare all or any part of the record the time within which a petition may be filed shall be extended until five days after its delivery to him.* The agency may file with the court the original of any document in the record in lieu of a copy thereof." (*Italics added.*)

[3] The reconsideration mentioned in the foregoing section is that referred to in Government Code section 11521, specifying that power to order a reconsideration shall expire 30 days after the delivery or mailing of a decision to respondent. Respondent proceeded as outlined in the emphasized portion of section 11523, Government Code, *supra*, by requesting appellant within 10 days after the last day for consideration to prepare a record. This record was delivered to respondent November 4, 1948, and within 5 days thereafter, to wit, on November 9, 1948, respondent filed an application for a writ of mandate and review of appellant's order in the superior court.

[4] Second: *Is section 5 of the Corporate Securities Act, set forth *supra*, unconstitutional as being special legislation and illegally discriminatory?*

This question must be answered in the affirmative. This statute involves a special legislative classification. It may be conceded that racing enterprises and particularly horse racing enterprises may be the subject of valid legislative classifications. However, the classification here attempted

does not have to do with the regulation of horse racing or betting, but is an attempt to regulate a field of corporate financing. (See *Krause v. Durbrow*, 127 Cal. 681, 685, 60 P. 438.) The Corporate Securities Act has been a general law regarding the special subject of issuance of securities, but applicable equally to all issuers thereof. The commissioner has full authority under the act to exercise his authority as to each individual application presented to him. There is a degree of speculation in the issuance of all securities, and to hold that the Legislature could by special statute establish different criteria as to corporations engaged in different businesses would result in complete confusion and conflict in the system of protection for investors. If the Legislature could restrict the issuance of horse racing shares as it has attempted to do here it would open the door for similar legislation as to any other commercial enterprise, depending upon the risk involved in the business, and would conflict with the provisions of the Fourteenth Amendment to the Constitution of the United States, and Article 1, Section 11 of the Constitution of California.

Likewise to sustain the present statute would improperly set horse racing corporations apart from all others as to the issuance of their securities and discriminate against the investor of limited capital in favor of the wealthy one. The right to invest in securities should not by legislative action be restricted to persons of means. In other words comparative wealth is not a proper basis for legislative classification.

This view is well expressed by the Supreme Court of the United States in, *Gulf, Colorado & Santa Fe Railway Company v. Ellis*, 165 U.S. 150, 155, 17 S.Ct. 255, 257, 41 L.Ed. 666, where the court says: "The state may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears

a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis."

If the Legislature could authorize appellant to fix a par value up to \$1000.00, it might also authorize him to fix a par value far in excess thereof, to wit, a million dollars per share, and thus for all practical purposes prevent the sale of securities by legal corporations engaged in the business of horse racing.

In view of our conclusion it is unnecessary to discuss whether or not the issuance of the stock dividend was "for the purpose of raising funds with which to finance racing."

[5,6] Third: *Did the trial court err in finding that respondent did not have a plain, speedy or adequate remedy at law since, pursuant to the provisions of section 11440 of the Government Code, respondent could have sought declaratory relief?*

This question must be answered in the negative. Assuming that the provisions of section 11440 were available to respondent such relief was an equitable remedy and not a legal remedy. (*Adams v. Cook*, 15 Cal.2d 352, 362, 101 P.2d 484. Cf. *Dare v. Board of Medical Examiners*, 21 Cal.2d 790, 795, 136 P.2d 304.) Nor does the fact that respondent might have accomplished a similar financial result by transferring its surplus to its capital account deprive respondent of the remedy it sought in the present action. It sought not alone to accomplish the transfer but the right to issue a stock dividend. A remedy is not adequate which does not afford the applicant the very relief which he seeks, and which is equally convenient, beneficial and effective. (*Dufton v. Daniels*, 190 Cal. 577, 581, 582, 213 P. 949.)

[7,8] Fourth: *Did the trial court err in holding that appellant exceeded his jurisdiction by his rule, section 666, Title 10 of the California Administrative Code, requiring that stock dividend shares of a racing corporation should be not less than \$1,000 par value?*

This question must be answered in the negative. An administrative officer's pow-

er to prescribe rules and regulations is not the power to make law but merely to adopt regulations to carry out the will of the Legislature as expressed in the language of the statute. (First Industrial Loan Co. of California v. Daugherty, 26 Cal.2d 545, 550, 159 P.2d 921. See also Manhattan General Equipment Co. v. Comm. etc., 297 U.S. 129, 56 S.Ct. 397, 80 L.Ed. 528.) Because the Legislature failed to enact a statute which appellant felt should have been enacted, he could not by rule supply such alleged defect. Therefore, since we have seen that the legislative enactment was unconstitutional, it is self-evident that appellant's rule was invalid.

Fifth: *Was it error for the trial court to make the following findings of fact?*

(a) "VI It is not true that the issue of the stock dividend applied for by petitioner herein would doubly or to any other extent or at all aggravate the holding of investments in horse racing enterprises of less than \$1,000 per person."

(b) "VII Petitioner has shown a need and justification for the granting of an exception to the Commissioner of Corporations' rule appearing in Section 666, Title 10, California Administrative Code."

(c) "VIII The issuance of the proposed stock dividend by petitioner would be fair, just and equitable provided that certain precautions are taken so that the stock dividend reaches only those who are now legally entitled to it."

(d) "XII None of the affirmative allegations of respondent's return and answer is true, except such as is likewise found in petitioner's petition and complaint."

This question must be answered in the negative.

[9] (a) The evidence failed to disclose that the stock dividend would double or otherwise aggravate the condition of share holdings below \$1,000 per person.

(b) This finding was properly sustained by the evidence which showed that there was no scheme, conspiracy or plan to trade improperly in shares of respondent's stock, and that even though on two previous occasions stock dividends similar in nature had been permitted by appellant and de-

clared by respondent such shares had not been improperly traded.

[10] (c) The evidence disclosed that the issuance of the stock dividend by a permit properly restricting the same would cause such stock dividend to reach the hands of those legally entitled thereto.

[11] (d) Appellant contends that this finding was too broad and that certain undisputed issues of fact were found to be untrue. Conceding this to be a fact, there was no prejudicial error in the finding. Hence pursuant to the mandate of Article 6, section 4½ of the Constitution of the State of California such error must be disregarded. (Bell v. Scudder, 78 Cal.App.2d 448, 457 et seq., 177 P.2d 796.)

The judgment is affirmed.

MOORE, P. J., concurs.

WILSON, Justice.

I dissent. On either of two grounds the judgment should be reversed.

1. Section 5 of the Corporate Securities Act is Constitutional

Entirely devoid of support is the argument advanced by petitioner and adopted by the majority opinion that section 5 of the Corporate Securities Act, as amended (Stats.1947, ch. 1122, p. 2561), is in violation of the Constitution as being special legislation and illegally discriminatory, and that in consequence thereof the rule of the Commissioner of Corporations is void which requires that securities to be issued by petitioner and other corporations for the purpose of raising funds with which to finance horse racing enterprises shall have a par value of at least \$1,000.

The Legislature has specially classified the business of horse racing, has made special regulations relating thereto and has authorized the Commissioner of Corporations to adopt and enforce, with reference to the issuance of the securities of corporations engaged in such business, a regulation not made or authorized in connection with those whose businesses are of a different nature and are not subject to control under the police power. It is within

the constitutional power of the Legislature so to do because their business is one which the State has inherent power to regulate or even to prohibit entirely either by statute or by constitutional amendment.

Petitioner must be deemed to have entered into such business in contemplation of the State's power in that regard and of the included power to establish and enforce such regulations as are not unreasonable for the protection of the public interest. By reason of the fact that petitioner's securities, unlike those of an ordinary business corporation, may be rendered worthless by a statute prohibiting horse racing adopted at any session of the Legislature or by a vote of the people at any election, or by the action of the Horse Racing Board in revoking or refusing to renew its license to operate, such securities may be treated specially by statute without violating the constitutional prohibition of special and discriminatory legislation.

The majority opinion treats petitioner as a normal business corporation, when in fact it is not, and has placed its securities on the same basis as those of corporations that are not subject to regulation under the police power. It is true that the Corporate Securities Act is a general law relating to the subject of the issuance of securities. It is and must be applicable alike to all corporations of the same class and character and to their securities. But a corporation such as petitioner, whose business is wholly unlike all others in that it is subject to control and regulation under the police power, may be separately classified and regulated in a manner not possible or necessary in the case of the ordinary corporation.

The general rule is that persons are free to contract in such manner and upon such subjects as they desire, but freedom of contract, like liberty, is not an absolute. Both may be regulated by just and impartial laws. Freedom of contract is subject to various restraints and limitations as to purpose and to divers conditions of time, place and circumstance. Persons may not enter into contracts as they choose, even for lawful purposes. The law and society say what contracts may be oral, what shall

be in writing, for what length of time they may continue in force and how they may be enforced. The liberty of contract may be circumscribed by statute in the exercise of the police power for the protection of the general welfare of the citizens of the state as well as for the preservation of their health, morals and safety.

The currently accepted doctrine is that when a private right appears to be in conflict with the public interest the former must yield to the latter. Neither the Fifth nor the Fourteenth Amendment to the Constitution of the United States precludes the Legislature from prescribing reasonable rules and regulations for the making of contracts for certain purposes.

"The power of government extends to the denial of liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to injuriously affect the public interests." *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U.S. 186, 202, 31 S.Ct. 164, 169, 55 L.Ed. 167, 181, 31 L.R.A.,N.S., 7. The guarantee of liberty does not withdraw from legislative supervision the making of contracts nor does it deny to government the power to provide restrictive safeguards. *Chicago B. & Q. R. Co. v. McGuire*, 219 U.S. 549, 567, 31 S.Ct. 259, 55 L.Ed. 328, 338. In the protection of the public welfare statutes have been sustained which limited the hours of labor by persons employed on public work although not applicable to work performed under private contract (*Atkin v. State of Kansas*, 191 U.S. 207, 24 S.Ct. 124, 48 L.Ed. 148; *Ellis v. United States*, 206 U.S. 246, 27 S.Ct. 600, 51 L.Ed. 1047, 11 Ann.Cas. 589), and which prohibited insurance companies from denying that insured property was worth the amount for which it was insured (*Orient Ins. Co. v. Daggs*, 172 U.S. 557, 19 S.Ct. 281, 43 L.Ed. 552). For other examples of statutes interfering with the right of making contracts see 219 U.S. at page 568, 31 S.Ct. at page 262. Those cases and many more that may be found in subsequent reports had to do with what may be termed ordinary business contracts, not those which are strictly within the police power such as

that which is the subject of this proceeding.

It is within the right of the government to restrain some individuals from all contracts as well as all individuals from some contracts, said the court in *Frisbie v. United States*, 157 U.S. 160, 165, 15 S.Ct. 586, 39 L.Ed. 657, 659, wherein the court rejected the plea that the statute was unconstitutional because it limited the fee of an agent in prosecuting a pension claim, since under the power of the Congress to give or to withhold pensions it may prescribe the conditions under which applications therefor may be presented. Applying the same principle in the case now before the court, since it is within the power of the state to permit or to prohibit horse racing it may prescribe the conditions under which such enterprises may be maintained, including the method by which they may be financed. The power of the Legislature to provide for the regulation of horse races (Const., Art. IV, sec. 25a) is not limited to the making of rules for the running of races and wagering thereon. The public is no less in need of security in the investment of money in the financing of a racing plant than in the running of races, and the power of the Legislature is not so circumscribed that it cannot provide protection in the former as well as in the latter. The Legislature determines the public policy of the state and the courts are without power to substitute another merely because they disagree with the legislative decision.

The fact, which is undisputed, that the running of horse races and wagering upon them may, in the interest of the public welfare, be regulated or even forbidden by law is a complete confutation of the unsupported theory advanced in the majority opinion that the Legislature and the people are powerless to regulate the sale of securities which make possible the operation of such enterprises. When a corporation finds it necessary to sell its securities to the public in order to initiate or to continue a venture into horse racing the police power enters its affairs and remains throughout its operations. The individual member of the public is entitled to the protection of

the police power in his investment in such securities to the same extent as in an "investment" in a *pari mutuel* wager.

In this case the Commissioner of Corporations has not arbitrarily established a rule without legislative authority nor has legislative power been delegated to him. The Legislature has fixed the primary standard for the commissioner's action and has empowered him to adopt rules and regulations, after notice and public hearing, and by such rules and regulations to prescribe the par value of securities proposed to be issued for the purpose of raising funds for the financing of racing enterprises authorized by law, the par value of shares not to exceed \$1,000. (Corp. Sec. Act, sec. 5 as am. by Stats.1947, ch. 1122, p. 2561.) Pursuant to such authority the commissioner adopted a rule that such securities should have a par value of at least \$1,000. The primary standard was fixed by the Legislature. The commissioner, in the exercise of the power lawfully delegated to him, adopted the rule which is applicable to all persons and corporations engaged in a like business.

The fear expressed in the majority opinion that the approval of the statute now under consideration will open the door to the establishment of different criteria as to corporations engaged in different businesses is groundless, since only those that are subject to the police power may be made responsive to special rules that the Legislature, in the exercise of that power, deems necessary to the protection of the public. Commercial corporations will not be affected nor will they be endangered by the declaration that the statute here involved is valid and enforceable.

The paucity of authority for the position taken by petitioner and adopted by the majority of this court is manifested by the fact that the only case cited in petitioner's brief or in the majority opinion with reference to unconstitutional discriminatory legislation is *Gulf, C. & S. F. Ry. Co. v. Ellis*, 165 U.S. 150, 17 S.Ct. 255, 41 L.Ed 666, which expresses the trite statement that the law may not say that a white man shall be subject to a certain rule and a black man not. The question was with

reference to the payment of attorneys' fees by railroad companies to successful litigants in cases of a designated character. The police power was not involved. The statute imposed a penalty upon railroad corporations for failure to pay certain debts. Compelling payment of debts is not a police regulation. The court so stated (165 U.S. page 158, 17 S.Ct. page 258) and on that basis declared the law unconstitutional. Manifestly neither that case nor the white-man-black-man illustration bears any analogy to the subject of this action. The authorities hereinbefore cited, as well as countless others to be found in the federal and state reports, sustain, as proper exercise of police power, legislation that is applicable to a certain class of persons when such class is so distinguishable from all others as to warrant special regulations. Illustrative are *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U.S. 96, 19 S.Ct. 609, 43 L.Ed. 909, and *Missouri, K. & T. R. Co. v. Cade*, 233 U.S. 642, 34 S.Ct. 678, 58 L.Ed. 1135, in which statutes, although special and discriminatory because they provide for attorneys' fees to successful plaintiffs in cases of a certain character and not to successful defendants nor to plaintiffs in other cases, were sustained as proper exercise of the police power and were held not to violate the unequal protection and due process clauses. In the *Matthews* and *Cade* cases the court distinguished *Gulf, C. & S. F. Ry. Co. v. Ellis*, supra, in that the statute discussed in the latter case was not an exercise of police power.

The argument advanced by petitioner and adopted by the majority that because the statute sets apart horse racing corporations from all others with reference to their securities it discriminates against an investor with a small amount of capital in favor of one with unlimited funds is a comparison of no more force than that in *Gulf, C. & S. F. Ry. Co. v. Ellis*, supra, and is expressly rejected by our Supreme Court as will hereinafter appear. It is true that a person who possesses less than \$1,000 would be unable to purchase a share. Likewise were the par value to be fixed

at \$100 one with only \$10 would be deprived of investing it.

Neither the affluent nor the impecunious prospective investor, whose privilege of purchasing petitioner's securities is affected, is before the court with an objection to the statute. Nevertheless, in view of the fact that the majority opinion rests in part on an alleged discrimination between investors according to their financial status, it should be noted that the courts have not been impressed by such a comparison. The statute which provides for the suspension of a driver's license in case of nonpayment of a judgment for damages resulting from an automobile accident was once held to be discriminatory, unreasonable and in violation of the due process clause because it was based on a person's ability to pay. In *re Lindley*, 1930, 108 Cal.App. 258, 291 P. 638. Before the period of gestation of the *Lindley* case had expired the Supreme Court overruled it and declared the statute did not violate any constitutional inhibition. *Watson v. Division of Motor Vehicles*, 1931, 212 Cal. 279, 298 P. 481. Similar statutes have been sustained in *Rosenblum v. Griffin*, 89 N.H. 314, 197 A. 701, 705, 115 A.L.R. 1367, where the court said that "Equality of right implies no equality of ability or means," and in *Nulter v. State Road Comm.*, 119 W.Va. 312, 193 S.E. 549, 194 S.E. 270.

The Commissioner of Corporations repeatedly makes orders requiring corporate shares to be sold for cash and not on installments or in exchange for property. Such an order deprives a person from acquiring securities unless he is possessed of sufficient cash to pay the full price. No objection is found to have been sustained on such ground.

The majority cite *Krause v. Durbrow*, 127 Cal. 681, 60 P. 438, in which a statute was declared void which contained provisions relating to the election of directors of a mining company which were different from those applicable to other corporations, on the ground that there was no natural or inherent distinction between a mining corporation and other corporations for profit. The right to engage in mining

operations is a property right and like any other normal business is not subject to regulation under the police power. There is no property right in horse racing or in the operation of a horse racing enterprise. It is a limited privilege which the State may grant or withhold, and if granted it may be revoked. Having accepted the privilege from the State petitioner must abide by the conditions imposed as a condition for continuing to exercise it.

2. *The petition for mandate and review was filed too late.*

The proceeding to have the commissioner's order reviewed is barred by the provisions of either the Corporate Securities Act or the Administrative Procedure Act (Government Code, § 11500), whichever is applicable.

If the Corporate Securities Act is controlling, the petition to review the order of the Commissioner of Corporations denying the permit not having been filed within 60 days after the issuance of the order, the court was without jurisdiction to entertain the petition for mandate and review. (Corp. Sec. Act, sec. 15, 2 Deering's Gen. Laws, pp. 1418, 1429, Act No. 3814.) The order was made on July 19, 1948, and the petition for review was filed on November 9, 1948, 113 days having intervened.

If the provisions of the Administrative Procedure Act are applicable the petition for review was not filed within the time allowed thereby. The chronology of the proceedings is as follows, all dates being in 1948:

July 19. Commissioner's order denying permit signed and served on petitioner.

August 18. Last day on which reconsideration could be ordered. (Gov. Code, sec. 11521.)

August 27. Petitioner's request for preparation of transcript of administrative proceedings made to commissioner.

September 24. Commissioner notified petitioner's attorneys transcript had been prepared and was ready for delivery and its cost.

September 27. Above notification confirmed by letter.

November 3. Letter from petitioner's attorneys received by commissioner enclosing check to cover cost of record. (Letter is dated October 27.)

November 4. Transcript delivered to petitioner's attorneys.

November 9. Petitioner's petition and complaint to review commissioner's order served on commissioner and filed in superior court.

From July 19, the date the commissioner's order was served on petitioner, to November 9, when the petition for review was filed in the superior court, 113 days had elapsed. Under section 11523 of the Government Code judicial review under the Administrative Procedure Act may be had only if petition therefor is filed within 30 days after the last day on which reconsideration could be ordered (in this case August 18) "except as otherwise provided" in that section. The exception is that if within 10 days after such last day for reconsideration the petitioner has requested the administrative agency to prepare the record, the time within which a petition for review may be filed is extended for five days after delivery of the record to the petitioner. (Gov. Code, sec. 11523.) That section also requires the agency to prepare and deliver the record to petitioner within 30 days after request therefor upon payment of the expense of its preparation and certification. Petitioner made timely request upon the commissioner for the preparation of the record. Within 30 days after such request was made the commissioner completed the transcript of the record and notified petitioner it was ready for delivery upon payment of its cost. Thus far each act leading toward a review of the proceeding was performed within the time prescribed by the statute.

Petitioner was notified orally on September 24 and in writing on September 27 that the transcript was ready for delivery. The five day period of extension of time for filing the petition for review must be construed to have commenced when petitioner was informed that the transcript had been completed. The record could have been delivered on September 24, or

at the latest on September 27, but for petitioner's delay in paying for it. Payment was made by letter from its attorneys dated October 27 but not delivered to the commissioner until November 3. There is no explanation or justification of the delay in making payment of the cost of the transcript, nor is there an explanation of the lapse of seven days between the date of the letter and its delivery to the commissioner.

Petitioner maintains that since the petition for review was filed within five days after the transcript was actually delivered to its attorneys, notwithstanding the delay deliberately caused by petitioner, the requirements of the law have been fulfilled and appellant's plea of the statute of limitations must be rejected. Such contention is untenable. It is narrowly technical and is made without regard or consideration for the purposes of the statute and manifestly upon the theory that no one other than petitioner has an interest in the proceedings or in their termination.

To sustain petitioner's position would permit every person against whom a ruling is made by the commissioner to enact his own statute of limitations by the simple expedient of deferring payment of the cost of the transcript, thereby postponing the date of its delivery and correspondingly delaying the proceeding for review.

The policy of the statute as expressed in the limitation of time for petitioning for review is to ensure promptness in the judicial review of an administrative order and an early determination of its validity. The agency is entitled to know whether its order is final and whether or not it is to be enforced, and the applicant and all persons dependent upon or interested in the result of the proceedings are entitled to know whether to rely upon the administrative order as determinative of their rights, obligations and liabilities.

An applicant for relief under the statute cannot take advantage of his own failure to exercise diligence in paying the amount necessary to enable him to petition the court for review. If he may delay for 32 days he may delay for a longer period and there would be no limitation upon the

time he may award to himself for initiating proceedings in court.

The argument that only petitioner and its stockholders could have been damaged by the delay and that the commissioner suffered no detriment or injury is no answer. In *Myers v. Johnson*, 89 Cal.App.2d 800, 201 P.2d 884, the plaintiff sought to recover taxes paid under protest. Obviously he was the only sufferer by a delay in the determination of the case since the defendant treasurer had the money and the plaintiff could not recover it save by a reversal of the judgment of the trial court. The plaintiff's appeal was dismissed for his failure to pay the cost of the reporter's transcript within the time prescribed by the rule on appeal. (Rule 4(c), 22 Cal.2d 3.) The reporter had advised him of the cost but he stood upon the letter of the rule and contended his time had not expired by reason of the failure of the clerk to notify him of what he already knew. The court, not moved by this contention, dismissed the appeal declaring that an applicant must exercise a reasonable amount of diligence to investigate any unwarranted delay by an officer of the court and take steps to see that legal duty is performed. A greater duty rested upon petitioner to proceed with expedition than upon the plaintiff in the *Myers* case since petitioner itself and not a public official caused the delay. In the instant case the commissioner was not at fault. He performed his duty promptly, prepared the record within the time prescribed by the statute and notified petitioner that it was ready for delivery upon payment of the cost. The delay rested solely on the latter in failing to pay the necessary fee.

To sustain petitioner's theory would be to amend by judicial legislation section 11523 of the Government Code to provide in effect that the time within which a petition for review may be filed is extended until five days after the applicant chooses to pay the cost of the transcript. I do not join in so assuming the prerogative of the Legislature.

The result would not be different should the commissioner, as suggested by petitioner, demand payment in advance for

the transcript. In such case payment could be deferred indefinitely and the right to review would be preserved by the mere filing of a request for a transcript. Such a demand in this case would not have ensured prompt payment since petitioner could have delayed payment and thereby postponed preparation of the transcript. Demand by the commissioner for payment before the preparation of the record would not have caused petitioner, if its technical contention should be sustained, to have been any more expeditious in its payment or vigilant in the prosecution of its petition for review.

The issue under discussion was raised in the trial court by demurrer and was not waived, as suggested by petitioner, by the filing of appellant's answer at the same time. (Code Civ.Proc., sec. 472.)

The judgment should be reversed with directions to sustain the demurrer and to enter judgment in favor of defendant.



96 Cal.App.2d 827

PEOPLE v. DAENER et al.

Cr. 4384.

District Court of Appeal, Second District,
Division 3, California.

April 6, 1950.

Hearing Denied May 4, 1950.

Harold John O'Rourke was convicted in the Superior Court of Los Angeles County, Clement D. Nye, J., of conspiracy to cheat and defraud and to obtain money and property from certain parties by false pretenses and false promises, and he appealed. The District Court of Appeal, Vallée, J., held that evidence sustained conviction.

Affirmed.

1. Conspiracy 47

A conspiracy may be established by circumstantial evidence. Pen.Code, § 182, subd. 4.

2. Conspiracy 30, 47

Under statute providing that a criminal conspiracy exists if two or more persons

conspire to cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform such promises, gist of offense is unlawful agreement between conspirators to commit an offense prohibited by the statute accompanied by an overt act in pursuance thereof, but an express agreement need not be proved and agreement may be inferred from declarations, acts and conduct of the alleged conspirators. Pen.Code, § 182, subd. 4.

3. Conspiracy 47

Under statute providing that criminal conspiracy exists if two or more persons conspire to cheat and defraud any person of any property by any means which are in themselves criminal or to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform such promises, evidence need not establish defendant's knowledge of the falsity of representation if it establishes that the representations were made recklessly and without information justifying a belief that they were true. Pen.Code, § 182, subd. 4.

4. Conspiracy 47

Evidence that by false representations, defendant and another obtained 2,000 sacks of wheat from defrauded parties without paying therefor sustained conviction of conspiracy to cheat and defraud by criminal means and to obtain money and property by false pretenses with fraudulent intent not to perform such promises. Pen.Code, § 182, subd. 4.

5. Criminal law 1159(2)

A verdict cannot be set aside on appeal for insufficiency of evidence unless it clearly appears that upon no hypothesis is there sufficient substantial evidence to support verdict.

6. Criminal law 761(6, 13), 778(11)

Instruction that flight of a person immediately after commission of crime is not sufficient in itself to establish guilt, but is a fact which if proved may be considered in the light of all other proved facts in deciding question of guilt or innocence did not

presuppose admission of crime charged, did not assume either the guilt or flight of defendant, and did not withdraw defendant's explanation of his absence from consideration by the jury, and giving of the instruction was not error. Pen.Code, § 1127c.

Morris Lavine, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Howard S. Goldin, Deputy Attorney General, for respondent.

VALLÉE, Justice.

Defendant O'Rourke was convicted by a jury of having conspired with defendant Daener to cheat and defraud John DuHart and Lottie DuHart by criminal means and to obtain money and property from them by false pretenses and false promises with fraudulent intent not to perform such promises. O'Rourke appeals from the judgment.

As grounds for reversal defendant urges that the evidence is insufficient to sustain the verdict and that the court erred in its instructions to the jury.

The DuHarts owned about 2000 acres of land at Fairmont in Los Angeles County on which they raised wheat and barley. The O'Rourkes had an alfalfa ranch a few miles away. About February 19, 1946, the two families became acquainted and thereafter visited socially. Mrs. DuHart planned a trip to Oregon. She told O'Rourke about it and said she could not go until she had sold their grain. O'Rourke told her that a friend of his named Daener had a grain store in Arcadia and would buy the grain; that he and Daener had been in the liquidating business together. About a week later O'Rourke brought Daener to the DuHart ranch and introduced him to the DuHarts as the man he had been telling them about who would buy their grain. DuHart stated that he had 2000 sacks of wheat for sale at \$5 a sack. O'Rourke told Daener to show the DuHarts his credentials, whereupon Daener showed them "his income tax that he paid in 1946 for either \$18,000.00 or \$38,000.00," and his card. O'Rourke then stated "He doesn't

have to bother about that because all dealings that are to be done will be done through us at our home."

After looking at the wheat, O'Rourke and Daener told DuHart they would take it at \$5 a sack, which was its reasonable market value, payment to be made by certified check when the last load was taken. Either O'Rourke or Daener told the DuHarts they would pick up the wheat as soon as Daener's trucks were available and take it to Daener's place of business in Arcadia. O'Rourke said Daener had a fleet of trucks, but Daener said his trucks were busy. Beginning a few days later, a Mr. Schwab and a Mr. Kiter picked up the wheat from day to day. The last load was taken on September 6, 1946. That morning the truck driver told the DuHarts the wheat was being taken to California Milling Company. On September 6, after the last load was taken, the DuHarts went to the O'Rourke home in Los Angeles. There they met the O'Rourkes and Daener. Daener said "He had to go down and pay the truck drivers off." O'Rourke said, "Well, you go ahead, Al [Daener], and I will settle with you later." Daener left. O'Rourke then told the DuHarts that as soon as Daener got things straightened around they would get their money. Daener returned later the same evening and told the DuHarts "He hadn't gotten every thing straightened out"; he and the O'Rourkes would be up to the DuHart ranch a week from the following Sunday and bring a certified check. O'Rourke concurred. The DuHarts asked why the wheat had been sold to California Milling Company instead of going to Daener's place of business. Daener replied that his warehouses were full. During the conversation Daener said the wheat had been stored at California Milling Company. Later the same evening he said they had sold it because the company did not want to store it but they had tried to store it before they sold it.

On the appointed Sunday O'Rourke, without Daener, appeared at the DuHart ranch. He told the DuHarts not to worry about the money; it was all right; he and Daener would pay them within a short time; Daener had gone to San Francisco

on a business trip; and if Daener did not pay for the wheat, he would pay them. Daener wrote the DuHarts from San Francisco that he would see them the following Sunday. He appeared then without the O'Rourke. He told the DuHarts he was having trouble with his wife; they would have the the money within a short time; he and O'Rourke would come up and pay it; not to worry; they had nothing to worry about; they would get their money. He told them he carried a \$100,000 life insurance policy with Occidental which would cover them in case anything happened to him. He gave them a writing to that effect.

The DuHarts next saw O'Rourke at their ranch on October 5. They asked if he had brought their money. He told them not to worry, to keep calm, everything was all right; Daener's "wife had his business tied up and therefore they could not get the money." That afternoon O'Rourke "Got pretty drunk" and said to Mrs. DuHart "'Oh, Hell, Lottie' he said, 'take it off as loss.' He says, 'You can knock it off as loss on your income.'" The O'Rourkes stayed at the DuHarts that night. The next day O'Rourke had Mrs. DuHart obtain the paper Daener had signed and given her. He then had her sign it and give it to him. He kept it. He also had her sign and give him a bill of sale of the wheat. In part it read: "Note of \$10,000 dated 9/6th due and payable in sixty days accepted at 6% interest." He gave her a note for \$10,000, dated September 6, signed by Daener, payable in 60 days to the DuHarts, telling her it was just as good as money and that he and Daener would pay it in not more than a week or ten days. The O'Rourkes left the next morning. The DuHarts did not see either of them or Daener after that until the preliminary hearing.

O'Rourke and Daener employed Schwab to haul the wheat, O'Rourke saying they were to move it to a warehouse and if any questions were asked regarding the ownership of the truck, Schwab was to say it was one of Daener's trucks. O'Rourke told Kiter, Schwab's helper, that he and Daener were big time wheat or grain operators,

owned warehouses in Los Angeles, had hundreds of tons of other grain to be hauled, and gave him \$5 for room rent and meals. Schwab took the first load of wheat to Globe Mills, which refused to take it. O'Rourke had submitted samples of the wheat to Globe Mills, which found it unsuitable for its needs. Daener then sold it to California Milling Company. O'Rourke told the buyer for California Milling Company that he had known Daener as a business man in San Francisco for years and that he was down here doing a little buying. California Milling Company paid Daener \$9,501.62 for the wheat as follows: August 23, \$1194.95, August 27, \$1873.32, August 29, \$2390.56, September 3, \$1185.57, September 5, \$1166.47, September 9, \$1180.-54, September 11, \$510.21.

Any one doing business in Arcadia was required to have a city license. Daener did not have an Arcadia license and did not have any place of business or warehouse in Arcadia. At the time the wheat was sold to California Milling Company O'Rourke was in financial difficulty. He had borrowed about \$600 and sold a \$4184 trust deed at 25% discount. September 3, 1946, O'Rourke had more than \$4000 in cash in his possession. He obtained a cashier's check for \$4000 and paid a mortgage. Daener testified he loaned O'Rourke \$7600 cash of the \$9501.62 he received from California Milling Company. About \$5000 of the \$7600 had been loaned on September 3rd.

O'Rourke was present in Department 42 of the superior court in Los Angeles on October 30, 1947, and notified to appear for trial in Department 41 on December 15, 1947. He did not appear and his bail in the amount of \$10,000 was forfeited and a bench warrant issued. He was taken into custody December 6, 1948, in a village in Maine, where he was living under the name of Robert Van Horn.

[1-3] A criminal conspiracy is defined to exist "If two or more persons conspire: * * * 4. To cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses

or by false promises with fraudulent intent not to perform such promises; * * *." Pen.Code, sec. 182. A conspiracy may be established by circumstantial evidence. The gist of the crime under section 182 is the unlawful agreement between the conspirators to commit an offense prohibited by the statute accompanied by an overt act in pursuance thereof. An express agreement need not be proved. The agreement may be inferred from the declarations, acts and conduct of the alleged conspirators. *People v. Benenato*, 77 Cal.App.2d 350, 358, 175 P.2d 296. "If in any manner the conspirators tacitly come to a mutual understanding to commit a crime, it is sufficient to constitute a conspiracy. *People v. Yeager*, supra; [194 Cal. 452, 229 P. 40]; *People v. Sisson*, 31 Cal.App.2d 92, 87 P.2d 420. It may result from the actions of the defendants in carrying out a common purpose to achieve an unlawful end. *People v. Montgomery*, 47 Cal.App.2d 1, 117 P.2d 437." *People v. Torres*, 84 Cal.App.2d 787, 794, 192 P.2d 45, 50. Defendant concedes "That false representations were made." He argues that the evidence did not establish his knowledge of their falsity. The evidence need not necessarily establish the defendant's knowledge of the falsity of the representation. It is enough if the evidence establishes that the representations were made recklessly and without information justifying a belief that they were true. *People v. Cummings*, 123 Cal. 269, 271, 55 P. 898.

[4,5] We think it patent without comment that the evidence we have related was sufficient to sustain the verdict. The facts sufficiently support the inference that O'Rourke and Daener conspired to commit the crime. A verdict cannot be set aside on appeal unless it clearly appears that upon no hypothesis whatever is there sufficient substantial evidence to support a verdict. *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778; *People v. Wright*, 94 Cal.App.2d 70, 210 P.2d 263.

[6] The court gave this instruction: "The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been commit-

ted, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence. Whether or not evidence of flight shows a consciousness of guilt, and the significance to be attached to such a circumstance, are matters for your determination." California Jury Instructions—Criminal No. 36. Defendant says the giving of this instruction was error; it "was plainly calculated and designed to impress indelibly upon the jury's mind as a fact of which they must take cognizance that the defendant had fled immediately after he was accused of a crime"; it "clearly assumes that flight was an undisputed fact in the case which the jury was bound to consider"; and it withdrew defendant's explanation of his absence from the consideration of the jury. Penal Code section 1127c provides "where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows: The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine." See *People v. Pianezzi*, 42 Cal.App.2d 270, 276, 280, 108 P.2d 685. The criticized instruction appears to be more favorable to the defendant than that authorized by section 1127c. The fact that defendant did not appear for trial on December 15, 1947, and that he was found in Maine under an assumed name was admitted. Defendant gave the officer who returned him to California one explanation for not appearing at the time and place set for his trial; he gave another and different one on the witness stand. The instruction did not tell the jury that defendant "had fled immediately after he was accused of a crime"; it did not presuppose the commission of the crime charged, *People v. Wier*, 20 Cal.App.2d 91, 94, 66 P.2d 703; it assumed neither the guilt nor flight of the defendant, *Peo-*

ple v. Hansen, 130 Cal.App. 217, 221, 19 P.2d 993; nor did it withdraw defendant's explanation of his absence from consideration by the jury. The giving of the instruction was not error.

Affirmed.

SHINN, P. J., and WOOD, J., concur.



96 Cal.App.2d 808

In re RAYMOND'S ESTATE.

HARKLEROAD v. RAYMOND.

Civ. 17362.

District Court of Appeal, Second District,
Division 2, California.

April 5, 1950.

Rehearing Denied April 21, 1950.

Hearing Denied June 1, 1950.

Proceeding in the matter of the estate of William Raymond, deceased, wherein Dudley Harkleroad, as guardian of the estate of Andrea Withrow, a minor, petitioned for a determination of the minor's interest in the estate of the deceased, and wherein Samuel R. Raymond, individually and as executor and trustee under the will of the deceased, opposed the petition. The Superior Court of Los Angeles County, William M. Byrne, J., rendered certain orders adverse to the guardian, and he appealed. The District Court of Appeal, Wilson, J., held that minor's right in the estate by representation through her mother was limited to \$30,000, such limitation applying not merely to original share of her mother but to that share as augmented.

Orders affirmed.

1. Wills ⇨440

In determining intention of a testator, court must stand by words of will, and no intention should be attributed to him which cannot reasonably be drawn from language of document itself.

2. Wills ⇨439, 466

A will is to be examined with a view to discovering the testamentary scheme or general intention and meaning of the par-

ticular words and phrases, and provisions shall be subordinate to such scheme, plan, or dominant purpose.

3. Wills ⇨439, 455

Entire scheme of disposition under will must be considered, property disposed of, persons named as devisees and legatees, and the words used should be considered in reference to the context and should be construed according to their surroundings.

4. Wills ⇨682(2)

Where testamentary scheme of testator appeared to have been to set up a trust to provide for his wife, his sister, and his children, and, on death of wife and sister, their shares in trust were to go to augment shares held for children, and, on death of any children, shares of children, as originally established or augmented, were to be held for benefit of their surviving issue, and it was provided that granddaughter's interest in her mother's share should be limited to \$30,000, granddaughter's participation was limited to \$30,000, the limitation applying not merely to original share of the granddaughter's mother, but to the share as augmented. Probate Code, § 101.

McCutchen, Thomas, Matthew, Griffiths & Greene, San Francisco, George Harnagel, Jr., Los Angeles, Boekel & Moran, John O. Moran, Paul E. Basye, San Francisco, for appellant.

Jennings & Belcher, Stevens Fargo, Los Angeles, for respondent.

WILSON, Justice.

Appellant, Andrea Withrow, a minor, one of six grandchildren of William Raymond, deceased, petitioned through her guardian for a determination of her interest in his estate. The trial court decreed that it was the intention of the testator William Raymond by his will to limit the participation of appellant under his will or any trust established therein to \$30,000. The appeal, as recited in the notice, is from the "Order in Respect to Petition for Determination of Interests in Estate" and from so much of the "Order in Respect to First Account Current and

Report of Trustee, etc." and "Order re Answer and Objections to Third Account Current, etc." as relate to the interpretation and construction of decedent's will.

The sole question to be determined is the extent of appellant's interest in the estate of decedent.

William Raymond died February 26, 1945. He was admitted to practice law but was not a practicing attorney. His will, which was executed on February 9, 1945, was drawn by experienced and competent lawyers. Decedent left surviving him his wife, Grace K. Raymond, his sister, Florence Boies and four children, Samuel Raymond, Elizabeth Withrow, Lucia Myers and Florence Sutphen. Elizabeth Withrow, the mother of appellant, died November 30, 1947. The other three children of decedent and his widow, who is now sixty-six years of age, and his sister, who is now seventy-one, are all living. Appellant, who was born April 13, 1941, was three years of age at the time decedent's will was executed and is the sole surviving issue of Elizabeth Withrow.

The present controversy is centered in the construction to be given to Article Fifth of decedent's will, by which he disposes of the residue of his estate, and particularly subsection (c) thereof. By that article the testator gave twenty per cent of the residue outright to his son Samuel R. Raymond and placed eighty per cent in trust as follows:

"The Trustee shall divide the said Trust Estate, as near as may be, into shares as follows: Thirty percent (30%) of the Trust Estate for the benefit of my wife, Grace K. Raymond, hereinafter referred to as Mrs. Raymond;

"Ten percent (10%) of the Trust Estate for the benefit of my sister, Florence Boies, hereinafter referred to as Mrs. Boies;

"Twenty percent (20%) of the Trust Estate for the benefit of my daughter Elizabeth Withrow, hereinafter referred to as Mrs. Withrow;

"Twenty percent (20%) of the Trust Estate for the benefit of my daughter Lucia Myers, hereinafter referred to as Mrs. Myers; and

"Twenty percent (20%) of the Trust Estate for the benefit of my daughter Florence Sutphen, hereinafter referred to as Mrs. Sutphen."

This disposition is followed by subsection (c) which reads:

"(c) Upon the death of Mrs. Raymond or Mrs. Boies, the share set aside for the one so dying, including any income therefrom undistributed at the date of such death, shall be divided into four equal parts, and one of said parts shall go to augment the share held for the benefit of Mrs. Withrow, one of said parts shall go to augment the share held for the benefit of Mrs. Myers, and one of said parts shall go to augment the share held for the benefit of Mrs. Sutphen, or their respective issue. The fourth of said parts shall continue to be held in trust for my son Samuel R. Raymond.

"Upon the death of either Mrs. Myers or Mrs. Sutphen, or Mrs. Withrow or Samuel R. Raymond, the share, as originally established or as augmented, held for such beneficiary so dying, including all undistributed net income from such share at the date of such death, shall be held for the issue of such beneficiary so dying, share and share alike, and the net income from such share shall be distributed in monthly or other convenient installments share and share alike, to the surviving issue of such beneficiary so dying. Upon such issue attaining the age of forty-five years, his portion of his parent's share, including all undistributed net income therefrom, shall be forthwith distributed to such issue.

"It is specifically provided, however, that upon the death of Mrs. Withrow, no greater portion of Mrs. Withrow's share than equals a value at the time of her death of Thirty Thousand Dollars (\$30,000) shall be held for the benefit of Andrea Withrow, her daughter; if upon the death of Mrs. Withrow, she should leave issue other than Andrea Withrow, the excess of Mrs. Withrow's share over and above said Thirty Thousand Dollars (\$30,000) shall be held for the benefit of such other issue, share and share alike. If, upon her death Mrs. Withrow leaves surviving her no issue other than Andrea Withrow, then the

excess of her share over and above said sum of Thirty Thousand Dollars (\$30,000) shall go to augment equally the shares then held for the benefit of my other children, including my son Samuel R. Raymond and including, by right of representation, the then living issue of any deceased child of mine. Should any of my children die without leaving issue, the share of this trust set aside for the benefit of such child shall go to augment equally shares then held for the benefit of my other children, including my son Samuel R. Raymond, and including by right of representation the then living issue of any deceased child of mine."

Appellant seeks a determination that in addition to the \$30,000 interest in her mother's share she is entitled to an interest (1) in the shares of Grace K. Raymond and Florence Boies, respectively, if she survives them, and (2) in the shares of the trust held for Samuel R. Raymond, Lucia Myers and Florence Sutphen, respectively, if they die without issue and she survives them.

Appellant maintains that the limitation applicable to her participation in her mother's share cannot be construed as a limitation on her participation in the shares of Mrs. Raymond and Mrs. Boies; that the limitation is not one of general application but applies to Mrs. Withrow's share alone; that since Mrs. Withrow is deceased and there is no longer any share held for her benefit to be augmented, upon the death of Mrs. Raymond and Mrs. Boies one fourth of their respective shares shall go to augment the share held for the benefit of the issue of Mrs. Withrow; that the gifts in remainder of the pro rata portions of the shares held in trust for Mrs. Raymond and Mrs. Boies cannot be cut down by inference or argument from other parts of the will or by any words which are not equally clear and distinct as words of the gifts themselves, citing section 104 of the Probate Code, *In re Estate of Marti*, 132 Cal. 666, 61 P. 964; *In re Estate of Goetz*, 13 Cal.App. 266, 109 P. 105; *In re Estate of Brown*, 22 Cal.App.2d 480, 71 P.2d 345; *In re Estate of Shirley*, 107 Cal.App. 267, 290

P. 302, and *In re Estate of Somerville*, 38 Cal.App.2d 463, 101 P.2d 533.

The law is correctly stated but the application thereof in the cases cited by appellant is of no assistance in construing the will before us since there is no similarity in the wills. In each of the cited cases there is an outright bequest. In the instant case there is no outright bequest to appellant; she is a contingent beneficiary taking only through her mother's share.

In *Re Estate of Marti*, supra, the testator gave the entire residue of his estate to his wife and in the latter part of his will expressed the desire that upon her death she should devise one half of the property bequeathed to her to the testator's relatives. The court held the word "desire" did not import a trust and the widow was entitled to the entire residue free from any limitation or trust.

In *Re Estate of Goetz*, supra, the testator made certain bequests followed by a statement that he had made no money bequests to certain of his nephews and his niece because the real property bequeathed to them was sufficient. The residue of his estate he bequeathed equally among all the legatees. It was held that it was reasonable to assume that the statement was in explanation of why he had made no definite money bequests to the niece and nephews to whom he demised the real property rather than that he intended thereby to exclude them from receiving any part of the residue of his estate. The court in interpreting the testator's intention noted that the explanation immediately followed the primary disposition of the property whereas the residue was disposed of six clauses further along.

In *Re Estate of Brown*, supra, the question was whether advancements should be deducted from trust property devised in one part of the will or from the residue of the estate which was bequeathed in the same paragraph as that containing the limitation. The court held that the natural and reasonable interpretation of the language used was that the paragraph in its entirety related to the residue; that the limitation ap-

plied only to the part of the estate then under consideration and not to another part which had been divided in another manner.

In *Re Estate of Shirley*, supra, the will provided that the testator's property was to be distributed to his son and daughter if living and if not living to their children. By a codicil the testator disinherited the daughter's husband, his heirs and assigns, because of something the son-in-law had done. The court stated the testator could have had in mind only one of two things: cutting the son-in-law off from any right which he might claim to have through his deceased wife or cutting off the estate conveyed to his granddaughter by the previous part of the will. The doubt was resolved in favor of the estate conveyed and it was determined that the granddaughter was entitled to take under the will.

In the first paragraph of the will in *Re Estate of Somerville*, supra, the testator disposed of specific property by giving a life estate to his widow and the remainder to his four children. In the second paragraph he bequeathed the residue of his property, setting up a trust for the shares of his two sons. The next paragraph provided that in case either of his sons should die before receiving the "principal portion given him by his will" [38 Cal.App.2d 463, 101 P.2d 536] the provisions made for such child should become void. The court held it must have been the intention of the testator from the language of the third paragraph to void the rights of the deceased child in the principal portion of the trust and he did not intend to affect an interest outside the trust given in an entirely separately numbered paragraph and under different context.

[1-3] In determining the intention of the testator the court must stand by the words of the will and no intention should be attributed to him which cannot reasonably be drawn from the language of the document itself. In *re Estate of Baldwin*, 69 Cal.App.2d 760, 766, 160 P.2d 124; In *re Estate of Somerville*, 38 Cal.App.2d 463, 468, 101 P.2d 533. There is a further rule, however, to be followed in the interpretation of the provisions of a will and that

is that the instrument is to be examined with a view to discovering the decedent's testamentary scheme or general intention and the meaning of the particular words, phrases and provisions shall be subordinated to such scheme, plan or dominant purpose. In *re Estate of Hollingsworth*, 37 Cal.App.2d 432, 435, 99 P.2d 599; In *re Estate of Somerville*, supra; In *re Estate of Puett*, 1 Cal.2d 131, 133, 33 P.2d 825. The entire scheme of disposition must be considered, the property disposed of, persons named as devisees and legatees; words used should be considered in reference to the context and construed according to their surroundings. In *re Estate of Welch*, 83 Cal.App.2d 391, 396, 188 P.2d 797; In *re Estate of Franck*, 190 Cal. 28, 31, 210 P. 417; In *re Estate of Kruce*, 10 Cal.App.2d 426, 429, 51 P.2d 1174; In *re Estate of Greenwald*, 19 Cal.App.2d 291, 296, 65 P. 2d 70.

[4] Applying the foregoing rules to the will in the instant case, Mr. Raymond's testamentary scheme appears to have been to set up a trust (1) to provide for his wife, his sister and his children, (2) upon the death of his wife and his sister, their shares in the trust were to go to augment the shares held for the children, and (3) upon the death of any of the children the shares of such children as originally established or augmented were to be held for the benefit of their surviving issue, if any, until such issue attained the age of forty-five years, limiting appellant's interest in her mother's share, however, to \$30,000. His plan was to provide for his wife and sister during their lifetime and upon their death to distribute their respective shares equally among his children.

In the normal course of events Mrs. Withrow would have survived Mrs. Raymond and Mrs. Boies. In that event Mrs. Withrow's share would have been augmented by her portion of the respective shares of her mother and her aunt and, in such event, appellant would have been limited to the \$30,000 interest in her mother's share. To determine that merely because Mrs. Withrow predeceased Mrs. Raymond and Mrs. Boies appellant should have the interest in her mother's share plus an inter-

est in their respective shares would be to alter the testator's plan. In providing that "upon the death of Mrs. Raymond or Mrs. Boies the share set aside for the one so dying * * * shall be divided into four parts and one of said parts shall go to augment the share held for the benefit of Mrs. Withrow * * * or their [her] respective issue" the testator could only have meant that Mrs. Withrow's portion of the respective shares of Mrs. Raymond and Mrs. Boies should go to augment her original share which in the event of her death would be held for her issue. He then limited appellant's interest in her mother's share to \$30,000.

It is reasonable to assume that in limiting appellant's interest in her mother's share the testator meant the share as originally established or as augmented, particularly when consideration is given to the place where the limiting language appears, which is immediately following the paragraph providing for the redistribution of the shares of Mrs. Raymond and Mrs. Boies and the children upon their respective deaths, and to the use of the word "however" which precedes the words of limitation and which otherwise would have no meaning.

Furthermore, in the concluding sentence of the same paragraph the testator provides that if any of his children die without issue the "share" of the trust set aside for the benefit of such child shall go to augment equally the shares held for the benefit of his other children. Obviously here the testator intended the "share" of the child dying without issue to be the share as originally established or as augmented, otherwise there would be no disposition of any amount by which the original share had been augmented. It is not unreasonable to assume, therefore, that in limiting appellant's portion of her mother's share to \$30,000 the testator intended that limitation to apply to her mother's share as originally established or as augmented, and not merely to the original share.

The same interpretation applies to any share in the trust held for the benefit of the children of the testator who might die

leaving no issue. The share of such beneficiary goes to augment the shares then held for the benefit of the other children including by right of representation the then living issue of any deceased children. This is not a gift to appellant. She takes by right of representation the same share or right her mother would have taken but her participation in that share is specifically limited to \$30,000. It is manifest from reading the entire will that it was the testator's intention that in no event should appellant receive more than that sum from his estate and such intention must be given effect. Prob.Code, sec. 101.

Orders affirmed.

MOORE, P. J., and McCOMB, J., concur.



96 Cal.App.2d 943

PEOPLE v. SHARPE et al.

Cr. 2161.

District Court of Appeal, Third District,
California.

April 12, 1950.

Hearing Denied May 11, 1950.

Robert H. Sharpe was convicted in Superior Court, Tehama County, W. T. Belieu, J., of perjury, conspiracy to commit perjury and of subornation of perjury, and Charles Barrett was convicted in the same court of subornation of perjury and of conspiracy to commit perjury and they appealed from judgment of conviction and from order denying motion for a new trial. The District Court of appeal, Peek, J., held that alleged misconduct of special prosecutor was not prejudicial to defendants and that defendants were properly sentenced to serve consecutive terms rather than concurrent terms.

Judgment and order affirmed.

1. Criminal law — 1171(1)

Alleged misconduct of special prosecutor in his voir dire examination of a prospective juror, and in his cross-exam-

ination of one defendant, and in closing argument to jury, was not prejudicial as to a defendant convicted of perjury, conspiracy to commit perjury and subornation of perjury, or as to a defendant convicted of subornation of perjury and conspiracy to commit perjury, in view of abundant evidence of defendants' guilt.

2. Conspiracy $\S$ 28 Perjury $\S$ 13

The crime of conspiracy to commit perjury requires an agreement to do an unlawful act and an overt act in furtherance of the agreement, and the crime of subornation of perjury requires an agreement to commit perjury followed by actual commission of perjury.

3. Criminal law $\S$ 984

A defendant convicted of perjury, conspiracy to commit perjury and subornation of perjury, and a defendant convicted of subornation of perjury and conspiracy to commit perjury, were properly sentenced to serve consecutive rather than concurrent terms, as against contention that a fine distinction between crime of conspiracy to commit perjury, and crime of subornation of perjury, prevents imposition of consecutive sentences, and that one crime was necessarily included in the other because much evidence used to prove conspiracy was also used to prove subornation of perjury.

Chris D. Johnson, and Walter C. Frame, Sacramento, for appellants.

Fred N. Howser, Attorney General, Doris H. Maier and C. J. Scott, Deputies, Sacramento, for respondent.

PEEK, Justice.

Defendant R. H. Sharpe appeals from a judgment convicting him of the crimes of perjury, conspiracy to commit perjury and subornation of perjury. Defendant Charles Barrett appeals from a judgment convicting him of the crime of subornation of perjury and conspiracy to commit perjury, and they both appeal from the order denying their motion for a new trial. Said defendants were charged with said crimes in an indictment returned by the

grand jury of Tehama county February 3, 1949. The indictment was based upon testimony given by defendant Sharpe and one William Gould before the grand jury of said county on or about February 6, 1946, which testimony tended to show that W. J. Harrington, Probation Officer of Tehama county, solicited and accepted bribes from appellant Sharpe. Specifically, count one of the indictment charged Sharpe, Gould and Barrett with conspiracy to commit perjury; count two charged Sharpe and Barrett with subornation of perjury in that they procured Gould to give false testimony, and count three charged Sharpe and Gould with perjury. Subsequently the indictment was dismissed as to Gould, who became a witness for the People, but Sharpe and Barrett were jointly tried before a jury returned verdicts of guilty as to all counts. Judgment was entered sentencing them for the terms prescribed by law, the terms under each count to run consecutively.

It is now urged that the judgment should be reversed for two reasons, (1) the alleged prejudicial misconduct of the special prosecutor, and (2) the alleged error of the trial court in sentencing them to consecutive rather than concurrent terms for the crimes of conspiracy to commit perjury and subornation of perjury.

In support of the first contention it is argued that although the judgment is supported by substantial evidence nevertheless defendants were denied a fair and impartial trial because of the misconduct of the special prosecutor, first, in his voir dire examination of a prospective juror, second, in his cross-examination of defendant Sharpe, and third, in his closing argument to the jury.

[1] Even if it be conceded that the attacked acts and statements by the special prosecutor constituted misconduct, see *People v. Brancato*, 83 Cal.App.2d 734, 189 P.2d 504, *People v. Horowitz*, 70 Cal. App.2d 675, 161 P.2d 833, and *People v. Macias*, 77 Cal.App.2d 71, 174 P.2d 895, it cannot be held to have been prejudicial in view of the abundant evidence of appellants' guilt. *People v. Seely*, 75 Cal.App. 2d 525, 171 P.2d 529. The instant case does not come within the rationale of *Peo-*

ple v. Hooper, 92 Cal.App.2d 524, 207 P.2d 117, as defendants contend. While we cannot commend the acts and conduct of said prosecutor as shown by the record, nevertheless such evidence does not reveal the aggravated misconduct presented in the Hooper case.

[2, 3] There is no merit to appellants' contention that the trial court erred in sentencing them to consecutive, rather than concurrent, terms for the crimes of conspiracy to commit perjury and subornation of perjury. It is true as defendants state that the crime of conspiracy requires an agreement to do an unlawful act and an overt act in furtherance of the agreement while the crime of subornation of perjury requires an agreement to commit perjury followed by the actual commission of perjury. However, it does not follow, as they contend, that there is such a fine distinction between the two crimes as would prevent the imposition of consecutive sentences. Nor does it follow that either crime is necessarily included within the other for the reason that much of the evidence used to prove the conspiracy to commit perjury also was used to prove the subornation of perjury. The record reveals evidence of several overt acts in furtherance of the conspiracy to commit perjury by Sharpe and Barrett other than the actual commission of perjury by Gould, which was necessary to prove the crime of subornation of perjury. People v. Ross, 103 Cal. 425, 37 P. 379. The opinion of this court in People v. Benenato, 77 Cal. App.2d 350, 175 P.2d 296, would appear to be dispositive of the contention so raised. 77 Cal.App.2d at page 367, 175 P.2d at page 306, thereof we stated that "If one offense requires proof of an element different from the other, they may not be deemed to constitute the same offense so as to preclude punishment for each. This is true although both offenses are founded chiefly on the same facts."

For the foregoing reasons the judgment and order denying the motion for new trial are affirmed.

ADAMS, P. J., concurs.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

POPEJOY v. HANNON et al.
Civ. 17591.

District Court of Appeal, Second District,
Division 2, California.

April 3, 1950.

Rehearing Denied April 14, 1950.

Hearing Granted June 1, 1950.*

Action by Mac Wade Popejoy against H. H. Hannon and others, individually, and doing business as Mutual Molding & Lumber Company, for personal injuries. The Superior Court of Los Angeles County, William S. Baird, J., entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, McComb, J., held that where trucker who was employed as yard foreman by lumber company, engaged employee who suffered injuries in fall from vehicle while attempting to avoid falling lumber negligently stacked, employee was entitled to recover from lumber company.

Judgment and order affirmed.

1. Workmen's compensation ⇨2158

The workmen's compensation laws are not designed to relieve any one other than employer from liability imposed by statute or by common law.

2. Workmen's compensation ⇨2159

Where trucker, employed as yard foreman by lumber company, in course of independent enterprise engaged employee who sustained injuries in fall from vehicle while attempting to avoid falling lumber negligently stacked in lumber yard by trucker, employee had a common-law cause of action against lumber company which was not destroyed because trucker by virtue of workmen's compensation law was relieved from liability.

3. Negligence ⇨139(1)

Where trucker's employee went to lumber yard to get load of lumber, and sustained injuries in fall from vehicle when he attempted to avoid falling lumber negligently stacked, refusal of trial court, in action by employee against lumber company, to instruct jury as to duty lumber company owed licensee or trespasser, was proper.

* Subsequent opinion 231 P.2d 484.

4. Negligence ⇨139(7)

In action by employee of trucker against lumber company for injuries sustained in fall from vehicle while attempting to avoid falling lumber negligently stacked instruction that if jury found that condition of premises at time and place of injury was dangerous and that company or trucker knew or should have known of such danger, and if dangerous condition was not known to employee and he was not negligent in failing to discover same, company owed duty to inform employee of danger that a failure to perform that duty would be negligence, was proper.

5. Trial ⇨296(1)

Where omitted portion of instruction was given in substance by court in another instruction, omission was not erroneous.

6. Trial ⇨295(1)

Instructions must be read as a whole, and if they harmonize as a whole and fairly and accurately state the law, a reversal will not result because a separate instruction does not contain all elements which are to be gathered from instructions as a whole.

7. Trial ⇨296(3)

In action by employee of trucker against lumber company for injuries sustained in fall from vehicle while attempting to avoid falling lumber negligently stacked, where instructions stated that company was not obliged to give employee notice of a danger which might arise from causes or conditions which were readily apparent to eye, corrected alleged erroneous omission in prior instruction that employee had no basis for believing company would discover risk.

8. Negligence ⇨139(1)

In action by employee of trucker against lumber company for injuries sustained in fall from vehicle while attempting to avoid falling lumber negligently stacked, instruction that if employee at time of accident was in employ of trucker, and while so acting was working upon premises of company assisting company and their employees, and that if company knew of such fact and acquiesced therein, employee was

an invitee toward whom defendants owed duty to have premises in a safe condition was proper.

9. Trial ⇨228(3)

In action by employee of trucker against lumber company for injuries sustained in fall from vehicle while attempting to avoid falling lumber negligently stacked, instruction imposing upon company duty to exercise ordinary care to keep their premises in a safe condition, and not in a reasonably safe condition was proper, because "safe" and "reasonably safe" are expressions which are synonymous and interchangeable.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Reasonably Safe" and "Safe".

10. Negligence ⇨138(2)

In action by employee of trucker against lumber company for injuries sustained in fall from vehicle while attempting to avoid falling lumber negligently stacked, instruction on res ipsa loquitur that company was not required to prove by a preponderance of the evidence that they were free from negligence which proximately caused lumber to fall, properly instructed jury as to burden of proof.

11. Negligence ⇨105

An invitee does not assume the risk of latent dangers of which he has no notice.

12. Negligence ⇨138(3)

In action by employee of trucker against lumber company for injuries sustained in fall from vehicle while attempting to avoid falling lumber negligently stacked, refusal of trial court to instruct jury on doctrine of assumption of risk was proper.

Sidney A. Moss, Los Angeles, Henry F. Walker, Los Angeles, of counsel, for appellants.

Rogers & Carnes, Byron R. Bentley, Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before a jury in an action to re-

cover damages for personal injuries, defendants appeal. There is also an appeal from the order denying defendants' motion for judgment notwithstanding the verdict.

Facts: Defendant Mutual Molding and Lumber Company is a partnership composed of the other three defendants. Defendants Hannon engaged in the lumber milling business at 93rd Street and Hooper Avenue in Los Angeles. A small lumber yard, 60 feet by 60 feet was on the northwest corner of the streets above mentioned. On the southwest corner was the milling plant. At the northwest corner of the lumber yard was a small office eight by eight feet. There were two telephones in this office, one listed to defendants and the other to H. Sugarman. The sixty foot square lumber yard had a driveway from 93rd Street and was used to stack lumber which the trucks loaded and unloaded. The surface of the lumber yard was asphalt, and had a slight southeast slope or inclination.

Defendants employed H. Sugarman as yard foreman. It was his duty to stack lumber in the yard, to load and unload it. In addition to his job as yard foreman, he was engaged in a separate and independent enterprise, a trucking business. In connection with his own trucking business he employed plaintiff as a truck driver on one of his trucks. Plaintiff was in Mr. Sugarman's employ from June, 1947 until December 15, 1947, the date of the accident hereinafter described.

Defendants owned a hyster¹ which was used in the lumber yard. About December 7, 1947, a load of smooth lumber arrived at the yard. Mr. Sugarman unloaded it and stacked it with the hyster. At the time he noticed that the lumber had no "stickers" usually placed to stick such lumber together, that the lowest tier of lumber was somewhat wobbly, but he later

placed two narrower tiers on top of it. The stack was about 15 feet high.

On December 15, 1947, plaintiff arrived at work and drove his employer's truck to deliver a load of lumber. He returned about 4:15 p. m. and parked Mr. Sugarman's truck on 93rd Street. He walked onto the premises and noticed that a customer was there, and that Mr. Kemp was on the hyster. Mr. Kemp stopped the hyster and got off, whereupon plaintiff got on the hyster and used it to take the top tier from the stack of lumber to place it on the customer's truck. There was one tier still standing on the stack. Later he got back on the hyster, put the prongs of the hyster under the one remaining tier stack as far as they would go, got off and removed the two exposed cross-blocks from the top and examined the prongs to see how far they were under the load. The three-tier stack was about 20 inches behind the load. After getting back on the hyster he started to lift the load and had it about two feet up when the three-tier stack began to fall. He swung his leg up over the steering wheel and jumped, landing on his right knee and skinning the back of his hand. As a result of his fall, plaintiff suffered a fractured kneecap, and has a permanently damaged right knee.

The jury returned a verdict in favor of plaintiff in the sum of \$25,000.

Questions: First: Are defendants liable to plaintiff for negligence since he was not in their employ but was employed by Mr. Sugarman who was an independent contractor?

[1] This question must be answered in the affirmative. Defendants argue with logic that plaintiff's exclusive remedy was in the proceeding before the Industrial Accident Commission, and since he could not maintain in the courts an action against his employer, Mr. Sugarman, who was pri-

1. A piece of equipment used in a lumber yard consisting of a small truck-like machine on wheels with rear-end motor and having two five-foot prongs extending out at the front end (the prongs being movable up and down in a horizontal

position) for the purpose of moving and stacking pieces of lumber. The operator's seat is on the machine with the motor below and to the rear. Above the seat is a canopy of pressed steel attached to metal bars.

marily liable to him, he cannot maintain an action against defendants on the theory of *respondeat superior* since such doctrine imposes a secondary liability on defendants. Since there is no primary liability, there obviously cannot be a secondary liability. Though the logic of the foregoing reasoning is evident, our Supreme Court has not seen fit to follow it, and has held that the Workmen's Compensation Laws are not designed to relieve any one other than the employer from liability imposed by statute or by common law. (*Baugh v. Rogers*, 24 Cal.2d 200, 214, 148 P.2d 633, 152 A.L.R. 1043.)

[2] Clearly under the facts alleged plaintiff had a common law cause of action against defendants, and under the rule just stated this cause of action was not destroyed when his employer by virtue of the Workmen's Compensation Law was relieved from liability to him in the courts.

Meyers v. Tranquility Irrigation District, 26 Cal.App.2d 385, 79 P.2d 419, which might seem to reach contrary conclusions, is distinguished in *Baugh v. Rogers*, supra, see 24 Cal.2d at page 212, 148 P.2d at page 640, 152 A.L.R. 1043.

Second: *Did the trial court commit prejudicial error in refusing to instruct the jury on the duty defendants would owe (a) to a licensee, or (b) to a trespasser?*

This question must be answered in the negative. The trial court instructed the jury as to the duty defendants owed to an invitee. Defendants' own evidence disclosed that plaintiff was an invitee and not a licensee or trespasser. Mr. Sugarman, called as defendants' witness, testified that he saw plaintiff loading a customer's truck with the stacker and left him there so doing to go across the street at another employee's request; also that he had seen plaintiff operating the hyster five or six times on other occasions; that he had many jobs to do and would go over to the mill to make out a mill ticket and the carrier would bring over a load of lumber to the truck, and at times plaintiff would get on the hyster and lift the load up and set it on the truck while he was making out the mill tickets.

[3] Clearly the evidence would not have sustained a finding that plaintiff was a licensee or trespasser. Hence the trial court properly refused instructions relative to defendants' duties toward such persons. (*Tschumy v. Brook's Mkt.*, 60 Cal. App.2d 158, 166, 140 P.2d 431; *Oettinger v. Stewart*, 24 Cal.2d 133, 137, 148 P.2d 19, 156 A.L.R. 1221.)

Such cases as *Keena v. United Railroads*, 57 Cal.App. 124, 207 P. 35, and *Wright v. Los Angeles Ry. Corp.*, 14 Cal.2d 168, 93 P.2d 135, relied on by the defendants, are clearly distinguishable on their facts for the reason that in such cases evidence had been introduced which would have supported the proffered instructions. Such is not the case here.

Third: *Did the trial court err in instructing the jury as follows?* "If you find that the condition of the premises at the time and place of the injuries in question was dangerous and that the defendants or their agents, including H. Sugarman, their foreman, knew or should have known of such danger, and if the said dangerous condition was not known to the plaintiff and he was not negligent in failing to discover same, you are instructed that the defendants owed a duty to inform plaintiff of said danger and a failure in that regard would constitute negligence on the part of the defendants."

[4] This question must also be answered in the negative. Defendants' contention that the instruction was erroneous because it did not state that it was inapplicable if the jury should find that plaintiff was not an invitee, is without merit for the reason that the uncontradicted evidence shows that plaintiff was an invitee. (*Blank v. Coffin*, 20 Cal.2d 457, 461, 126 P.2d 868.)

[5] Neither is there any merit in defendants' contention that the instruction was erroneous because it omitted these words, "who has no basis for believing that they will discover the condition or realize the risk involved therein." The omitted portion of the instruction was given in substance by the court in another place where it stated, "The defendants were

not obliged to give the plaintiff notice of a danger which might arise from causes or conditions which were readily apparent to the eye; the defendants were entitled to assume that the plaintiff would perceive and see that which would be obvious to him upon the ordinary use of his sense of sight, and the defendants were not required to call the plaintiff's attention to or notify him of a condition which would be readily apparent to him upon the ordinary use of his eyesight."

[6,7] Instructions must be read as a whole and if they harmonize as a whole and fairly and accurately state the law, a reversal will not result because a separate instruction does not contain all the elements which are to be gathered from the instructions as a whole. (Carney v. RKO Radio Pictures, Inc., 78 Cal.App.2d 659, 666, 178 P.2d 482.) This rule is clearly applicable here. The instructions read as a whole were correct.

Fourth: *Did the trial court err in instructing the jury as follows?* "If the plaintiff Mac Wade Popejoy, at the time of the accident, was in the employ of H. Sugarman, and while acting in the scope of such employment was working upon the premises of the defendants assisting the defendants and their employees, in the course of loading a truck with lumber, and if the defendants or their employees knew of such fact and acquiesced therein, then you are instructed that the plaintiff Mac Wade Popejoy was an invitee toward whom the defendants owed the duty to use ordinary care to have the premises in a safe condition and to supply a safe place in which to work, and if you further find that the defendants or their employees failed in this regard and that such failure was a proximate cause of the injury to the plaintiff and that plaintiff was not guilty of contributory negligence, you will bring in a verdict in favor of the plaintiff Mac Wade Popejoy."

[8] Such instruction was a correct statement of the law under the facts of this case. Contrary to defendants' contention it did not merely state that plaintiff was an invitee if defendants had knowledge and acquiesced in his presence on

their premises. A reading of the instruction shows that it contained the other elements necessary to constitute him an invitee.

Herzog v. Hemphill, 7 Cal.App. 116, 93 P. 899, is factually distinguishable from the instant case as pointed out in the opinion in the cited case. There was no allegation that the urinal to which plaintiff was going was designed or used as a part of the business conducted on the premises. In the case at bar it is conceded that the hystar which was being operated by plaintiff was a part of defendants' equipment and used in their business.

Fifth: *Did the trial court commit prejudicial error in instructing the jury that if certain facts existed, "then you are instructed that the plaintiff Mac Wade Popejoy was an invitee toward whom the defendants owed the duty to use ordinary care to have the premises in a safe condition and to supply a safe place in which to work;" and that if defendants failed so to do and if such was a proximate cause of injury to plaintiff and if plaintiff was not guilty of contributory negligence, then "you are instructed to bring in a verdict in favor of the plaintiff Mac Wade Popejoy."*

This question must likewise be answered in the negative, for the reason that in addition to the foregoing instruction the trial judge instructed the jury as follows:

"Toward an invitee, he who extended the invitation, express or implied, is obliged to refrain from active negligence and to exercise ordinary care to keep the premises in a condition reasonably safe for the invitee," and "Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves or others."

[9] Defendants' stricture that these instructions were erroneous because it imposed upon defendants the duty to exercise ordinary care to keep their premises in a safe condition while their true duty is to exercise ordinary care to keep their premises in a reasonably safe condition is without merit for the reason that it has been held that "safe" means "reasonably

safe" and that the expressions are synonymous and interchangeable. (Jones v. Bridges, 38 Cal.App.2d 341, 346, 101 P.2d 91.)

Sixth: *Did the trial court commit prejudicial error in giving defendants' contingently requested instruction reading thus?* "If an instruction on *res ipsa loquitur* is given, the defendants request that it be followed by:

"Defendant's instruction No. 24.

"The defendants, however, are not required to prove by a preponderance of the evidence that they were free from negligence which proximately caused the lumber to fall. They are bound to produce only sufficient evidence to create in your minds such doubt as to why the lumber fell that you cannot say you are convinced by a preponderance of the evidence that the falling of the lumber was proximately caused by the negligence of the defendants."

[10] This question must also be answered in the negative. It is true that the court did not give plaintiff's requested instruction on the doctrine of *res ipsa loquitur*. The court correctly instructed the jury as to the burden of proof and the instruction quoted above was immaterial. Such instruction is consistent with the one given upon the burden of proof, contrary to defendants' contention. The instruction to the jury does not say they had to prove freedom from negligence by a preponderance of the evidence. It merely states that all they had to do was to produce enough evidence so that the jury was not convinced by a preponderance of the evidence that the defendants were guilty of negligence.

Seventh: *Did the trial court err in refusing to instruct the jury on the doctrine of assumption of risk?*

[11, 12] This question must likewise be answered in the negative. The undisputed evidence disclosed that plaintiff was an invitee. Since an invitee does not assume the risk of latent dangers of which he has no notice, it was proper to deny the request. (Oettinger v. Stewart, 24 Cal.2d 133, 139, 148 P.2d 19, 156 A.L.R. 1221;

Ostertag v. Bethlehem Shipbuilding Corp., 65 Cal.App.2d 795, 802, 151 P.2d 647. See also DeGraf v. Anglo California Nat. Bank, 14 Cal.2d 87, 100, 2 P.2d 899.

Judgment and order affirmed.

MOORE, P. J., and WILSON, J., concur.



NULAND et al. v. PRUYN et al.

Civ. 7684.

Sac. 6029.

District Court of Appeal, Third District,
California.

April 6, 1950.

Rehearing Granted May 4, 1950.*

Joe Nuland and Alva Leo Archer brought suit against S. R. Pruyn and J. R. Busby for an order dissolving alleged partnership, on ground that alleged partnership had been wrongfully terminated by defendants, for damages for breach of agreement to create alleged partnership, and for an account. The Superior Court of Solano County, Harlow V. Greenwood, J., rendered a judgment for the plaintiffs, and the defendants appealed. The District Court of Appeal, Van Dyke, J., held that agreement between the parties was ambiguous as to whether relationship created was that of partnership or of employment, and that therefore evidence was admissible to show the intent of the parties, that evidence was insufficient to establish a wrongful dissolution of the alleged partnership, and that Superior Court committed prejudicial error in determining rights of the parties on theory that there had been a wrongful dissolution.

Judgment reversed and new trial ordered on all issues.

I. Appeal and error — 1008(3)

Whether a contract is in any of terms ambiguous or uncertain is a matter of determination in the first instance by the trial court, and, if it is found so to be, it is primarily the duty of the trial court to construe it, after a full opportunity afforded the parties to produce evidence of the facts,

* Subsequent opinion 222 P.2d 261.

circumstances, and conditions surrounding its execution, and the conduct of the parties relative thereto.

2. Appeal and error Ⓒ1008(3)

Where a writing is so uncertain that either of two constructions urged might be sustained, it is not within the functions of a court of review to declare that the interpretation given by the trial court should be supplanted by the other construction of which the instrument is susceptible.

3. Contracts Ⓒ175(2)

Contract providing that defendants owned radio repair and service business, that plaintiffs represented that they were expert radio service and repairmen, that defendants desired plaintiffs to devote their services to the business, that equipment and stock was reasonably worth \$2,500, that 50 per cent of gross receipts of business should be deposited in bank account until defendants received \$2,500 as repayment, that thereafter a fund of at least \$1,000 was to be maintained, and that excess was to be withdrawn and divided equally between the parties as dividends, was ambiguous as to whether relationship of parties was a partnership or merely one of employment, and evidence was admissible to aid in interpretation.

4. Partnership Ⓒ328(3)

In action for an order dissolving alleged partnership because of alleged wrongful termination of alleged partnership by defendants, for damages for breach of agreement to create alleged partnership, and for an accounting, evidence was insufficient to sustain finding that defendants wrongfully terminated alleged partnership, and it was reversible error to render accounting on theory that alleged partnership was wrongfully dissolved.

5. Partnership Ⓒ75, 300

If partnership was by notice rightfully dissolved by defendants, plaintiffs would have been entitled to have their ownership in assets determined as of date of dissolution and to have payment made to them in money or in kind, and if such was not done and plaintiffs' property was used in partnership business, they would be entitled to an

election to receive their property and to share in the profits made thereafter in proportion their property bore to the whole or to be paid interest on the value of their property so used.

6. Partnership Ⓒ273

In case of a wrongful expulsion of partners from partnership and continued use of the expelled partners' assets, rights of expelled partners would be based on an assumption of a continued partnership with full participation in profits according to a ratio set up in articles of partnership, at least for a period from wrongful expulsion to actual dissolution by circumstances or decree of court.

Taft, Wright & Hopkins, Cranson L. Hopkins, Vallejo, for appellants.

Brunswick Sholars (of Schofield, Hanson & Sholars), San Francisco, and Leo C. Dunnell, Fairfield, for respondents.

VAN DYKE, Justice.

By their complaint in this action the plaintiffs alleged that on June 26, 1944, they and the defendants entered into a written agreement whereby the parties thereto agreed to the creation of a partnership for the operating of a radio repair and service business in Vallejo, California, for a period of five years. This written agreement is not set out in haec verba in the complaint, but its alleged legal effect is pleaded. Plaintiffs further alleged that they entered upon the performance of the agreement and fully performed their obligations thereunder until on or about September 6, 1944, on which date they were by the defendants wrongfully excluded from participation in the business and prevented from further performance. They pleaded that on that date and in contravention of the partnership agreement the defendants, without cause, served upon them a written notice of election to terminate the partnership and that the service of the same was a part of a joint and concerted action and conspiracy by defendants against them for the purpose of excluding them from participating in the management and profits of

the partnership. They alleged that thereupon defendants immediately took exclusive charge and possession of the partnership business and wrongfully excluded the plaintiffs therefrom thereafter, in the meantime refusing them access to the partnership records and refusing any accounting of the business. They claimed these acts made a dissolution of the partnership necessary; that defendants thereby caused a dissolution of the partnership in contravention of the partnership agreement. They alleged resulting damages consisting of the loss by them of their share of the profits of the partnership from the date of the exclusion to the date of accounting and that an accounting of the partnership affairs was necessary. They prayed for an order dissolving the partnership and, based upon a requested finding that the dissolution was wrongfully caused in contravention of the partnership agreement, they asked damages for the breach of the agreement, an account of the business to determine their share of profits, the appointment of a referee to take such account and for judgment for any amount found due them.

The defendants answered, denying virtually all of the foregoing allegations of the complaint.

Upon the pleadings so framed the case went to trial. At the outset the question of whether the written agreement, admittedly executed but denied as to the alleged legal effect, created a partnership or merely an employment of plaintiffs by defendants, received the attention of the trial court. Considerable evidence was taken concerning the facts, circumstances and conditions surrounding the execution of the agreement and of the conduct of the parties thereafter. The court then announced its determination that the contract not only spoke for itself, but that it was a partnership agreement. The court thereupon ordered that an account be taken of the partnership business and referred the taking of that account to a referee, who thereafter proceeded to take the account and upon completion thereof filed with the court her referee's report. The court adopted this report, which determin-

ed that there was due to the plaintiffs the sum of \$4,039.05 each and thereafter entered judgment in their favor, adjudging that each of them recover that sum against the defendants jointly and severally. From this judgment this appeal is taken.

Herein the appellants contend that the court misconstrued the contract. To the determination of this contention it will be necessary to refer to the terms and provisions of the agreement somewhat at length. By the terms of the agreement appellants here, S. R. Pruyn and J. R. Busby, are collectively referred to as the first party thereto and the respondents here, Joe Nuland and Alva Leo Archer, are collectively referred to as the second party. The agreement recites that the first party is the owner and operator of a certain radio repair and service business in Vallejo, and the second party represents and declares that they are expert radio service and repairmen, experienced and qualified in the matter of repairing, rebuilding and servicing radio receiving sets and kindred items. It is then recited that the parties desire that the second party devote their services to the radio repair and service business under the terms and conditions set forth. In consideration of these premises detailed provisions are made concerning the proposed actions and obligations of the parties thereunder. It is agreed that the first party (appellants here) shall not be called upon to render any services whatever in the conduct of the business, but may do so if they desire. On the other hand, Nuland is required to devote to the business not less than five eight-hour days each calendar week. Archer is required to devote his full and exclusive time to said business and is forbidden to accept other or different employment of any kind or character whatsoever. He agreed to work not less than six eight-hour days each calendar week. The parties agreed that the initial value of the tools, equipment, materials, supplies and stock in trade of the business was reasonably worth \$2,500. It was stipulated that "fifty (50%) per cent of the gross receipts" of the business should be deposited in a bank account to be known as "the fund" from which only the first

party jointly or severally might draw; that from this fund moneys would be withdrawn by the first party from time to time until they had received \$2,500 as "repayment for their investment and/or purchase price" of the aforesaid property. Then the funds were to be accumulated, never falling below a balance of \$1,000. The excess over that was to be withdrawn not less than once a month and divided equally between the parties "as dividends from the operation of said business." However, if it should turn out that said balance was insufficient to properly operate the business, then the parties agreed that they might, by mutual agreement, increase the amount of the balance. All operating expenses of the business were to be paid from "the fund". It was further agreed that the remaining fifty per cent of the "gross receipts" should be equally divided between the first and second parties not less than once each calendar month. The second party was charged with the duty of purchasing supplies and materials, but could not make such purchases in excess of \$50 from any source without written consent of the first party and no power was given to incur obligations otherwise without first obtaining such written consent. The parties agreed to keep accurate books of account to which all should have access. The agreement provided the term thereof would be a period of five years, but if Nuland or Archer were inducted into the armed forces or for any reason became physically incapable of performing their duties then the "first party may, at his option or election, terminate the within agreement by giving notice in writing to the second party or any member thereof of his intention so to do, fifteen (15) days in advance of such termination." If the second party either jointly or severally violated or breached the agreement the first party could forthwith cancel and terminate the same by giving written notice of intention so to do to either member of the second party. If second party faithfully performed their duties then upon the expiration of the term of the agreement the personal property constituting the physical assets of said business should be divided equally between the first

party and the second party. Finally, it is declared to be the intention of the parties that Nuland and Archer shall devote their best interests and efforts towards the success of the business, conduct themselves in a sober and businesslike manner and refrain from intoxication or other practices which might tend to injure the reputation or good name of the business.

Over the proper interpretation of this agreement as constituting a partnership or, on the other hand, a contract of employment, the parties to this appeal, both in their briefs and in their arguments, have wholly disagreed. Appellants contend that without regard to the evidence and merely taking the agreement "by its four corners" the object to be attained by the original owners of the business was to secure the services of competent men to be employed in the radio repair business. They point to the way in which the agreement makes a unit of Pruyne and Busby and the second unit of Nuland and Archer; to the stated purpose of the first party to obtain expert and experienced repairmen; to the stated purpose of the second party to devote their services; to the control by the first party of all the funds; to the limitations placed on the second party in respect of the expenditure of moneys and the incurring of obligations; to the expressed giving to the first party of the power of termination, whereas no such power is stated to be in the second party; to the requirements concerning conduct of the second party without such restrictions being placed upon the first party; to there being no declared obligation moving from the first party to the second party other than the payment of compensation; to the lack of a provision for the sharing of profits and the presence of a provision for "compensation" from "gross profits"; to the lack of any express declaration of intent to form a partnership; to there being no requirement for capital contribution by the second party nor pledge of credit thereby nor provision expressed for liability for losses. And from these things they conclude that *on its face* the contract is one of employment only.

On the contrary, the respondents say the contract fully measures up to the code defi-

nition of a partnership, to wit, "an association of two or more persons to carry on as co-owners a business for profit" (Corp. Code, Sec. 15006, subd. (1)); that the code further declares (Corp. Code, Sec. 15007, subd. (2)) the receipt by a person of a share of profits is prima facie evidence that he is a partner, although no such inference is to be drawn if profits are received as payment; that the use of the word "partnership" is not essential to the formation of one; that the question of partnership or not is a matter solely of the intention of the parties to do the things which partners do; that the agreement refers to an agreed value of personal property then being used in the business and provides for the withdrawal of the agreed amount "as repayment for their investment and/or purchase price" thereof, meaning that the then owners agreed to accept the stipulated value in payment for such property which would thereafter belong to the business, that is, to the parties in common as co-owners. They point to the provision for maintenance of the balance in the business funds of \$1,000, thus providing working capital and to the final provision for equal division of all assets upon expiration of the agreed term. They cite authorities to the effect that the lack of capital contribution by one or more partners does not prevent the relationship of partners. They argue that the absence of any reference to liability for debts is supplied by inference and is absent from many agreements of partnership. They say the inequality of control is a matter which can be agreed upon between partners inter se and they conclude that the agreement has all of the content necessary to the formation of a partnership.

[1-3] It seems apparent that we have here an instrument which presents, in so far as its interpretation is concerned, questions of fact rather than of law. The agreement is ambiguous and uncertain in respect of the matters here in question and comes within the rules governing the interpretation of such documents. * * * Whether a contract is in any of its terms ambiguous or uncertain is a matter of determination in the first instance by the trial

court. If it is found so to be, it is primarily the duty of such court to construe it, after a full opportunity afforded the parties to produce evidence of the facts, circumstances and conditions surrounding its execution, and the conduct of the parties relative thereto. * * * And where a writing is so uncertain that either of the two constructions urged might be sustained, it is not within the functions of a court of review to declare that the interpretation given by the trial court should be supplanted by the other construction of which the instrument is susceptible." 6 Cal.Jur. 327, sec. 192.

Illustrative of this principle is the case of *Slama Tire Protector Co. v. Ritchie*, 31 Cal.App. 555, 562, 161 P. 25, 27. In that case an agreement had been made concerning the sale and distribution in a given territory of a certain tire protector device and the question before the court was whether the contract was one of sale or one whereby an agency was created and the goods which were the subject of the agency had been consigned to the agent and not sold to him. After discussing the terms of the contract and pointing out the uncertainties therein, the court said:

"Thus we could proceed and point out other language of the contract which, taken alone or viewed in connection with the provisions of the instrument above referred to, clearly implies that the contract was intended to establish the relation of principal and agents between the parties, and not intended as a contract for the sale of the goods; but it is unnecessary to further examine the contract for this purpose. The instrument is presented herein in full, and there can be no difficulty in observing from its language that the conclusion arrived at by the court below as to its legal nature, scope, and effect involves a reasonable view of the language of the writing.

"We do not say that the provisions of the contract above specifically adverted to are wholly inconsistent with the theory that the transaction was intended as a contract of sale. What we do say is that the provisions are perfectly consistent with a contract creating an agency. * * *

"As suggested, however, it must be admitted that the contract contains some language which, if considered by itself or without reference to or consideration of other language of the instrument, might warrant the construction to which the writing is subjected by the plaintiff, viz. that it involves an agreement for the absolute sale of the tire protectors to the defendants. Indeed, it may justly be assumed to be true that the instrument is so characterized by ambiguity and uncertainty as to the nature of the relation which the parties intended thereby to create between themselves that either of the two constructions of the contract urged by the respective parties might upon reasons equally cogent be sustained. The question therefore then arises, assuming, of course, that no competent testimony extrinsic to the writing itself reflecting light upon the real intention of the parties has been received: Is it, in such a situation, within the proper or legal functions of a court of review to declare that the construction given the writing by the trial court should be rejected and supplanted by the other construction of which the instrument is susceptible? Manifestly no reason can be conceived which would support an affirmative reply to that question. The appeal court could not adopt such a course in such a case without resorting to the exercise of arbitrary power."

The principle declared in the foregoing authority has found approval in later cases, among which may be cited *Kautz v. Zurich Gen. A. & L. Ins. Co.*, 212 Cal. 576, 582, 300 P. 34, 37. Therein, concerning the principle here involved, the Supreme Court said: "* * * The construction given the instrument by the trial court appears to be consistent with the true intent of the parties, and, where that is the case, the appellate court will not substitute another interpretation, though it seem equally tenable." See, also, *Manley v. Pacific Mill & Timber Co.*, 79 Cal.App. 641, 648, 250 P. 710.

As of July 31, 1946, the court made and filed findings of fact and conclusions of law, whereby it found to be true all of the allegations of plaintiffs' complaint and in addition specifically found that the part-

nership was entered into in writing on the 26th of June, 1944; that no accounting had been had of the partnership assets; that such account was necessary in order to ascertain the amounts due the plaintiffs from defendants; that defendant Busby was presently in possession of all partnership assets, having purchased all right, title and interest therein of defendant Pruyne; that all of the allegations of defendants' answer to the complaint were untrue, and that defendants had wrongfully caused a dissolution of the partnership, the plaintiffs being without blame therein. As conclusions of law the court declared:

"1. That the partnership heretofore existing between the plaintiffs and the defendants be and the same is hereby declared to be dissolved, the defendants having wrongfully caused the same by their conduct.

* * * * *

"3. That the defendants be, and they are hereby required to render to the above entitled court a full and complete accounting of all transactions of the said partnership including all profits arising therefrom from the beginning of said venture up to and including the dissolution thereof."

On April 9, 1947, the court entered an interlocutory decree. This decree recited that on February 13, 1946, the court "did cause to be entered in its minutes that there was since on or about the 26th day of June, 1944, a partnership" existing between the parties; that it had theretofore filed findings of fact and conclusions of law; that it now appeared no final decree in the cause could be made until an accounting had been had for the purpose of determining the value of the properties and business of the partnership and of plaintiffs' interest therein. It then ordered that the partnership theretofore existing be and it was thereby declared to be dissolved; that Georgia H. Crowley be appointed a referee to take the account, the parties being ordered to produce before the referee all books, papers and writing in their possession and under their control, relating to the business. The referee was empowered to examine the parties and

the witnesses and was declared to have all the powers conferred on referees by law.

[4] It is to be noted that the court by the findings of fact which it had made and entered had found that on September 6, 1944, appellants had, in contravention of the partnership agreement, wrongfully served on plaintiffs written notice of their election to terminate the partnership; that plaintiffs had not committed any breach of the agreement; that the serving of the notice was part of a joint and concerted action and conspiracy by defendants against plaintiffs with the intent of excluding plaintiffs from the management of the business and participation in profits and that thereupon appellants had wrongfully taken exclusive charge and possession of the partnership business, and had excluded and still continued to exclude plaintiffs therefrom. Appellants contend these findings are utterly without support in the evidence. This contention must be sustained.

Respondents' only witnesses were the appellants themselves, called under Section 2055 of the Code of Civil Procedure. Their testimony, in so far as it relates to the matter now under discussion, contains nothing that could be construed as sustaining the above findings and on the contrary would support a conclusion that the notice of termination was given for good cause. Busby testified that Nuland purchased the bulk of the parts that were acquired and never obtained defendants' permission as required by the agreement. Pruyn testified that Nuland and Archer did not close their radio store in San Francisco, although the agreement specifically provided that Nuland was to devote not less than five eight-hour days each calendar week to the partnership business and Archer was required to devote his full and exclusive time thereto, accepting no other or different employment of any kind. He was to work not less than six eight-hour days each calendar week. Finch, who had been employed in the shop between the date of the agreement and the giving of notice, testified that he never saw Nuland in the shop and that Archer was not an experienced or qualified radio repairman, but on the con-

trary was an amateur. In entering into the agreement both men had represented that they were expert radio service and repairmen, experienced and qualified in the matter of repairing, rebuilding and servicing radio receiving sets. The foregoing is the only testimony contained in the record bearing on the question of whether or not the notice of termination was given without cause. Although respondents were present in court, they did not take the stand to deny or refute or explain such evidence, but remained silent. Under this state of the record, not only were the trial court's findings above referred to without support in the testimony, but they were in conflict with the only testimony given in the case. The significance of this lack of support for the court's finding of wrongful exclusion will now be discussed.

[5] The notice of termination given by appellants to respondents on September 6, 1944, was in writing and it was stated therein that it was for cause. It was declared to be effective as of its date. Partners may among themselves contract freely concerning many matters, including the right on the part of any of the members to terminate the partnership. On this matter the agreement contained the following provision: "In the event of a breach or violation of the terms and conditions of the within agreement by the party of the second part, either jointly or severally, the first party may at its option and election, forthwith cancel and terminate the within agreement by giving written notice of its intention so to do to the second party or any member thereof." If this notice of termination was in fact given for just cause, as the only evidence taken upon that point indicated that it was, then the partnership ended as of the date of its giving, and while the respondents, even so, might well have been entitled to an accounting on the theory that the parties had been co-partners, yet that accounting must have proceeded upon different principles than did the accounting which was actually taken. If the partnership was by the notice rightfully dissolved on September 6, 1944, appellants' rights would have been as follows: They would have been entitled

to have their ownership in the assets determined as of that date and paid over to them in money or in kind; if this was not done and their property was used in the business they would have had, on account being taken, an election to receive their property and to share in the profits made thereafter in the proportion their property bore to the whole or to be paid interest on the value of their property so used. See Annotation to *Forbes v. Becker*, 80 A.L.R. 12, concerning accountability of partner or joint adventurer for profits earned subsequently to death or dissolution, Subdivision VI (p. 58). It is therein stated that: "Admitting the liability of a partner to an accounting for profits earned subsequently to dissolution, as established by cases cited in prior divisions of the annotation, the question is at once presented, to what extent the other partner or his legal representatives shall be entitled to share in such profits, or, in other words, how shall the subsequently earned profits be apportioned between the parties. * * * The basis upon which a partner or his legal representative is held entitled to an accounting for profits earned after dissolution has been said to be, the use to which his interest in the capital of the firm has been put in earning such profits." *White v. Reed*, 124 N.Y. 468, 26 N.E. 1037, is cited by the author of the annotation as holding that "the granting relief of that character does not proceed on the ground that the party seeking it is a member of a continued partnership, but rests upon the fact that, when he retired from the firm, he had some remaining interest in the capital appropriated and used in the continuance of business by the other partners." Massachusetts cases are cited as holding "the liability of the surviving members is simply to make compensation for the money they have used." It is then stated that "In accordance with this view, it has been held that one claiming an interest in profits earned subsequently to the dissolution of a partnership is entitled to such share of the profits as his interest in the capital of the firm bears to the total capital, or, in other words such share of the profits as can rightly be attributed to the continued use of his property or capital

in the business. Such would seem to be the generally accepted rule." Cited in support of this statement are the following California cases: *Painter v. Painter*, 4 Cal. Unrep. 636, 36 P. 865, later appeal in 6 Cal.Unrep. 677, 65 P. 135; *Ruppe v. Utter*, 76 Cal.App. 19, 243 P. 715.

[6] On the contrary, for wrongful expulsion and continued use of assets, as found by the court, a different rule applies generally, based upon an assumption of a continued partnership, with full participation in profits according to the ratio set up in the articles of partnership, at least for the period from the wrongful expulsion to actual dissolution by circumstances or decree of court.

It is apparent in this case that it was this latter theory upon which the court here made its final judgment after the referee had filed her report.

From the report filed by the referee, it sufficiently appears that she determined the liability of appellants to respondents upon the basis of profits to be equally shared by all of the parties, including in the amounts going to make up her ultimate findings the money received on sale of the business. In effect, the referee found that from the beginning of the partnership to the closing-out sale the appellants were chargeable with an excess of receipts over disbursements in the sum of \$16,156.20, one-fourth of which each partner was entitled to. And the court, adopting this result, gave judgment in accordance therewith, adjudging that each of the respondents should recover from the appellants jointly and severally the sum of \$4,039.05, together with interest at the rate of seven per cent upon such sum from the 19th day of March, 1946, which appears to mark the end of the period over which the accounting was taken.

From what has been said it is apparent that the judgment given by the court cannot be sustained in the absence of a finding justifiably made and supported by the evidence that from the time the notice of termination was given the appellants wrongfully excluded respondents from the partnership affairs. As we have pointed out heretofore, such a finding has no support in

the evidence, and on the contrary is in opposition to the only evidence addressed to the question of whether or not respondents had so breached their agreement that the appellants were given and exercised the right to terminate the partnership.

For these reasons the judgment must be reversed, and in reversing the same we deem it proper to order a new trial as to all of the issues tendered by the pleadings, including those involving the interpretation of the contract between the parties. We have heretofore expressed no opinion as to a proper interpretation of that document and deem it best that no such opinion be expressed. We hold that the instrument is unclear and ambiguous in respect of this matter to a degree requiring that the parties be afforded an opportunity to introduce evidence of the facts and circumstances attending its execution and of the conduct of the parties thereunder in aid of its interpretation by the trial court. It is apparent from this record that the issue was not approached from that point of view. While the trial court did not refuse to receive such evidence, it is clear from the record that the learned trial judge considered the document to be of such nature that it could and must be construed by consideration of its terms alone, in which conclusion we cannot join. It may well be that when the matter is approached from the point of view that such evidence is admissible, testimony may be forthcoming which will definitely clear away the uncertainties inherently within the written contract, and, as stated by the Supreme Court in *Barlow v. Frink*, 171 Cal. 165, 152 P. 290, 292, it is advisable that we leave "the matter of its construction to be determined by the trial court under such evidence as the parties desire to present, unrestrained or uncontrolled by any expression of opinion on the subject by this court."

The judgment is reversed and a new trial ordered upon all issues in conformity with this opinion.

ADAMS, P. J., and PEEK, J., concur.

McNULTY v. SOUTHERN PAC. CO. et al.
No. 14149.

District Court of Appeal, First District,
Division 2, California.

April 7, 1950.

As Modified on Denial of Rehearing

May 6, 1950.

Hearing Denied June 1, 1950.

Action by Thomas Knight McNulty against the Southern Pacific Company and others, for personal injuries. From a judgment of the Superior Court in and for the City and County of San Francisco, Thomas M. Foley, J., in favor of plaintiff, the defendants appealed. The Court of Appeal, Goodell, J., held that a verdict for \$100,000 for loss of both legs was not excessive.

Affirmed.

1. Carriers $\S$ 347(11)

In action against railroad for injuries sustained by passenger, where railroad sought to show by conclusion from make-up of train and point at which it stopped that passenger was injured by attempting to get off while train was in motion, disparity of the conclusions of the parties as to point at which train must have stopped presented question for jury.

2. Appeal and error $\S$ 1004(1)

Decision of trial court and jury on subject of damages for personal injury cannot be set aside upon appeal unless verdict is so plainly and outrageously excessive as to suggest, at first blush, passion or prejudice or corruption on part of jury.

3. Courts $\S$ 90(1)

Claim that damages for personal injuries is excessive is primarily factual in nature and cannot be decided upon basis of awards in other cases.

4. Damages $\S$ 95

Reasonable compensation for personal injuries is matter on which there legitimately may be wide difference of opinion.

5. Appeal and error $\S$ 1004(1)

Trial judge is better qualified to act upon question of excessive verdict for damages assessed by jury than is an appellate court.

6. Damages ⇨132(11)

\$100,000 for loss of both legs by 42 year old bank cashier with life expectancy of 26 years was not excessive.

7. Master and servant ⇨330(3)

In action for injuries sustained by passenger who, after alighting, was run over by train, evidence that train started with an unusual jerk was sufficient to sustain recovery from engineer.

8. Master and servant ⇨310

Rule requiring of carriers the utmost degree of care applies with equal force to carrier's employees and agents.

9. Master and servant ⇨330(3)

In action for injuries sustained by passenger who, after alighting, was run over by train, where conductor was charged by rule with responsibility for enforcing all operating rules and there was evidence that rule requiring rear-end brakeman to take a position at least 30 feet in back of train whenever it came to a stop was not observed, evidence was sufficient to sustain recovery from conductor.

10. Carriers ⇨318(2, 4)

In action against railroad, engineer and conductor, for injuries sustained by passenger who, after alighting, was run over by train, wherein complaint predicated negligence not only on alleged violent jerk of train but also on failure to maintain adequate lighting facilities in and about station, evidence sustained recovery from railroad company.

11. Trial ⇨296(11)

In action to recover damages in the amount of \$250,000 for injuries, an instruction that jury could assess amount of damages but not to exceed sum of \$250,000 was proper, particularly in view of numerous other given instructions on subject of damages so phrased as to give jury true elements for their consideration and to warn them against speculation, emotion, sympathy, passion or prejudice.

12. Appeal and error ⇨1062(3)**Trial** ⇨145

In action by train passenger for injuries, where complaint alleged negligent

operation of train and in the same count alleged negligence in failure to maintain adequate lighting facilities at station, instruction withdrawing issue as to lighting conditions should have been given in absence of evidence to establish negligence or carelessness in that respect, but refusal to so instruct was not prejudicial and did not vitiate general verdict.

13. Trial ⇨330(5)

A plaintiff may rely upon any one of alleged acts of negligence as proximate cause of his injury, and where several acts are pleaded, a general verdict for plaintiff will not be set aside for want of evidence to support it if there is sufficient evidence of negligence to justify it upon one of the issues.

14. Trial ⇨260(1)

Refusal to give proposed instruction is not error simply because the proposed instruction states the law with more clarity than given instructions.

15. Appeal and error ⇨901, 1032(3)

Party alleging error in refusal to instruct has burden not only of showing the error but also of showing that such error is sufficiently prejudicial to justify reversal.

16. Trial ⇨260(1)

Refusal of requested instruction is not error if subject matter thereof is substantially incorporated in instructions given.

17. Damages ⇨216(1)

In action for injuries sustained by train passenger, refusal to instruct that if jury returned verdict for passenger it would be improper to attempt to measure amount of award, if any, by attempting to put themselves in passenger's place or by asking themselves what sum they would take to make such an exchange of places, was not error.

18. Carriers ⇨321(23)

In action for injuries sustained by train passenger, where theory of passenger was that there had been a violent jerk of train and there was testimony that it was not normal for a train to start with a jerk, instruction that railroad company was bound to provide vehicles safe and fit

for the purposes to which they were put, and was not excused from default in that respect by any degree of care, was proper; the possibility that defective equipment caused accident being within range of passenger's theory.

19. Trial ⇨260(8)

In action for injuries sustained by train passenger, where court instructed that unless it were shown by or might be inferred from evidence offered by passenger, contributory negligence was matter of defense to be proved affirmatively by defendants, and gave several other instructions on contributory negligence, requested instruction which emphasized that contributory negligence might as well appear from evidence introduced by passenger as from that introduced by the defense, was not improperly refused.

20. Trial ⇨250

Court need not give instruction merely because it may be said to be applicable to case from viewpoint of party offering it.

21. Trial ⇨260(8)

In action for injuries sustained by passenger who, after alighting, was run over by train, wherein passenger testified as to what he did in alighting, instruction that in absence of evidence to contrary the law presumes that plaintiff did everything at time of and immediately prior to occurrence that a reasonably prudent person would have done under the circumstances for his own protection and safety was not improper in view of additional instruction on the presumption of the exercise of ordinary care.

22. Trial ⇨296(3)

In action for injuries sustained by passenger who, after alighting, was run over by train, instruction that carrier was duty bound to avoid inflicting injury upon passengers, particularly when such persons are in the act of alighting from train should not have included the word "particularly," but the emphasis which it gave was neutralized by instructions that carrier was required to give passengers a reasonable opportunity to alight at their destinations, and to exercise a reasonable degree

of skill, and was not an insurer of passengers' safety in alighting from train.

23. Carriers ⇨321(15)

In action for injuries sustained by passenger who, after alighting, was run over by train, instruction that carrier had duty to allow passenger a reasonable time to alight was proper.

24. Carriers ⇨321(15)

In action for injuries sustained by passenger who, after alighting, was run over by train, instruction that carrier had duty not to start or move train while passenger was in act of alighting until passenger was safely on station platform and clear of the train was proper.

25. Trial ⇨296(7)

In action for injuries sustained by passenger who, after alighting, was run over by train, instructions on *res ipsa loquitur* were not improper in view of other instructions on the same subject.

26. Appeal and error ⇨205, 1056(1)

In action for injuries sustained by train passenger who, after alighting, was run over by train, rejection of evidence that passenger had on past occasion jumped from moving trains or that it was his habit to do so was not prejudicial.

A. B. Dunne, Dunne & Dunne, San Francisco, for appellants.

Appel, Dains & Liebermann, San Francisco, for respondents.

GOODELL, Justice.

This appeal was taken from a judgment entered on a verdict for \$100,000 in an action for personal injuries. A motion for new trial was denied.

The plaintiff, a commuter living at Millbrae, was a fare-paying passenger aboard train 106 which left the Third and Townsend depot in San Francisco about 12:31 a. m. on January 17, 1947. The train consisted of the locomotive and tender pulling six cars, the first three being "deadheads" or empties, the next two being passenger

coaches then in use as such and lighted, and the last car being a "deadhead", unlighted, passenger coach. On that trip Millbrae, plaintiff's destination, was a flag-stop, and before leaving San Francisco the conductor gave the engineer an order to stop there. The stop was admittedly momentary, and shortly after the train pulled out plaintiff was found lying on the Millbrae station platform near the southbound track, with his right leg, severed below the knee, lying on the roadbed between the rails of the southbound track, and his left leg badly mangled but not severed. Blood was on the rails about six feet north of the place where he was found. The freight train crew which made the discovery immediately notified police authorities who arrived promptly, gave first aid, and sent for an ambulance. The police chief marked the spot where plaintiff lay, and later made a measurement which became a fixed and determined factor in the case.

None of the five members of the crew of train 106 (engineer, fireman, conductor, and two brakemen) saw plaintiff leave the train, or saw the accident, or knew it had happened until they reached San Jose. Another Millbrae passenger, who was a witness for plaintiff, knew nothing of the accident until he read of it that evening in the paper. All these facts are without contradiction.

The real issue of fact in this case was as to the manner in which the plaintiff left the train.

Plaintiff testified that he had occupied a seat near the rear of the second lighted coach (the fifth car in the train and the one just ahead of the "deadhead", unlighted coach) and that as the train slowed down for the Millbrae stop he went to the rear platform of his car and thereafter started to descend the four steps leading therefrom. As he did so he took hold with his right hand of the grab-iron on his right and when the train came to a stop and he reached the lowest step and was about to step with his right foot onto the station platform, the train started up with a "pronounced" jerk which threw him around, disengaged his hold and threw

him down between his car and the last car and under the wheels thereof.

The chief of police of Millbrae testified that plaintiff was lying disabled on the station platform near the track at a point about 175 feet (a little over two car lengths) northerly from the northerly line of Millbrae Avenue. The five members of the train crew and two other trainmen (who were sidetracked at the station) testified as to the place where the train stopped. There were differences between their estimates, but it may be fairly said that the testimony on appellants' side was that the rear end of the train stopped at about Millbrae Avenue. That Avenue crosses the right of way at approximately a right angle, a short distance north of the Millbrae stationhouse.

In his opening statement appellants' counsel told the court and jury " * * * we expect to show you that measuring back, knowing the consist [railroad parlance for the make-up and type of cars] of the train, from the point of this stop * * * that the rear end of that train would have been some place near Millbrae Avenue. And we expect to show you from that that if Mr. McNulty was injured at a point 160 to 175 to 181 feet north of the Millbrae [Avenue] crossing, he could have been injured in only one way, and that is by attempting to get off that train while it was in motion and before it had come to a stop."

[1] This was a frank and definite statement of appellants' position and theory. Respondent contended, on the other hand, that the train necessarily must have stopped with its rear end near the place where he was found helpless and in shock. The difference, in feet, between the two points, was somewhere around 160, 175, or 181, and this wide disparity presented a broad factual question for the jury. Its verdict implies a finding that the stop was nowhere nearly as far south as any of appellants' witnesses placed it.

Appellants' first contention is that *the verdict was excessive and the result of caprice.*

Appellants' brief opens with the statement that "the overshadowing considera-

tion in the case is the amount of the verdict."

[2] At the outset it should be remarked that "Upon appeal, the decision of the trial court and jury on the subject cannot be set aside unless the verdict is 'so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury'". *Hale v. San Bernardino, etc. Co.*, 156 Cal. 713, 715, 106 P. 83, 84, citing cases; followed in *Hicks v. Ocean Shore R. R., Inc.*, 18 Cal.2d 773, 785, 117 P.2d 850. This test, it must be admitted, imposes an extremely heavy burden on an appellant claiming excessive damages.

Respondent's right leg was cut off by the wheels of the train, and he testified that at the time, as he lay helpless on his back, he knew this. It was found on the roadbed between the rails. His left leg was badly mangled but not severed, and at the hospital it had to be amputated three inches below the knee. In the same operation the amputation of the right leg was completed three inches above the knee.

Plaintiff was 42 years old at the time of the accident, and 43 at the time of trial, with an expectancy of 26 years. His health had been good; he had played golf and some baseball, had done some fishing, and some walking and gardening. He had been with the American Trust Company in San Francisco for over 25 years, since 1921, and held a responsible position as assistant cashier with that banking institution at a monthly salary of \$365.

Shortly before the accident he had taken a special training course in the bank to qualify him for a position in one of its suburban branches, which course embraced instruction respecting real estate transactions and practices. In fact on the evening before the accident he had been at a dinner attended by banking and real estate men in connection with this new branch of his activity with the bank.

At the time of the trial he was in the bank's branch at San Bruno.

Respondent's confinement in the hospital after his operations was apparently for a minimum period. His injuries seemed

to heal quickly and satisfactorily. On returning to his home he spent some time in bed and was then up and around the house. The train accident gave him a head injury but that seemed to have cleared up without complications or serious difficulties. He suffered from phantom distress and pains common to amputation cases, at times acute, severe and sharp, "like a toothache". He had some difficulty adjusting himself to his two artificial limbs, and in learning to walk and get around with them; he had difficulty in getting up and down steps and inclines.

All in all, respondent's recovery up to the time of trial had been about as satisfactory as could be hoped for, considering the severe injuries he had received and the shock to his system which such serious injuries entailed.

In cases where damages are claimed to be excessive an appellant often points to places in the record where the conduct of the plaintiff, or his counsel, or both, in the presence of the jury has been designed to inflame and excite them and arouse the "passion and prejudice" which form the basis of an excessive verdict. This record shows no such conduct, and it is not claimed by appellants that it does. In the courtroom the respondent did not even exhibit the stumps of his legs. There was nothing in his demeanor or conduct, or in that of his counsel, which indicated the slightest attempt to exaggerate or magnify his injuries or suffering. His testimony on that score and otherwise was notably temperate, moderate and dispassionate.

Respondent could prove no loss of earnings since his employer paid him his full salary regularly throughout the eight and a half months of his absence from the bank.

As he adjusted himself to his artificial limbs and could get around, he started back to work for one day a week, then two, and at the time of trial had returned practically to a full week at his desk. His wife drives him to and from his place of business at San Bruno.

His special damages were \$2,925.43.

Appellants point to some of the circumstances which fortunately attend this par-

ticular case, outlined above, as an argument why such a large verdict is not justified.

The fact remains that respondent, in the very prime of life, must carry on for the remainder of it with this serious handicap. While it is true that his employer took care of him throughout his hospitalization and recuperation with full pay, there is no assurance, in the nature of things, that respondent can continue to hold his present position, or one anywhere nearly as good, with the physical handicap that is his, seriously impairing his ability to get around as an able bodied man can. As the manager or assistant manager of a branch bank in a community where it is necessary to visit, inspect and appraise property of all kinds and situated in all kinds of places, it is a certainty that respondent will not have the freedom of movement of the ordinary person holding such a position and this, in time, may not only retard his normal advancement with the bank but may jeopardize the position which he now holds. For one thing, he can no longer drive an automobile, and obviously in the performance of his everyday business duties he will need considerable assistance.

[3] In discussing the size of this verdict it must be remembered that "The appellant's claim that the amount of damages awarded * * * is excessive, concerns an issue which is primarily factual in nature and is not therefore a matter which can be decided upon the basis of the awards made in other cases." *Crane v. Smith*, 23 Cal.2d 288, 302, 144 P.2d 356, 364.

Despite that, counsel have cited numerous cases showing the sizes of verdicts, and in a case such as this it is hardly possible to exclude such comparisons from the discussion. We shall attempt to confine it to amputation cases, and, with two exceptions, to *leg*-amputations.

[4] Always, in such discussion it must be borne in mind also that "The question of what may be reasonable compensation in cases of this kind is a matter on which there legitimately may be a wide difference

of opinion." *Roedder v. Rowley*, 28 Cal. 2d 820, 823, 172 P.2d 353, 354; citing *Bellman v. San Francisco H. S. Dist.*, 11 Cal.2d 576, 586, 81 P.2d 894.

In *Kircher v. Atchison, T. & S. F. Ry. Co.*, 32 Cal.2d 176, 195 P.2d 427, the plaintiff recovered a verdict for \$60,000 for the loss of his left hand. The District Court of Appeal reversed the judgment and ordered a new trial on the sole issue of damages, Cal.App., 183 P.2d 105, 112, characterizing the award "as shocking to our sense of justice and one which was rendered under the influence of passion and prejudice." A hearing was granted and the Supreme Court affirmed the judgment. In so doing the court recounted the training and experience of the plaintiff, but did not go into any detailed computations respecting his loss of earning capacity for the future. It simply said, "The jury was * * * entitled to take into consideration plaintiff's youth, background, and all other relevant circumstances, *Roedder v. Lindsay Rowley*, 28 Cal.2d 820 [172 P.2d 353] * * *" [32 Cal.2d 176, 195 P.2d 434.] This, also, was said: "An allowance of damages is primarily a factual matter, *Crane v. Smith*, 23 Cal.2d 288 [144 P.2d 356], and it is well settled that even though the award may seem large to a reviewing court, it will not interfere unless the allowance is so grossly disproportionate to a sum reasonably warranted by the facts as to shock the sense of justice and raise a presumption that it was the result of passion and prejudice. *Johnston v. Long*, 30 Cal.2d 54, 76 [181 P.2d 645]. It is a matter of common knowledge, and of which judicial notice may be taken, that the purchasing power of the dollar has decreased to approximately one half what it was prior to the present inflationary spiral [citations] and the trier of fact should take this factor into consideration in determining the amount of damages necessary to compensate an injured person for the loss sustained as the result of the injuries suffered."

The *Kircher* case is one of the latest decisions of our Supreme Court on the subject of excessive damages.

This court in *Huggans v. Southern Pacific Co.*, 92 Cal.App.2d 599, 207 P.2d 864, recently had occasion to consider the same subject, and affirmed a judgment on a verdict awarding \$91,000 for injuries including the loss of the left leg below the knee and the major portion of the right foot. (Here the respondent lost *his right leg three inches above the knee.*)

In that case and in two others in this district, *Gluckstein v. Lipsett*, 93 Cal.App.2d 391, 209 P.2d 98, and *Sullivan v. City and County of San Francisco*, 95 Cal.App.2d 745, 214 P.2d 82, applications were made in recent months for hearing by the Supreme Court on the ground of excessive damages but were denied.

Recent cases from other jurisdictions dealing with leg injuries show that some rather large verdicts have been upheld.

In *McKinney v. Pittsburgh, etc., Co.*, D. C.1944, 57 F.Supp. 813 there are several factors corresponding with those found in the case at bar. *McKinney* was 43, with an expectancy of 26 years, and both legs were amputated midway between ankle and knee. He suffered other injuries but they are not described in the opinion. The verdict was for \$130,000 and on a motion to set it aside as excessive the trial judge suggested a stipulation reducing the verdict to \$100,000 and indicated that otherwise he would grant the motion. Presumably this conditional order was followed. The judge said: "I think that the members of the jury were unduly affected by sympathy. *McKinney* had a particularly winning and attractive personality and as he crept on his knees past the jury box to the witness stand and climbed upon the witness stand, he was quite an appealing sight."

As we have pointed out earlier there was nothing of that kind in the instant case.

The injuries were fairly comparable (although there they were less serious than here); the plaintiff's age and expectancy were the same in each case and the verdict there, after reduction, the same as here.

In *Affolder v. New York etc. Co.*, D.C. E.D.Mo.1948, 79 F.Supp. 365, the plaintiff, a switchman, was awarded \$95,000 for the

loss of his right leg. The amputation left a stump about four inches long. The court ordered a remittitur of all in excess of \$80,000. That was for one leg.

[5] It should be noted that in both the *McKinney* and *Affolder* cases (U.S. Dist. Courts) the reduction was made by the trial judge and not by an appellate court. This is consistent with the rule in this state, namely, that after the jury assesses damages the trial judge is better qualified to act upon the question of a large verdict than is an appellate court. See *Johnston v. Long*, 30 Cal.2d 54, 76, 181 P.2d 645.

In *Haselden v. Atlantic Coast Line R. Co.*, 1949, 214 S.C. 410, 53 S.E.2d 60 the court had before it the case, not of an amputation of legs or feet, but a badly smashed and mangled foot. The jury awarded a verdict of \$45,000. The Supreme Court of South Carolina rejected the claims of excessive damages and affirmed the judgment.

In *Counts v. Thompson*, Mo.Sup.1949, 222 S.W.2d 487, 495, the plaintiff, a railroad man, was awarded a verdict for \$165,000 for the loss of both legs above the knees "removing the lower third of the thigh bones." The trial judge reduced this to \$140,000, and on appeal the Supreme Court of Missouri ordered a further reduction to \$80,000 and affirmed at that figure. But it must be borne in mind that *this was in a jurisdiction where the court said in Trokey v. U. S. Cartridge Co.* Mo.App., 222 S.W. 2d 496, that it did "not find that a judgment for personal injuries [had] ever been permitted to stand in this state for more than \$50,000." (Emphasis added.) Compare *Zibbell v. Southern Pacific Co.*, 1911, 160 Cal. 237, 116 P. 513.

In *Toledo C. & O. R. R. Co. v. Miller*, 108 Ohio St. 388, 140 N.E. 617, plaintiff was awarded \$75,000 for the loss of both legs. The accident happened in 1916. On appeal, in 1923, the Supreme Court of Ohio refused to hold that the verdict was excessive. That was 27 years ago.

[6] The trial court in the case at bar, in denying a motion for new trial, found that the verdict was not excessive, *Johnston v. Long*, supra, 30 Cal.2d at page 76, 181

P.2d 645, and we have not been convinced that it was.

Appellant contends that the evidence is insufficient to sustain the verdict and judgment against defendants Oster and Tobin.

[7] Oster was the engineer, and appellants concede that if he started the train without a signal, or, upon signal, started it improperly he could be held. One of the principal issues of fact was whether or not he started up with an unusual jerk. Hence there is no difficulty in holding that there was sufficient evidence to align him on the side of responsibility.

[8,9] Tobin, the conductor, admitted that the general direction and government of the train were vested in himself. Moreover the company's rule, read into evidence, provides that "Both the conductor and the engineer are responsible for the safety of the train and the observance of the rules, and, under conditions not provided for by the rules, must take every precaution for protection. This does not relieve other employees of their responsibility under the rules."

Rule 843 reads: "The general direction and government of a train is vested in the conductor, and all other persons employed on the train will obey his instructions. Should there be any doubt as to authority or safety of proceeding he will consult the engineer, who will be responsible with him for the safety and the proper handling of the train and such use of signals and other precautions as circumstances may require * * *."

Another rule, 846, reads: "The protection of trains is of the first importance, and conductors must not allow other duties to interfere therewith. They must require their flagman to act with the utmost promptness and in strict accordance with the rules. A trainman must be stationed, when practicable, on the rear of every train while in motion."

It appeared in evidence that another rule required the rear-end brakeman to take a position at least 30 feet in back of the rear end of the train whenever it came to a stop, and that in this Millbrae stop—because of the brevity thereof—that was

not done. This, alone, would seem to involve the conductor in liability in view of the language of rule 843 fixing the conductor with responsibility for enforcing all operating rules.

The rule requiring of carriers the utmost degree of care of course applies with equal force to the carrier's employees and agents, since it is only by and through these human agencies that a corporate carrier can operate. Incidentally, an instruction tendered by defendants told the jury in so many words that "A corporation can act only through its servants, agents and employees * * *."

We are satisfied that, although the conductor was on the train and not on the ground when the accident occurred, there was sufficient evidence to fasten liability on him as well as on the engineer.

[10] The complaint predicated negligence not only on the alleged violent jerk of the train but also on the company's failure "to supply and maintain sufficient and adequate lighting facilities in and about said station * * *." It is argued that such failure, if any, would not be attributable to either the conductor or the engineer. That may be conceded, but still the plaintiff's recovery was not restricted to the latter of the two grounds. This is discussed later.

In presenting their next point,—that there was insufficient evidence to sustain the verdict and judgment against the company—appellants say "It is a commonplace,—one on which the court instructed,—that a corporation can act only through human beings. If the human beings it has engaged to carry out its activities are free from negligence, it, equally, is free from negligence." That rule, of course, works both ways and the negligence once found, of either the conductor or the engineer, or both, would be the company's negligence.

Fifty-three pages of appellants' briefs are devoted to a series of lengthy and detailed attacks respecting instructions, most of which we think are extremely technical. Before discussing them it should be said that a reading of the charge as a whole, just as it was delivered to the jury, shows a singularly fair and well-balanced set of

instructions. It would appear that more instructions were given at appellants' request than at respondent's, although this cannot be said definitely.

[11] Appellants complain, first, that the court twice told the jury that the plaintiff was suing for \$250,000, thus, it is argued, carrying to the jury a clear implication that it could return a verdict up to that amount. The jury was told that it could " * * * assess the amount of damages * * * *but not to exceed the sum of \$250,000.*" (Emphasis added.)

"An instruction of this character is usually given in negligence cases, and it is difficult to understand how a jury in such * * * cases can be properly instructed by the court without employing language similar to that used by the court in the instruction complained of. There could be no error, therefore, in so instructing the jury * * *." That is not *our* language. It was used by the Supreme Court in the case of *Lahti v. McMnamin*, 204 Cal. 415, 421, 268 P. 644, 646, where a similarly worded instruction was given, and it would seem to settle the matter. Other cases to the same effect are *Ellis v. Central California Traction Co.*, 37 Cal.App. 390, 403, 174 P. 407; *Ritzman v. Mills*, 102 Cal.App. 464, 468, 472, 283 P. 88; *Johnson v. Pickwick Stages System*, 108 Cal.App. 279, 286, 291 P. 611; *Kleem v. Chapot*, 112 Cal.App. 553, 556-557, 297 P. 574; *Machado v. Harm*, 112 Cal.App. 748, 754-755, 297 P. 626; *Parsell v. San Diego etc. Co.*, 46 Cal.App.2d 212, 215-216, 115 P.2d 539; *Buswell v. City & County of San Francisco*, 89 Cal.App.2d 123, 134, 200 P.2d 115.

Moreover, numerous instructions were given on the subject of damages, so phrased as to give the jury the true elements for their consideration, and to warn them against speculation, emotion, sympathy, passion or prejudice.

[12, 13] Error is claimed in the court's refusal to instruct the jury that "There is no evidence in this case that there was any negligence or carelessness on the part of defendant Southern Pacific Company in supplying and maintaining sufficient and

adequate lighting facilities at the point of accident * * *."

The complaint alleged that "defendants negligently and carelessly operated said train so as to cause it to violently jerk and move forward thereby precipitating plaintiff off of said car." It also alleged that "At said time it was dark and defendant, Southern Pacific Company, negligently and carelessly failed to supply and maintain sufficient and adequate lighting facilities in and about said station and the area immediately adjacent thereto so as to enable passengers alighting from its trains at night to discern the place where said train stopped."

Thus two separate and independent charges of negligence were contained in the same count.

The legal question was exactly the same as that presented in *Criss v. Angelus Hospital Ass'n*, 13 Cal.App.2d 412, 415, 56 P. 2d 1274, 1275, a malpractice case, where four distinct types of negligence were charged in one count, one of them being "Admitting plaintiff's wife to the hospital". There was no evidence which would sustain a finding on that score, and the defendants requested an instruction telling the jury so. The refusal was assigned as prejudicial error. It was held to be harmless, but not prejudicial, error.

That the plaintiff himself did not consider that a sufficient showing had been made respecting the lighting condition is indicated by his failure to propose any instruction on that subject. The instruction withdrawing that issue should have been given, but we are satisfied, for the reasons and on the authorities found in the *Criss* case, *supra*, 13 Cal.App.2d at page 415, 56 P.2d 1274, that the failure to give it was not prejudicial error.

The situation falls squarely within the rule that " * * * a plaintiff may rely upon any one of the alleged acts of negligence as the proximate cause of his injury * * *". Accordingly, where several acts are pleaded, a general verdict for the plaintiff will not be set aside for want of evidence to support it if there is sufficient evidence of negligence to justify it

upon one of the issues * * *." 19 Cal. Jur. p. 675. Hence the error in refusing to remove the lighting issue from the case in no way vitiated the general verdict. Cases following the Criss case are *Parker v. Manchester Hotel Co.*, 29 Cal.App.2d 446, 448, 85 P.2d 152 and *King v. Schumacher*, 32 Cal.App.2d 172, 180, 89 P.2d 466. An earlier case to the same effect is *Big Three Min. & Mill Co. v. Hamilton*, 157 Cal. 130, 141, 107 P. 301, 137 Am.St. Rep. 118. See, also, *Hume v. Fresno Irr. Dist.*, 21 Cal.App.2d 348, 356-357, 69 P.2d 483; *Shields v. Oxnard Harbor Dist.*, 46 Cal.App.2d 477, 491, 116 P.2d 121.

[14,15] In the instances about to be reviewed the court is criticized for refusing to give instructions proposed by appellants on various subjects. It may be conceded for the purpose of the discussion that in some of those instances appellants' proposed instructions contained a statement of the law with more clarity than the instructions which were given. See *Mullanix v. Basich*, 67 Cal.App.2d 675, 680, 155 P.2d 130, 133. That, in itself, would not be a good reason for holding the refusal to be error. "The burden cast upon the party claiming error is not only to show it, but also to show that such error is sufficiently prejudicial to justify a reversal." *Mullanix v. Basich*, supra, citing *Coleman v. Farwell*, 206 Cal. 740, 276 P. 335.

[16] "Numerous cases establish the rule that it is not error for a court to refuse to give a requested instruction if the subject matter thereof is substantially incorporated in the instructions given. A party is not entitled to have the jury instructed in any particular phraseology, and may not complain on the ground that his requested instructions are refused if the court, of its own motion or otherwise, correctly announces the substance of the law applicable to the case; this is true even though the requested charges state the principles involved more clearly and definitely than those given." 24 Cal.Jur. pp. 806-810. Late cases to the same effect are *Burke v. John E. Marshall, Inc.*, 42 Cal. App.2d 195, 204, 108 P.2d 738; *People v. Barber*, 62 Cal.App.2d 206, 213, 144 P. 2d 371; *Huston v. Schohr*, 63 Cal.App.2d

267, 277, 146 P.2d 730; *Luis v. Cavin*, 88 Cal.App.2d 107, 115, 198 P.2d 563; In *Chandler v. Benafel*, 3 Cal.App.2d 368, 371, 39 P.2d 890, 892, it is said: "* * * It is not the rule that, merely because an instruction may be said to be applicable to the case *from the viewpoint of the party offering it*, [that] the court by reason thereof is required to give it." (Emphasis added.)

[17] Appellants claim the court erred in refusing an instruction reading: "If you should return a verdict for plaintiff it will be improper to attempt to measure the amount of an award, if any, by attempting to put yourselves in plaintiff's place, or by asking yourselves what sum you would take to make such an exchange of places * * *." No authority is cited, and we know of none, holding erroneous the failure to give such an instruction.

[18] Appellants next claim that the court erred in charging that the company "was bound to provide vehicles safe and fit for the purposes to which they are put and is not excused for default in this respect by any degree of care." The theory of respondent was that there was a violent jerk in the operation of the train. One of appellants' witnesses testified that it is not normal for a train to start with a jerk, and respondent points out that either the engineer was negligent in operating the train *or that something was wrong with the equipment*. It would seem to follow that the instruction was proper. No authority is cited to the contrary. Each side was entitled to instructions on its theory of the case, and the possibility that defective equipment caused the accident was certainly within the range of plaintiffs' theory.

The engineer testified on direct examination that attached to his locomotive was a mechanism known as a "booster engine" which was "used solely in starting a train, in order to give it additional power at the start", and the operation of which "makes a much smoother start. It allows you to use more power in starting."

[19,20] Appellants complain that the court in instructing on contributory negligence failed to lay enough stress on the

fact "that in making out their defense of contributory negligence, the defendants were entitled to rely on plaintiff's showing."

In the instruction which was refused the thought was emphasized that contributory negligence might appear as well from "evidence introduced on the plaintiff's case" as from that introduced by the defense, the quoted words being used thrice therein.

The court gave the usual stock instruction concluding with the sentence "Unless it is shown by or may be inferred from, *the evidence offered by plaintiff*, such negligence is a matter of defense, to be proved affirmatively by defendants." (Emphasis added.)

In addition thereto the court gave several other instructions on contributory negligence which informed the jury of *the plaintiff's duties and obligations as a passenger*, and of defendants' right to assume and presume that such duties and obligations would be met.

This particular assignment of error is peculiarly subject to the holding in *Chandler v. Benafel*, supra, that "* * * It is not the rule that merely because an instruction may be said to be applicable to the case *from the viewpoint of the party offering it*, [that] the court by reason thereof is required to give it."

[21] Appellants argue that, unlike a case where the witness to an occurrence has died, the plaintiff here was able to, and did, testify as to just what he did in alighting from the train, hence they claim that the following instruction should have been refused: "In the absence of evidence to the contrary, the law presumes that * * * the plaintiff * * * did everything at the time of and immediately prior to the occurrence in question that a reasonably prudent person would have done under the circumstances for his own protection and safety."

However, the following instruction would seem to have balanced it off: "It is sometimes said that there is a presumption that a person injured in an accident exercised ordinary care for his own safety.

You are instructed that *such a presumption cannot stand in the face of testimony which overcomes it. If the presumption has been overcome by testimony it passes out of the case.*" (Emphasis added.)

The jury were also instructed that there is a presumption that a *defendant* exercised due care, and that *the plaintiff must prove the contrary*; also that *no inference or presumption of negligence of defendants arises from the mere fact of injury.*

Thus the jury were given the presumptions attending both sides.

As was said in *Tuttle v. Crawford*, 8 Cal.2d 126, 133, 63 P.2d 1128, 1131, "The presumption is a natural one, and the bare Code section, as given by the court, told the jury nothing that the philosophy of life and human experience do not impart to the average person."

The cases cited in *Martindale v. Atchison, T. & S. F. Ry. Co.*, 89 Cal.App.2d 400, 412, 201 P.2d 48 (including *Tuttle v. Crawford*) hold that the giving of this instruction is not prejudicial error.

[22] Appellants attack several instructions on the degree of care owing by a carrier to its passenger. One of these instructions told the jury that the carrier was duty bound to avoid inflicting injury upon passengers "particularly when such persons are in the act of alighting from such train." The word "particularly" should not have been used, but we are satisfied that such emphasis as it gave was neutralized by other instructions which told the jury that the carrier had to permit the passengers "a reasonable opportunity to alight at their destinations, and is required to exercise to that end a reasonable degree of skill." And, further, "You are not to understand from this that the railroad company is an insurer of the passengers' safety in alighting from the train, because it is not an insurer of their safety in alighting from the train."

[23, 24] Appellants argue that the carrier's duty is not, as the jury was told, to allow the plaintiff "a reasonable time to alight" but only to exercise proper care to that end.

An instruction was given that "It was likewise the duty of the employees of the Southern Pacific Company not to start or move the train while Mr. McNulty, or anyone else, was in the act of alighting therefrom until such alighting passenger was safely on the station platform and clear of the train."

No authority is cited to show that these instructions were erroneous, and we consider the criticism technical.

[25] The criticism which appellants make of the *res ipsa loquitur* instructions is answered simply by pointing to other instructions given on the same subject, and particularly to the following:

(1) "If when the plaintiff McNulty went under the train and he was in the act of alighting from the train, he was himself in motion and his own voluntary movements proximately contributed to his being injured there is no room in this case for the application of the so-called doctrine *res ipsa loquitur* and the fact of accident and injury raises no presumption and is no ground for any inference of negligence on the part of any defendant, and if there is no other evidence of negligence on the part of defendants your verdict must be in favor of defendants."

(2) "No inference or presumption of negligence on the part of defendant or its employees arises from the mere fact that the plaintiff was injured when alighting from the train of defendant Southern Pacific Company."

(3) "Reference has been made to the doctrine of *res ipsa loquitur*. Even where this doctrine applies, it does not shift the burden of proof on the issue of whether or not defendants were negligent. The only effect of that doctrine, where it applies, is to impose on the defendants the burden of going forward with the evidence, and where the defendants have done so, and their evidence affords explanation of how the accident happened, from which it appears defendants were not negligent, the defendants have satisfied the burden under the doctrine and then, under that doctrine it still remains, after all of the evidence is in, in such circumstances, that the burden

of proof has not shifted and the burden of proof is still upon the plaintiff on the issues of defendants' negligence. If, on the whole case, the plaintiff has not sustained this burden, your verdict must be in favor of the defendants."

[26] Finally, appellants contend that the court erred in sustaining objections to questions put to plaintiff which were designed to develop that he had on past occasions jumped from moving trains or that it was his habit to do so. It is difficult to see how the rejection of such evidence could have been prejudicial error.

We are satisfied that although there were a few instances of harmless error in this record there was none of a serious or prejudicial nature. The instructions, as we have said before, were fair and well balanced.

The judgment and order appealed from are affirmed.

NOURSE, P. J., and DOOLING, J., concur.



96 Cal.App.2d 932

CARTWRIGHT v. CARTWRIGHT et al.

Civ. 17426.

District Court of Appeal.

Second District.

Division 2, California

April 12, 1950.

As Modified May 11, 1950.

Rehearing Denied May 26, 1950.

Hearing Denied July 6, 1950.

James L. Cartwright, individually and as special administrator of the estate of Benjamin B. Cartwright, deceased, brought action against Alexander Benjamin Cartwright, Sr., and another, to recover certain realty and personalty allegedly belonging to the estate of the deceased. The Superior Court of Los Angeles County, Harold B. Jeffery, J., rendered a judgment for the defendants, and the plaintiff appealed. The District Court of Appeal, McComb, J., held that evi-

dence sustained finding that there had been delivery of certain deed, that failure to find on a certain issue was not prejudicial error, that no consideration was necessary for deeds of gift, that evidence did not authorize a finding of exercise of undue influence by defendants, that rejection of certain evidence was proper, and that distribution of personality without going through formalities of having estate probated, was improper.

Judgment affirmed in part and cause remanded.

1. Deeds ⇨208(1)

Testimony of attorney that after execution of deed by husband and wife, he asked wife in presence of husband what wife wished attorney to do with deed, and wife replied that she wanted attorney to give deed to grantee, and attorney thereupon handed deed to grantee, was sufficient to sustain finding that deed was delivered.

2. Appeal and error ⇨1071(6)

Where, in suit to set aside deed, there was no evidence which would sustain a finding that a confidential relationship existed between defendant and deceased grantors with respect to deed in question, so that if trial court had made a specific finding on subject of confidential relationship, it would have been adverse to contention of plaintiff that confidential relationship existed, failure to make a specific finding was not prejudicial to plaintiff and did not constitute ground for reversal of judgment for defendants.

3. Deeds ⇨15

Where deeds were deeds of gift, no consideration was necessary for the deeds. Civ.Code, § 1040.

4. Deeds ⇨17(1)

Where grantee executed a note in favor of grantors, for sum of \$750, and note was subsequently paid, there was a valid consideration for the deed.

5. Deeds ⇨211(4)

In suit to set aside deeds executed by deceased grantors, evidence sustained finding that deeds were delivered without undue influence on part of grantees.

6. Cancellation of Instruments ⇨46

In suit to set aside deeds executed by deceased and his wife, evidence that grantees allegedly failed to summon a doctor during deceased's last illness, was properly excluded as immaterial.

7. Appeal and error ⇨1033(4)

Where trial court ruled in favor of plaintiff on motion of defendants for a nonsuit, plaintiff was in no position on appeal to urge error in such ruling.

8. Wills ⇨1

The right to dispose of one's property by will rests entirely with the state legislature, and, in absence of compliance with legislative enactment on the subject, property may not be lawfully distributed to beneficiaries.

9. Executors and administrators ⇨86(1)

Where personality of deceased was distributed without formalities of having deceased's estate probated, the persons receiving the property were accountable to special administrator of estate of deceased.

William C. Ring, Los Angeles, for appellant.

Krag & Sweet, and Charles R. Hand, Alhambra, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before the court without a jury in an action seeking to recover certain real and personal property alleged to belong to the estate of plaintiff's decedent, plaintiff appeals.

Facts: On February 11, 1944, Benjamin B. Cartwright and his wife, Mary E. Cartwright, subscribed, acknowledged and delivered to defendants herein a deed to a parcel of real property located in Alhambra, California. The property was held in joint tenancy by the grantors. Thereafter Mary E. Cartwright told attorney Ogg that she wanted to deed lot 14 to Alexander B. Cartwright, Sr., and lot 15 to her grandson, Alexander B. Cartwright, Jr., with Mary E. and Benjamin B. Cartwright retaining a

note for \$750 secured by a trust deed on lot 15, said note and trust deed to be signed by Alexander B. Cartwright, Jr. and his wife Cecile Cartwright. The documents were accordingly prepared by attorney Ogg, the deed signed by Mary E. and Benjamin B. Cartwright as grantors, and a note and trust deed from Alexander B. Cartwright, Jr., and Cecile Cartwright was executed in the sum of \$750 in favor of Mary and Benjamin Cartwright. At the same time Benjamin B. Cartwright told attorney Ogg to have the note and trust deed on lot 15 made out to Mary E. Cartwright. The same date Mary E. Cartwright assigned the note covered by the trust deed on lot 15 to her son, James L. Cartwright. Mary E. Cartwright instructed attorney Ogg to hold the deed to lot 15 for her, as well as the note and trust deed in the amount of \$750, until she died, then the deed was to be recorded and the deed of trust given to plaintiff. After her death attorney Ogg recorded the deed and gave the trust deed and note to plaintiff James L. Cartwright. Thereafter the note was paid in full to plaintiff and he signed a quitclaim deed on February 26, 1946, on lot 15 in favor of Alexander B. Cartwright, Jr. and Cecile Cartwright.

After the death of Mary E. Cartwright there was found a document denominated a "gift list" in the nature of a holographic will which was filed with the county clerk of Los Angeles, October 1, 1947, but never probated. This document signed by Mrs. Cartwright purported to dispose of certain personal property which she owned. Defendant, pursuant to the gift list, distributed the personal property to various persons named therein.

The present action was instituted to set aside the deed to defendant Leona P. Cartwright and to recover the personal property which defendant Leona Cartwright had received under the "gift list." Judgment was entered in favor of defendants.

Questions: First: *Was there substantial evidence to sustain the trial court's finding that the deed of February 11, 1944, executed by Benjamin and Mary Cartwright was delivered to defendant Leona P. Cartwright?*

[1] This question must be answered in the affirmative. Attorney Ogg testified that

after the deed had been executed and accepted by Benjamin and Mary Cartwright, he asked Mrs. Cartwright in the presence of her husband what she wanted him to do with the deed, to which she replied that she wanted him to give it to defendant Leona P. Cartwright. He thereupon handed the deed to said defendant. This constituted substantial evidence to sustain the trial court's finding that the deed was delivered to Leona P. Cartwright.

Second: *Did the trial court commit prejudicial error in failing to find upon the issue of whether a confidential relationship existed between decedents and defendant Leona P. Cartwright?*

[2] This question must be answered in the negative. The record is devoid of evidence which would sustain a finding that a confidential relationship existed between defendant Leona P. Cartwright and decedents pertaining to the deed in question. Hence if the trial court had made a specific finding upon the subject it would have been adverse to plaintiff's contention and therefore the error in failing to make a specific finding was not prejudicial to plaintiff and does not constitute ground for reversal of the judgment. (*Reiniger v. Hassell*, 216 Cal. 209, 211 et seq., 13 P.2d 737.)

Third: *Was the trial court's finding that the deeds were executed to defendants or either of them for a good and lawful consideration sustained by the evidence?*

[3] (1) This question as to the first deed executed in favor of Leona P. Cartwright is immaterial for the reason that the deed was a deed of gift and it was not necessary that there be a consideration for the same. (Sec. 1040, Civil Code.)

[4] (2) There was a valid consideration for the deed granting lot 15 to Alexander B. Cartwright, Jr., since he signed a note in the sum of \$750 which was subsequently paid as consideration for the deed.

(3) The deed covering lot 14 to Alexander B. Cartwright, Sr., was delivered to him. It was unnecessary to have a consideration for this deed since it was a deed of gift. (Sec. 1040, Civil Code.)

Fourth: *Did the trial court commit prejudicial error in finding that the deeds were*

delivered without undue influence upon the part of defendants?

[5] An examination of the record fails to disclose any evidence which would sustain a finding that defendants or either of them exercised undue influence over the grantors. Therefore the finding was supported by substantial evidence.

Fifth: *Did the trial court err in rejecting plaintiff's offer to prove that defendants failed to summon a doctor during Benjamin Cartwright's last illness?*

[6] This question must also be answered in the negative. Clearly such evidence was immaterial and had no bearing upon the questions before the court.

Sixth: *Did the trial court commit prejudicial error in denying defendants' motion for a nonsuit when it stated that it was not interested in hearing any evidence or argument upon any cause of action excepting that bearing upon the nondelivery of the deeds?*

[7] This question must likewise be answered in the negative. Plaintiff is not in a position to urge error since the trial court ruled in plaintiff's favor on the motion.

Seventh: *Was the trial court guilty of misconduct?*

Plaintiff has failed to direct our attention to any statement or action of the trial judge which might be considered prejudicial to plaintiff's cause. Therefore this question must also be answered in the negative.

Eighth: *Did the trial court commit prejudicial error in failing to give judgment for plaintiff as special administrator of the estate of Benjamin B. Cartwright for the personal property of his deceased wife which was distributed partially to defendants without probate of Mary E. Cartwright's holographic will?*

[8, 9] This question must be answered in the affirmative. The right to dispose of one's property rests entirely with the state legislature, and in the absence of compliance with the legislative enactment on the subject, property may not be lawfully distributed to beneficiaries. Since the personal property of Mrs. Cartwright had been dis-

tributed without going through the formalities of having her estate probated, the parties receiving the same are accountable to the special administrator of her estate, and the trial court should have ordered the personal property of its value delivered to plaintiff as special administrator of the estate of Mary E. Cartwright.

The judgment is affirmed as to the portions dealing with the deeds executed by decedents, and reversed as to those portions dealing with the personal property of decedent Mary E. Cartwright, and remanded to the trial court with instructions to take evidence and make findings as to what personal property of said decedent if any has come into the possession of defendants or either of them, and if it be determined that any personal property of decedents came into their possession, to order that the same or its value be delivered to plaintiff as special administrator. Each party to bear his own costs on appeal.

MOORE, P. J., and WILSON, J., concur.
Hearing denied; CARTER, J., dissenting.



96 Cal.App.2d 833

THODE et al. v. McAMIS et al.

Civ. 7722.

Sac. No. 6047.

District Court of Appeal, Third District,
California.

April 6, 1950.

Rehearing Denied May 4, 1950.

Hearing Denied June 1, 1950.

L. H. Thode and others, partners doing business under the fictitious name of Thode & Sons Lumber Company, brought action against **L. C. McAmis**, **Virginia McAmis**, **Standard Accident Insurance Company** and others, to recover value of certain materials sold by plaintiffs to the defendants and used by the defendants in the construction of a dwelling house for the defendants **L. C. McAmis** and **Virginia McAmis**, husband and wife. From that part of judgment entered by the Superior Court, Butte County, **Harry Deirup, J.**, which denied plaintiffs any re-

lied against the defendant Standard Accident Insurance Company, the plaintiffs appealed. The District Court of Appeal, Van Dyke, J., held that bond furnished by contractor to owners agreeing to indemnify them against such loss or damage as they might suffer if liens for labor or material were established against dwelling house being constructed was strictly a "contract of indemnity" and that materialmen could not recover directly thereon for materials furnished.

Judgment affirmed.

1. Mechanics' Liens ⇨313

Where bond furnished by contractor to owner agreed to indemnify owner against such loss or damage as owner might suffer if liens for labor or material were established against dwelling house being constructed, bond was strictly a "contract of indemnity", and materialmen could not recover directly thereon for materials furnished. Civil Code, §§ 2778, 2837.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Contract of Indemnity".

2. Mechanics' Liens ⇨229

The only penalty for failure of owner to file contract and bond which by its terms inures to benefit of lien claimants prior to commencement of construction as authorized by statute is that liens may be perfected for the reasonable value of the work or material furnished without limitation to contract price. Code Civ.Proc. § 1183.

3. Evidence ⇨450(9)

Where provisions of bond furnished by contractor to owner agreeing to indemnify owner against such loss or damage as owner might suffer if liens for labor or materials were established against dwelling house being constructed were clear and direct, such document was within itself the contract of the parties and it could not be changed by evidence aliunde.

4. Pleading ⇨8(7), 312

Where indemnity bond furnished by contractor to owner and contract entered into by contractor and owner for construction of dwelling house were both appended to complaint by materialmen seeking to recover directly on the bond for materials

furnished as exhibits, and it was alleged that such documents were made a part of the pleadings by reference thereto, allegations in the complaint that bond was issued as a performance bond were but conclusions of the pleader which were not supported by language of the documents referred to.

Hubert I. Townshend, Oroville, for appellants.

King & Savage, Oroville, J. F. Good, Oroville, for respondents.

VAN DYKE, Justice.

The appellants herein are copartners doing business under the firm name of Thode & Sons Lumber Company. As plaintiffs in the trial court they brought an action to recover from defendants Jester, Stockwell and Henderson, copartners doing business as The Woodcraft Shop, the value of certain materials sold by them to said defendants and by said defendants used in the construction of a dwelling house for defendants L. C. McAmis and Virginia McAmis, husband and wife. Against the property of the defendants McAmis they sought foreclosure of a materialman's lien. They also sought to recover from defendant Standard Accident Insurance Company, a corporation, the value of the same materials, basing their claim for this relief upon a bond given by that company to the owners. They recovered judgment against defendant Jester as prayed for. They were denied judgment against the owners because they had failed to perfect their claim of lien against the owners' property. They were denied relief against the insurance company, and it is from this last part of the judgment, that which denied them any relief against the insurance company, that they appeal.

Doctor McAmis and his wife, under date of May 27, 1946, entered into a contract with Jester and his associates, wherein they were referred to respectively as owner and contractor, under which designations they will be hereinafter referred to. By the agreement the contractor agreed to build a dwelling house upon a lot owned by the

owner in accordance with plans and specifications referred to in the instrument. The owner agreed to pay the stipulated price in five equal installments. Specifically, the contractor agreed to provide all the materials and to perform all the work shown on the drawings and described in the specifications, entitled "'Proposed Dwelling for Dr. and Mrs. L. C. McAmis' * * * and to do everything required by the general conditions of the contract, the specifications and the drawings." Work was begun June 1, 1946. On June 3d following, the Standard Accident Insurance Company, hereinafter referred to as the Insurance Company, executed and delivered to the owner a bond, the material portions of which read as follows:

"That Earl Juster, Earl Hunderson and Harvey Stockwell doing business as The Woodcraft Shop (hereinafter called Principal) as Principal, and the Standard Accident Insurance Company, a corporation of the State of Michigan, * * * as Surety, are held and firmly bound unto Dr. L. C. McAmis (hereinafter called Owner) in the full and just sum of Eleven Thousand Nine Hundred Eighty seven and 85/100 Dollars (\$11,987.85) to the payment of which, well and truly to be made, the Principal and Surety bind themselves, * * *, firmly by these presents.

"Whereas, the Principal has entered into a certain written contract, * * *, with the Owner for Construction of a dwelling in Oroville, California,

"Now, Therefore, the condition of the above obligation is such, That, if the above bounden Principal shall indemnify the Owner from and against any and all loss or damage directly arising by reason of the failure of the Principal to perform faithfully said contract, as well as against any and all direct loss which the Owner may sustain by reason of any mechanic's lien or liens that may be finally established against said improvements and the ground upon which constructed, for work done and/or material furnished in and about the performance of said contract, then this obligation shall be void, otherwise of full force and effect."

Neither the contract nor the bond was recorded as might have been done under Section 1183 et seq. of the Code of Civil Procedure, and it is apparent by reference to the date of the bond that since it was made after work commenced it could not have been filed for record before the work was commenced under the contract, as would be necessary in respect to the bond given under those sections if the same was to afford all of the protection which the recording of a contract and bond provided for in those sections would afford to the owner. As before stated, appellants never perfected their claim of lien against the property of the owner, but they sought by their complaint in the trial court to recover directly from the Insurance Company, claiming they had a right so to do in an action direct upon the bond.

[1] We think the bond involved here permits of no such construction as will afford appellants any claim against the Insurance Company. The language of the bond is clear. It is strictly a contract of indemnity. The language used is apt and free from ambiguity. The Insurance Company does not undertake or guarantee that the contractor will perform the contract or that liens may not be established against improvements and the ground upon which they are to be constructed, but on the contrary undertakes to indemnify the owner against such loss or damage, if any, as the owner may suffer if the principal does fail or if such liens are finally established. Such a contract affords a remedy to the owner to the extent of such loss only, and only after a loss has been actually paid by owner. Civ.Code, sec. 2778. This latter condition, of course, expressed in the cited code section, is as much a part of the instrument as though set out therein. Contracts of suretyship are to be interpreted under the same rules to be observed in the case of other contracts. Civ.Code, sec. 2837. The parties to this contract are only the contractor, the owner and the Insurance Company, and every provision of the contract can be given full application without consideration of any other persons. It results therefore that appellants had no right of action upon this bond.

Appellants' contention that they do have such right of action is based upon a claim that they are members of a class, to-wit, materialmen for whose express benefit this bond was given. To uphold this contention they cite and rely upon a number of cases among which are the following: *Sunset Lumber Co. v. Smith*, 91 Cal.App. 746, 267 P. 738, holding that if a surety guarantees that a contractor will perform all obligations of the contract, thus impliedly guaranteeing he will pay for all labor and materials, that such undertaking constitutes a contract made expressly for the benefit of those who furnish such commodities; *Woodhead Lumber Co. v. E. G. Niemann Investments, Inc.*, 99 Cal.App. 456, 278 P. 913, holding that where a bond indemnified a mortgagee of a building to be constructed, against loss from failure of the owner to complete it and in addition undertook expressly that the owner would pay in full the claims of all persons performing labor upon or furnishing materials to be used in such work, the latter provision constituted a contract for the benefit of such persons and they might sue directly upon it; *W. R. Spalding Lumber Co. v. Fradkin*, 68 Cal. App.2d 308, 156 P.2d 450, holding that where in a letter a surety agreed with the owner that the bills incurred in the performance of a contract would be paid and there would not be any liens, the letter constituted a contract for the benefit of lien claimants upon which they might have direct action against the writer. But these and other cases cited are all inapplicable here. Generally speaking, they went upon the theory that the bond or undertaking in question contained provisions which could not be given full effect unless the contracts be construed as being expressly for the benefit of others than the named parties. Thus in *Woodhead Lumber Co. v. E. G. Niemann Investments, Inc.*, supra, the court said, 99 Cal.App. at page 460, 278 P. at page 915: "The provision in the bond in reference to loss by reason of failure to complete the building clearly inured to the benefit of the mortgage company—that concerning the payment of materialmen did not. To give this latter clause effect (and it is to be remembered that 'the whole of a contract is to be taken together,

so as to give effect to every part, if reasonably practicable * * *' [Civ.Code, sec. 1641]), it must be held that it inured primarily to the benefit of the materialmen. Therefore, since it is alleged that appellant was one of the materialmen, appellant is entitled to sue upon the bond. And, it being further alleged that by agreement it furnished services and materials used in the construction of the building and that the same have not been paid for, its cause of action is completely stated." See, also, *French v. Farmer*, 178 Cal. 218, 172 P. 1102.

In the case at bar we have no such provisions as are referred to in the cited cases and the provisions of this bond can be given full effect by keeping the contract completely among those who are expressly made parties thereto.

[2] Appellant further argues that a right of action upon the bond is conferred by section 1183 of the Code of Civil Procedure. We do not agree. Said section furnishes the owner, subject to court approval, with a method whereby he may, if he desires to do so, limit the amount of mechanics' liens to the contract price by filing the contract and a bond which by its terms inures to the benefit of lien claimants prior to the commencement of construction. An owner is not required to seek such protection, the only penalty for not doing so being that liens may be perfected for the reasonable value of the work or material furnished without limitation to contract price.

[3] Appellants further contend that there was here a clear intent on the part of the owner to provide, through this bond, protection for materialmen and laborers and the trial court permitted considerable testimony to be introduced concerning the facts and circumstances attending the execution of this bond. However, this bond, as we have said, is not ambiguous or uncertain; its provisions are clear and direct and such a contract constitutes an exclusive statement of the intent of the parties in making it. Such a document is within itself the contract of the parties and it cannot be changed in any respect by evidence aliunde.

We hold that this bond was not intended in any degree for the benefit of any person other than the owner.

For a comprehensive annotation upon the right of a person furnishing material or labor to maintain action on a contractor's bond to an owner or a public body or on an owner's bond to a mortgagee, reference is made to 77 American Law Reports, pages 21 to 214, inclusive. The law is therein summarized in respect of the particular question here involved, 77 A.L.R. at page 213, as follows:

"According to the prevailing rule, the right of laborers and materialmen to recover on a contractor's bond depends upon the terms of the instrument. * * * It depends upon whether the bond is actually for the benefit of such persons, or is for the protection of the nominal obligee and merely incidentally benefits the third parties. A condition for the payment of laborers and materialmen is clearly for the benefit of such persons, within the contemplation of this doctrine. * * *

* * * * *

"Where the bond is conditioned merely to indemnify and hold harmless the owner or public body, it seems, both by authority and reason, that it does not inure to the benefit of laborers and materialmen so as to enable them to recover thereon."

[4] Appellants next contend that the decision of the court is contrary to the pleadings, the findings and the evidence. Their argument runs in this manner: The complaint contained allegations that the bond was made and issued as a performance bond under said construction contract of May 27, 1946, and the court by a general find found this allegation to be true; a performance bond guarantees the performance of the contract; the contract obligates the contractor to pay materialmen; therefore the finding that this was a performance bond conflicts with conclusions of law and judgment in denying appellants the relief they sought against the Insurance Company. But the invalidity of this argument is apparent when it is considered that the bond and the contract were both appended to the complaint as exhibits and it was al-

leged that the same were made a part of the pleading by reference thereto. Therefore the allegations above referred to concerning the nature of the bond were but conclusions of the pleader which were not supported by the language of the documents referred to. *Shaw v. McCaslin*, 50 Cal. App.2d 467, 473, 123 P.2d 102.

For the reasons hereinbefore given the judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.



96 Cal.App.2d 804

VOLKERING v. ALLEN.

Civ. 17268.

District Court of Appeal, Second District,
Division 1, California.

April 5, 1950.

Rehearing Denied April 20, 1950.

Hearing Denied June 1, 1950.

Action by La Verne Volkering against William Allen for assault and battery. The Superior Court, Los Angeles County, Arthur Crum, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Doran, J., held that denial of a continuance is a matter of judicial discretion with which there should be no interference unless an abuse of discretion is established.

Judgment affirmed.

**1. Appeal and error ☞966(1)
Continuance ☞7**

Denial of a continuance is a matter of judicial discretion with which there should be no interference unless an abuse of discretion is established.

2. Appeal and error ☞966(2)

Where record disclosed that defendant's attorney was stricken with heart attack, 20 days before date case was originally set for trial, which prevented him from doing any trial work for 90 days, and when case was called for trial, facts concerning such illness were presented by affidavit of attorney having same business address, as

defendant's attorney who conducted case on behalf of defendant in an orderly and able manner, there was no abuse of court's discretion in denying motion for a continuance.

3. Assault and battery ☞43(5)

In action for assault and battery in which complaint alleged general damages and record contained medical testimony to effect that plaintiff still suffered intermittent pains and that there was a possibility of a "flareup", instruction that plaintiff could recover cost of physicians' and surgeons' services, nursing, hospitalization and care reasonably certain to be required in her future treatment, was proper.

4. Assault and battery ☞43(5)

In action for assault and battery, instruction that plaintiff could recover exemplary damages if defendant were guilty of oppression, fraud or malice, express or implied, and that malice might be established either by proof or presumption of law, was proper.

5. Assault and battery ☞40

Award of general damages of \$4,280 in addition to exemplary damages of \$1,000 for assault and battery in which plaintiff, a young woman, was struck to ground by defendant and suffered bruising and marring of face and broken arm which produced intermittent, but permanent, aches and pains, was not excessive.

Fred Horowitz and Alvin F. Howard,
Los Angeles, for appellant.

Don Lake, Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from a judgment in an assault and battery action, awarding respondent compensatory damages in the sum of \$5,000.00, and exemplary damages of \$1,000.00. The appellant complains that the trial judge committed error in refusing to grant a continuance, in giving certain jury instructions, and on the ground that the award of damages is excessive.

The record discloses that the plaintiff, defendant, and another couple, had been

dining, drinking and dancing at the Paris Inn from about 9:30 p. m. until about 12 or 12:30 a. m. on November 8, 1947. The party then proceeded to a parking lot preparatory to returning home, where the appellant "started to get fast or fresh" with respondent. When the respondent attempted to get out of the car to escape appellant's advances, the latter "picked up the (respondent's) bag and started beating on me with it * * * on the head and back".

After beating Miss Volkering with the hand bag Allen "threw my bag and it landed on the pavement but it hit me * * * back of the ear". Respondent then "ran to call Mary and she was opening the door (of the other car) and I went to get in the car and at that time Mr. Allen (appellant) grabbed me from behind and pushed me forward and as I fell into the car I broke my arm". Sam Richardson, driver of the other car, then "started around and started punching" at appellant and the latter "stepped into his car and drove away". According to the respondent's testimony, appellant subsequently "said he was very sorry that it happened to me and to not worry about anything because he would take care of my bills", but that appellant never paid any of the expenses.

In respect to appellant's intoxication at the time of the assault, Allen testified, "I paid for about six or eight rounds (of whiskey and mixed drinks)". Both Miss Volkering and Mary Van Skuyk gave testimony that "every time drinks were ordered Mr. Allen would drink mine and Mr. Richardson's and Mary's"; that appellant "drank practically all that came to the table", and that "he was pretty drunk"; that the other three were all sober. Appellant denied being intoxicated and testified that respondent and Mr. Richardson were "trying to rob me", whereupon appellant gave Miss Volkering a push and "she fell backwards into the automobile".

As a result of the assault respondent suffered "a spiral fracture at the junction of the middle distal third of the left humerus", further described as "a fracture sort of corkscrew in character, and it involved the bone from the shoulder to

the elbow". This required "an open reduction (which is) opening the fracture site by surgery and aligning the bones in the proper position and then we put in three metal screws to hold the fragment together". Such procedure, it was testified, left a permanent scar with possibility of a "flareup as a result of these screws being in the arm". At the time of trial, Miss Volkering still suffered intermittent aches and pains, and testified, "I do not have full extension (of the arm) * * *. I don't have as much strength in it as I have in the other one but it has recovered pretty well". Other injuries were described as "the black and blue part behind my ear when the purse was thrown at me, and then my chin was skinned".

One of the main contentions made in appellant's brief is in respect to the trial court's refusal to grant a continuance. The brief states: "This case was originally set for trial on January 10, 1949 and not continued at any time. On December 21, 1948, some twenty days before trial, Marshall Abbott, defendant's attorney, was stricken with a heart attack which prevented his doing any trial work for a period of 90 days. (Suppl.Clk.Tr. p. 1)". When the case was called for trial in the Master Calendar Department, the facts concerning Mr. Abbott's illness were presented by way of affidavit by Attorney Alexander L. Oster, whose business address appears to be the same as that of Attorney Abbott.

Defendant's motion for a continuance was denied and the cause transferred to Department 18 for trial. In the latter department when the case was called Attorney Oster made the following statement: "If the Court please, may the record show that Marshall Abbott is the attorney for the defendant and I am appearing for him. I made a motion for continuance in Department 1, which was denied. I do not appear regularly, I just appear for Marshall Abbott." A jury was then impaneled; the trial proceeded and five witnesses including plaintiff and defendant, gave testimony. Attorney Oster conducted the case on behalf of the defendant.

While admitting that "The motion for continuance was addressed to the discretion of the judge presiding in the Master Calendar Department", appellant contends that there was abuse of such discretion; that "defendant was forced to trial without his attorney, not to serve the ends of justice, but to serve no purpose whatsoever", and that "Mr. Oster was forced to 'represent' defendant".

Appellant's second contention is that "The Court erroneously instructed the jury concerning the items recoverable", in that the jury was instructed that plaintiff could recover the cost of physicians' and surgeons' services, nursing, hospitalization and care "reasonably certain to be required in her future treatment". This claim is predicated upon the assertion that the complaint does not allege any such elements of damage, and that there was no evidence to show any "probability" of such future need. Respondent's brief, however, calls attention to the fact that the complaint does allege general damages which would include an award for future detriment. As hereinbefore indicated the record contains medical testimony to the effect that plaintiff still suffered intermittent pains and that there was a possibility of a "flareup".

It is also argued that the trial court erroneously instructed that plaintiff could recover exemplary damages if defendant were "guilty of oppression, fraud or malice, express or implied"; and that malice might be established either by proof or presumption of law". Answering this contention respondent's brief states that the court quoted the statute regarding exemplary damages, and avers "That defendant was guilty of oppression and malice cannot be gainsaid". Respondent also cites *Davis v. Hearst*, 160 Cal. 143, 116 P. 530, holding that malice may be shown by an attempt wrongfully to injure another.

Finally, appellant contends that the award of general damages in the sum of \$4,280.00 in addition to exemplary damages and special damages, was excessive. It is claimed that there was no testimony showing that plaintiff suffered pain "other than

REEVES et al. v. NICHOLS et al.

Civ. 4020.

District Court of Appeal, Fourth District,
California.

March 30, 1950.

aches and pains in her arm during damp weather * * * not described as severe or sharp. There is no testimony of any anxiety or nervous shock or suffering. There is no testimony of any permanent injury other than a scar on her upper arm resulting from the incision of an operation". Respondent, however, draws the conclusion from the evidence that "appellant * * * without cause, brutally attacked and struck to the ground a young woman, * * * respondent here, breaking her arm and bruising and marring her face, and causing permanent scars and producing intermittent but permanent aches and pains, especially in her broken arm".

[1,2] Consideration of the facts of the case as evidenced by the record leads to the reasonable conclusion that no error of a prejudicial nature was committed by the trial court. In so far as relates to the denial of a continuance, this, as stated in appellant's brief, is a matter of judicial discretion with which there should be no interference unless an abuse of discretion is established. Far from establishing such an abuse in the instant case, the record reflects an orderly and able presentation of the defendant's case. That the jury did not credit the defendant's account of what occurred and rendered judgment for the plaintiff, in no way indicates that defendant did not have a fair trial.

[3-5] The same may be said in respect to the giving of instructions on the subject of damages, and the amount of the award. Evidence was before the jury which, if believed, indicated a brutal and unprovoked assault which resulted in serious injuries to Miss Volkering. As a matter of law it cannot well be said that the award was so great as to be deemed excessive. Nor were the instructions, considered as a whole, prejudicial to the rights of the appellant.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

O. E. Reeves and others, copartners, doing business under the firm and style of Reeves & White, brought action against Don J. Nichols and others, as copartners, doing business under the firm and style of Utility Oil Associates, to recover rental due under contract for leasing of oil well drilling equipment, for damages for failure of defendants to keep the machinery in repair, as agreed, and for reasonable attorney's fees, and the defendants filed a cross-complaint to recover damages for amounts expended by them in repairing the equipment, for wages lost, and for time lost while waiting for repairs. The Superior Court of Kern County, Warren Stockton, J., rendered a judgment for the plaintiffs, and the defendants appealed. The District Court of Appeal, Fourth Appellate District, Griffin, J., held that there was no sufficient showing that plaintiffs violated OPA regulations so as to bring about a forfeiture of the contract, that defendants were not entitled to recover for repairs or for time lost while waiting for repairs, and that plaintiffs were entitled to recover damages because of failure of defendants to keep equipment in repair.

Judgment affirmed.

1. War and national defense ⇨164

Where maximum price regulation provided that lessor of oil well drilling equipment might lease and deliver the equipment at maximum rental rates proposed by him in his report, but that he might not receive payment until the OPA approved proposed maximum rental rate, lease of equipment at rate in excess of that finally fixed by the OPA as maximum rental after use of equipment by lessee had ceased, did not render the lease void, and did not preclude recovery of maximum rental price fixed by the OPA, the order fixing the maximum rent being retroactive.

2. War and national defense ⇨164

In action by lessors of oil well drilling equipment against lessees to recover rental due under written agreement, burden was

on lessees to show that lessors had not properly complied with OPA regulations and that they thereby forfeited their rights under the contract.

3. War and national defense ⚖164

In action by lessors of oil well drilling equipment against lessees to recover rental due under written agreement, evidence sustained finding that lessees failed to establish that lessors did not properly comply with OPA regulations so as to forfeit their rights under the contract.

4. Bailment ⚖19

Where contract for leasing of oil well drilling equipment provided that lessees must, at their own expense, keep the equipment in good repair during term of agreement and replace any broken parts at their own expense, and no exception was made in contract for loss of time of lessees due to repairs, lessees were not entitled to recover money paid out by them for repairs and for time lost while waiting for repairs.

5. Bailment ⚖14(1)

Where contract for leasing of oil well drilling equipment provided that lessees would, at expiration of rental period, redeliver equipment in as good a condition as when received, lessors were properly awarded damages for failure of lessees to keep machinery in repair.

6. Appeal and error ⚖1010(1)

Finding which was supported by the evidence, could not be disturbed on appeal.

P. E. Cavaney, Los Angeles, for appellants.

Mark F. Jones and W. L. Engelhardt, Los Angeles, for respondents.

GRIFFIN, Justice.

Plaintiffs brought this action against defendants to recover rental due under a written agreement for the leasing of oil well drilling equipment, for damages in failing to keep the machinery in repair, as agreed upon, and for reasonable attorney's fees provided for in the contract.

The agreement, dated July 30, 1945, provided that plaintiff rented to defendant company, Utility Oil Associates, the equipment for \$1,500, beginning July 30, 1945, for ten days, then two additional extensions of ten days each were granted at \$1,500 for each ten days extension. The amount due after the first payment of \$1,500, was payable at the rate of \$150 per day while the equipment was operating and \$75 per day for stand-by time until the equipment was returned.

The defense to the action was predicated mainly upon the claim that a maximum rental price had not been fixed by the Office of Price Administration for the leasing of such machinery, as required under Revised Price Regulation No. 136—Order L-608, and that plaintiffs leased the outfit in violation of said regulation.

By cross-complaint defendants alleged that the equipment was second-hand—badly worn, and on account of interruptions and delays, caused by breakdowns, the machinery could not be used by them for a total period of 23 days of the time it was in their possession. It is further alleged that the contract was induced by misrepresentation of facts as to the condition thereof and as a result of which defendants were damaged in the sum of \$8,500.

After trial the court found generally that defendants took possession of the equipment on July 30, retained it for 39 days, and during that period it was operated for a period of 21 days; that during the remaining 18 days it was not being used. It then found that at the time the equipment was leased to defendants the O.P.A. had not fixed a maximum or other rental price on said equipment but did on June 13, 1946, make an order fixing it at \$82 per day; that the order provided that the rental of \$82 should be retroactive and apply to all rentals of said equipment since May 22, 1942, whether said equipment was in use or not; that by the terms of the order there was due from defendants to plaintiffs rental in the sum of \$82 per day for the period of 21 days and \$75 per day for the period of 18 days, totaling \$3,072, and that no part thereof had been paid except the sum of \$1,500,

leaving a balance of \$1,572. It then found that by the terms of the rental agreement defendants agreed that they would, at their own cost and expense, cause the equipment to be kept in good repair and would return it to plaintiffs in as good condition as when received, reasonable wear and tear from use excepted; that defendants failed to keep it in such repair and that by reason thereof plaintiffs were damaged in the sum of \$2,098.30. \$1,200 was allowed as reasonable attorneys' fees. An additional sum of \$54.75 was allowed for materials furnished to defendants by plaintiffs.

As to the counterclaim, the court found that the machinery and equipment was worn; that parts thereof did break down and that by reason thereof the drilling of the well was delayed, but found that it was not true that the machinery or equipment was unfit for the purposes for which the same was let and hired, but that it was leased under a written agreement providing that no warranty was made by the plaintiffs to the defendants as to its condition; that defendants inspected it before delivery and accepted it; that certain of the breakdowns of the equipment were without fault on the part of defendants, but found that the greater portion of them were caused by the fault of the defendants. It then specifically found that plaintiffs did not guarantee the machinery or equipment; that defendants did not rely upon any statements made by plaintiffs but relied upon their own inspection of the equipment as to the condition thereof. It found generally against the defendants as to their allegation of fraud. Judgment was entered accordingly.

Defendants particularly attack the item of rental. They contend that at the time the contract here involved was executed the maximum price regulations had previously been established governing oil field machinery, citing O.P.A.—M.P.R. 134, 136, and a base date was fixed as of October 1st, 1941 (Revised M.P.R. 136, p. 15); that a timely filing by plaintiffs of a list of rates and prices, etc. under said regulations was a condition precedent to a recovery by them; that the contract was contrary to the regulations and accordingly void and unenforceable, citing such cases as Kellogg v. Howes,

81 Cal. 170, 22 P. 509, 6 L.R.A. 588; Smith v. Bach, 183 Cal. 259, 191 P. 14; Napa Valley E. Co. v. Calistoga E. Co., 38 Cal. App. 477, 176 P. 699; Rodgers v. United States, 6 Cir., 138 F.2d 992; and Jacks v. Taylor, 34 Cal.App. 95, 166 P. 858.

It is true that many of the O.P.A. regulations require, as a condition precedent to the making of a sale of equipment that a maximum price be first established. However, Maximum Price Regulations 136, sec. 14, par. 2, provides that the lessor may lease and deliver the product at the maximum rental rate proposed by him in his report, but he may not receive payment until the O.P.A. approves the proposed maximum rental rate, etc.

[1] We find no provision in the regulations that prevents the making of a lease covering such equipment before the maximum price has been established. The prohibition contained therein runs against the collection of the rental before the proposed rent has been approved. Section 14b of the same regulations does provide for the filing of a report, setting forth the description of the product, the acquisition costs, the proposed rental rates, etc. When this report is to be filed, with relation to the time of the renting of the equipment is not stated in the regulations. Plaintiffs offered in evidence Exhibits 6, 7 and 9. Exhibit 9 was a letter from the O.P.A. dated 6/13/48, advising plaintiffs that on October 9, 1945, it established a maximum rental rate for the rotary drilling rig, based upon the owner's valuation thereof. For reasons therein stated it revoked that order and method of calculating rates and established a new rate of \$82 for a 24-hour day, and it is therein provided that "The above maximum rates may be charged throughout the period while the equipment is in the possession of the lessee", and "This Order shall become effective immediately and shall apply to all rentals of the subject equipment since May 22, 1942." Defendants now claim that since the first order was issued on October 9, 1945, six days after the use of the equipment and rig by defendants had ceased, that such order could not be retroactive so as to hold that the defendants had complied with

O.P.A. Regulation No. 136, for the rental period for which plaintiffs seek recovery.

[2] It would be an unjust and strained construction under Maximum Price Regulation 136, *supra*, and the orders issued from the Office of Price Administration, to hold that such order was not now retroactive to the date therein specified, i.e., May 22, 1942. The burden was on defendants to show that plaintiffs had not properly complied with the O.P.A. regulations and that they thereby forfeited their rights under the contract. *Balfour v. Heuer*, 77 Cal.App.2d 227, 175 P.2d 55.

In *Basler v. Sharp & Fellows Co.*, 73 Cal.App.2d 480, 166 P.2d 403, 406, this court had under consideration a contract for the recovery of rental for road building equipment wherein the defendant claimed the charges were in excess of those allowed by the O.P.A. regulations. The court there found that the agreed charges for rental had been reduced to meet the requirement of the O.P.A. and did not exceed the permissible maximum. In that case there was evidence that the plaintiff submitted the charges to the proper officials and received at least an implied approval thereof. The court specifically held that the respondent had made out at least a *prima facie* case and it was incumbent upon the appellant to produce the requisite evidence to support its contention that the amount claimed was in excess of that permitted, and held that the respondent "made an earnest attempt to comply with the Regulation, and received at least implied approval of his charges".

[3] Defendant has made no sufficient showing which would indicate that the judgment, as to the rental value of the machinery, should be disturbed.

Defendants claim that they should not be charged for certain items, due to repair work. They produced evidence, including a drilling log of the oil well, indicating that considerable money was paid out by them for repairs, in wages and time lost while waiting for repairs on the outfit.

[4] In reference to this contention the contract itself appears to answer defendants' claim. It provides that the defendants must, at their own cost and expense, keep the equipment in good repair during the

term of the agreement and replace any broken parts in the drilling machinery at their own expense. No exception is made therein for loss of time due to repairs.

[5] As to the damages allowed plaintiffs for the failure of defendants to keep the machinery in repair, the contract specifically provides that defendants will, at the expiration of the rental period, redeliver the drilling equipment in as good a condition as when received and the cost of making those necessary repairs became immediately due and payable by defendants to the plaintiffs. There is sufficient competent evidence to support the finding of the court that repairs in the sum allowed for damages were necessarily incurred by plaintiffs in placing the equipment in its former condition after it was repossessed by them.

[6] Although the evidence on the subject was conflicting, the finding that plaintiffs did not make any false or fraudulent representations to the defendants as to said machinery or equipment or its condition or its adaptability for the purpose for which it was leased, is supported by the evidence and cannot be disturbed on appeal. *Chichester v. Seymour*, 28 Cal.App.2d 696, 83 P.2d 301.

No other questions being raised, the judgment is affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.



96 Cal.App.2d 742

PEOPLE v. SULLIVAN.

Cr. 2622.

District Court of Appeal, First District,
Division 2, California.

March 30, 1950.

Hearing Denied April 27, 1950.

William B. Sullivan was convicted in the Superior Court, San Mateo County, Aylett R. Cotton, J., of rape, and he appealed. The District Court of Appeal, Goodell, J., held that testimony by witness other than prosecutrix that subsequent to commission of alleged offense defendant committed same of-

fense against witness under similar circumstances was properly admitted to show a plan, scheme, system or design into which fitted the commission of the offense for which defendant was on trial.

Judgment and order denying a new trial affirmed.

1. Criminal law ⚡369(2)

The relevance of evidence that proves crimes other than that charged must be examined with care.

2. Criminal law ⚡372(1)

In rape prosecution, testimony of witness other than prosecutrix, that subsequent to commission of alleged offense against prosecutrix defendant committed same offense against her under similar circumstances, was properly admitted for limited purpose of tending to show that there existed in mind of defendant a plan, scheme, system or design into which fitted the commission of the offense for which defendant was on trial.

Alfred J. Hennessy, San Francisco, for appellant.

Fred N. Howser, Attorney General, Clarence A. Linn, Deputy Attorney General, for respondent.

GOODELL, Justice.

Appellant was convicted of a violation of § 261, subd. 3, of the Penal Code and sentenced to the penitentiary. He appeals from the judgment and from the order denying a new trial.

Appellant in his brief sets out the five contentions,—(1) that evidence of another alleged offense was improperly admitted; (2) insufficiency of the evidence to support the judgment; (3) errors of law arising during the trial; (4) error in the instructions, and (5) that the acts complained of did not constitute rape. None of the five points, excepting the first, is developed in appellant's brief, hence our discussion will be confined to that one point.

On the evening of Saturday, January 29, 1949, the complaining witness, B. R., a woman of 25, and a woman friend of hers, attended a public dance in Oakland.

Defendant asked B. R. to dance with him and thus they met. They danced several times together and between some of the dances they went to the bar and had highballs. About 12:30 defendant offered to drive both girls to their homes in San Francisco and they got into his car, a Plymouth sedan with one door on each side. After taking the other girl home defendant asked B. R. to go to his apartment but she refused, saying that she must go home as her mother was ill. Defendant drove around for a while and then drove southwesterly through the Mission District assuring that the route would lead into her neighborhood, but instead of taking her home he drove out of the city and past Tanforan racetrack. When she insisted on going home he turned around and drove westerly toward Skyline Boulevard and told her that either she would go to his apartment or he would turn into Sharp's Park. She still refused, and he drove toward Sharp's Park and stopped his car beside the road. When he did so and indicated his intentions she reminded him that he had given her his card and cautioned him to desist. Thereupon, she testified, "he grabbed me by my hair and put his hand around my throat and I began screaming, I was scared, and then he began hitting me." He hit her with his fists on her head and face; she had bumps on her head and her face was scratched and cut, her nose was bleeding, and her mouth cut. He kept on beating her and finally she opened the door and slid out of the car onto the ground. Defendant was right behind and above her and still striking her on the face and head. She testified that she fought to the best of her ability, and to the point of exhaustion; that she "was sick, I could hardly fight, all I could do was pray * * *." Defendant, according to her testimony, forced her into the back seat of the car, forcibly took off two articles of her underwear and committed the offense charged. He drove back to San Francisco still insisting that she go to his apartment, and refusing to return her girdle until they got there. She pleaded with defendant to take her home but he drove up in front of his home and tried to drag her in. She grabbed hold of a post

and finally he desisted and promised to take her home, but after driving around he again insisted that they were going to his apartment. As he slowed down at the intersection of Market and Castro Streets, around 3:30 a. m., B. R. jumped from the car, and ran into a gas station where she sought the protection of the two attendants.

Both attendants testified that she was hysterical, and kept repeating "Dont let him hit me" and "Dont let him get me" and that she had blood on her face, the flesh was laid open under the side of her nose, her lips were swollen and there was a lump on the left side of her head. One of the attendants who washed the blood from her face testified that the flesh of her nose was torn, her lips puffed and her face lacerated; that the blood had dried and it took a little time to remove it around her mouth on her chin and cheek (Defendant testified B. R. received the face and head injuries when she jumped from the car at the gas station). On cross-examination the same attendant denied that the blood was only "a little splotch" and said it was smeared on her face in several places under her nose, on her cheek and chin. He estimated that the cut under her nose was about a half inch long and a quarter inch wide. Both men saw a girdle protruding from the right pocket of defendant's coat as he stood at the gas station.

A police inspector who saw B. R. on the morning in question, a few hours after the offense, testified that her lips were bruised and her cheek bone bruised and swollen. Two photographs in evidence, taken that morning, show the marks on B. R.'s face and a mark on her right hand.

The appellant's principal contention, and really his only point on appeal, arises from the admission in evidence, over objection, of the testimony of the witness R. W. respecting a similar attack upon herself about two months after the first offense and while appellant was out on bail on the first charge.

This witness, a girl of 18, testified that she met appellant for the first time at a public dance hall in San Francisco. A day or two later, on March 28, 1949 he called for her at her home about 8 o'clock p. m.

and drove down Mission street to a cafe, and from there to another cafe on the Bayshore Highway in San Mateo County where they danced a few times and he had some alcoholic drinks. She had nothing but soft drinks. They left there a little after 10 p. m and drove up to McLaren Park which is in San Francisco. Defendant had some bottles of whiskey with him out of which, she said, defendant tried to have her drink from the time they left her home until they returned there. At McLaren Park he stopped the car and told R. W. that she was going to be raped. She resisted and he forcibly removed an article of her underwear. She testified that every time she started to scream defendant hit her on the jaw with his fist. He told her to get over the back seat, and when she refused "he got over and drug me over and in the meantime practically choked me to death." "I was lying there, being pinned down. He pulled my hair; he hit me in the chin and jaw with his fist, about the head and face." She then testified respecting the act of intercourse. After that he drove her home, and on the way asked her for a date the next night but she told him she had an engagement. On the night after that he called on her at 8 o'clock. By prearrangement two officers were there and took defendant into custody, the witness having reported the rape the morning after its occurrence.

Before the testimony of R. W. had progressed to the point of describing the alleged offense the court interrupted, saying: "I think I will give an instruction * * * for the purpose of showing why this is admitted", and there was then read to the jury the following:

"Evidence was offered in this case for the purpose of showing that the defendant committed another crime other than the one of which he is accused and for which he is on trial in this action, namely, that he committed an act of rape with force and violence upon [R. W.].

"Such evidence was received for a limited purpose only: not to prove distinct offenses or continued criminality, but for such bearing, if any, as it might have on the question whether the defendant is in-

nocent or guilty of the crime charged against him in this action, to wit: rape with force and violence upon the person of [B. R.].

"You are not permitted to consider that evidence for any other purpose, and as to that purpose you must weigh such evidence as you do all others in the case.

"The value, if any, of such evidence depends on whether or not it tends to show that there existed in the mind of the defendant a plan, scheme, system or design into which fitted the commission of the offense for which he is now on trial."

This instruction was given again at the end of the trial.

[1,2] We are mindful of the rule that "The relevance of evidence that proves crimes other than that charged * * * must be examined with care." *People v. Peete*, 28 Cal.2d 306, 316, 169 P.2d 924, 930, citing *People v. Albertson*, 23 Cal.2d 550, 577, 145 P.2d 7 and 46 Harv.L.Rev. 954, 983. We are satisfied, however, that the testimony of the witness R. W. was properly admitted.

In *People v. Peete*, supra, 28 Cal.2d at page 317, 169 P.2d at page 931 the court said: "When a defendant's conduct in connection with the previous crime bears such similarity in significant respects to his conduct in connection with the crime charged as naturally to be explained as caused by a general plan, the similarity is not merely coincidental, but indicates that the conduct was directed by design. See II Wigmore, Evidence (3d. Ed.) 202, 275; *R. v. Smith*, 41 Crim.App.Rep. 229, 236.)"

The court there cites and discusses numerous cases where the admission of such evidence was sanctioned. Since that decision there have been several cases where the same rule was held to have been properly applied, among them the following: *People v. Webster*, 79 Cal.App.2d 321, 179 P.2d 633 (murder); *People v. Cassandras*, 83 Cal.App.2d 272, 188 P.2d 546 (rape); *People v. Daniels*, 85 Cal.App.2d 182, 192 P.2d 788 (theft); *People v. Mason*, 86 Cal. App.2d 445, 195 P.2d 60 (theft); *People v. Brower*, 92 Cal.App.2d 562; 207 P.2d 571 (forgery).

In the *Cassandras* case, 83 Cal.App.2d at pages 279-282, 188 P.2d at page 550, 552 there will be found an extended exposition of the rule and at page 281, 188 P.2d at page 551 a discussion of its application in rape cases.

People v. Webster, supra, has many features similar to this case. In comparing the two cases it must be borne in mind that in the *Webster* case the prosecution had to rely wholly on circumstantial evidence, which is not the case here. Moreover, that was a prosecution (and conviction) for first degree murder. Notwithstanding the strictly circumstantial nature of the case and the gravity of the offense, evidence of a similar attack subsequent to the one on trial, was held admissible.

The evidence in the *Webster* case need not be repeated, it being sufficient to say that the crime was committed on June 30, 1946; that at the trial testimony was given by a woman to the effect that about six weeks later *Webster* had attacked her; the circumstances of his meeting with each woman, of what happened thereafter, and particularly the manner in which each had been attacked as evidenced in the first instance by marks on the victim's body, and in the second by the victim's testimony, were strikingly similar. On appeal the court in 79 Cal.App.2d at page 327, 179 P.2d at page 636, said: "It would be unusual to find two crimes with greater details of similarity of execution, showing a common plan or scheme or system in the commission of both. Thus the evidence of the collateral crime was properly admitted. *People v. Lisenba*, 14 Cal.2d 403 [94 P.2d 569]; *People v. Peete*, 28 Cal.2d 306 [169 P.2d 924]; *Lisenba v. People*, 314 U.S. 219, [62 S.Ct. 280, 86 L.Ed. 166]. That the collateral crime was committed after the commission of the offense for which defendant was on trial does not in itself furnish sufficient reason for rejection of the evidence concerning it. *People v. Gosden*, 6 Cal.2d 14 [56 P.2d 211]."

In this case there is no question of identity in either instance, since defendant admits having B. R. in his car on January 30 and R. W. on March 28. He claims that with B. R. there was no intercourse at all.

He admits that with R. W. there was, but claims it was with her consent and without resistance. In each instance defendant met the girl in a public dance hall. In each instance he took her in the same car and forced her into its back seat. In each instance he had one or more bottles of whiskey and tried repeatedly to get the girl to drink with him. In each instance when he met with resistance he hit the girl with his fists on the face and head, pulled her hair and put his hands on her throat. In each instance he took from the girl her undergarments. Appellant's counsel points out that he did not remove R. W.'s girdle while he did remove that of B. R.—this being the only variance pointed out by counsel in the procedure followed by appellant in the two cases. In each instance defendant drove to a spot in or near a park.

This was not a close case nor was it dependent on circumstantial evidence, as was the Albertson case. The testimony of the complaining witness respecting the beating which appellant had given her was corroborated to a large extent by the two gas station attendants who described fully her appearance when she arrived there in hysterics and seeking protection against appellant. It was corroborated also by the Police Inspector who saw her the same morning, and by the photographs.

Respondent's brief contains a full exposition of the people's contention that the testimony of R. W. was admissible as tending to show a pattern, scheme, design or plan common to both attacks amounting to a distinctive mode of operation. Although respondent therein cites the Albertson, Peete, Webster, Cassandras, Daniels and Mason cases, also *People v. Dabb*, 32 Cal.2d 491, 197 P.2d 1, and quotes from several of them, appellant has made no attempt to distinguish any of them or to show by argument or citation that they have no application. He filed no closing brief, and when the appeal came on for argument his counsel did not appear.

The judgment and order denying a new trial are affirmed.

NOURSE, P. J., and DOOLING, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

96 Cal.App.2d 738

SCHOMAKER et al. v. PROVVOO et al.

Civ. 14248.

District Court of Appeal, First District,
Division 2, California.

March 30, 1950.

Action by Donald L. Schomaker, a minor, by his guardian ad litem, Margaret Edy, and another, against John David Provoo, and Patrick Casey, for personal injuries inflicted upon minor by an automobile driven by defendant Provoo and owned by defendant Casey. The Superior Court, for the City and County of San Francisco, Robert McWilliams, J., entered judgment for defendant Casey after verdict and plaintiffs appealed. The District Court of Appeal, Dooling, J., held that evidence concerning condition of automobile driver was admissible for purpose of throwing light upon driver's unusual conduct prior to accident.

Affirmed.

1. Automobiles ⇨243(3)

In action for injuries, in which plaintiff contended that defendant automobile owner had entrusted his automobile to other defendant while latter was intoxicated, evidence that defendant automobile driver during period of time in question had been very unstable, was admissible for purpose of throwing light upon driver's unusual conduct prior to accident.

2. Appeal and error ⇨970(2)

Unless it can be seen that evidence is without any weight whatever in determining issue, action of trial court in receiving it will not be reversed.

3. Evidence ⇨99

In determining relevancy of evidence that may be offered upon issue of fact, much depends upon nature of issue, and a wide discretion is left to trial judge.

4. Evidence ⇨474(4)

Testimony of an intimate acquaintance is not limited to his opinion of absolute sanity or insanity. Code Civ.Proc. § 1870, subd. 10.

5. Evidence ⇨470

Opinion of non-expert witnesses may be given on those matters which are too subtle or too complex to permit adequate

presentation in any other way, and this is basis of intimate acquaintance rule. Code Civ.Proc. § 1870, subd. 10.

6. Appeal and error ⇨237(2)

Where medical witness was asked whether a particular witness was his patient and whether doctor considered himself privileged not to disclose information about patient and doctor thereupon claimed privilege, the fact that appellant made no motion to strike testimony nor request to instruct or admonish jury, precluded appellant from contending on appeal that it was misconduct to call doctor knowing that privilege would be claimed.

7. New trial ⇨99, 103

Denial of a motion for new trial, sought on ground of additional fact which might not have been apparent to counsel at trial, that a witness's visits to medical witness were not for any condition affecting witness's credibility, was proper in view of fact that original testimony of medical witness was not admitted for impeachment purposes and that appellant, although invited to submit an instruction on a limited purpose of this line of evidence, failed to do so.

8. New trial ⇨140(1)

An affidavit on information and belief has no evidentiary value on motion for new trial.

Hoberg & Finger, Alfred E. Graziani, San Francisco, for appellants.

Dana, Bledsoe & Smith, San Francisco, Morton B. Jackson, San Francisco (of counsel), for respondent.

DOOLING, Justice.

Plaintiffs appeal from a judgment entered on a jury verdict in favor of defendant Casey. The action was for personal injuries inflicted upon the minor, Donald L. Schomaker, by an automobile driven by defendant Provoo and owned by respondent Casey. The complaint as against Casey counted on the statutory liability of the owner of an automobile who permits another to operate it, Vehicle Code sec. 402, and on common law negligence

in entrusting the automobile to a person known to be or who should have been known to be an incompetent driver. The second claim was based upon the contention that at the time respondent Casey entrusted his automobile to Provoo the latter was intoxicated. *Knight v. Gosselin*, 124 Cal. App. 290, 12 P.2d 454.

After meeting Provoo at a social gathering at which some alcoholic beverages were admittedly consumed respondent Casey in San Francisco entrusted his car to Provoo at about 4 a. m. for the limited purpose, according to Casey's testimony, of allowing Provoo to drive a few blocks to the home of other friends where Provoo's wife was spending the night. Instead Provoo took a seventy mile drive, going over the Golden Gate Bridge to Sausalito, thence to Vallejo, around the East Bay through Oakland and returning to San Francisco by way of the Bay Bridge. The accident occurred at about 11 a. m. near the Fleishhacker Zoo in San Francisco. It was appellants' theory that the bizarre conduct of Provoo in taking such a ride without any companion during those hours of the morning would support an inference that Provoo must have been obviously intoxicated when the automobile was entrusted to him.

In an effort to rebut this inference respondent called Provoo's father who testified, over objection, that his son during the period of time in question "had been very unstable. He had reversed his opinions * * * he had seemed, well, a little unstable and irrational in some of the statements he had made in conversation that I had detected and noticed * * *."

Appellants argue that the only logical purpose of this testimony was to impeach the credibility of Provoo as a witness (Provoo having given testimony favorable to appellants) and that such impeachment was improper. *People v. Mackey*, 58 Cal. App. 123, 208 P. 135. The same objection was made in the trial court and the evidence was admitted for the limited purpose of its tendency to explain Provoo's unusual conduct in taking his seventy mile solitary ride between 4 a. m. and the time of the casualty. The trial judge said:

"I think it may have some relevancy as throwing light upon his conduct that evening. For that limited purpose I will allow it. It is claimed he was intoxicated—I believe that is the charge of the plaintiff, either directly or by implication, and this may throw light upon that claim of the plaintiff. He may answer."

[1, 2] There was no error in this ruling. The evidence was relevant in attempted explanation of Provoo's extraordinary conduct. "Unless it can be seen that the evidence is without any weight whatever in determining the issue, the action of the court in receiving it will not be reversed."

[3] "The tendency of modern decisions is to admit any evidence which may have a tendency to illustrate or throw any light on the transaction in controversy, or [give] any weight in determining the issue, leaving the strength of such tendency, or the amount of such weight, to be determined by the jury; and, in determining the relevancy of evidence that may be offered upon an issue of fact, much depends upon the nature of the issue to sustain which or against which it is offered, and a wide discretion is left to the trial judge in determining whether it is admissible or not." *Moody v. Peirano*, 4 Cal.App. 411, 418, 88 P. 380, 382; *Firlotte v. Jessee*, 76 Cal.App.2d 207, 210-211, 172 P.2d 710; *Estate of Ades*, 81 Cal.App.2d 334, 342, 184 P.2d 1.

The court had informed counsel for appellants: "And if you offer what I regard as proper instructions limiting the purpose of the evidence now under discussion, I will be glad to consider such instructions." Appellants would have been entitled to such instruction but the record shows no such instruction requested. Their right to it was thereby waived. *Hatfield v. Levy Brothers*, 18 Cal.2d 798, 809-810, 117 P.2d 841.

[4, 5] Appellants further object that under Code of Civil Procedure, subd. 10, sec. 1870 the testimony of an intimate acquaintance is limited to his opinion of absolute sanity or insanity. The rule if so applied would be unreasonably restricted, limiting such testimony to black and white and ex-

cluding every intervening shade of gray. The opinion of nonexpert witnesses may be given on those matters which are too subtle or too complex to permit adequate presentation in any other way *Manney v. Housing Authority*, 79 Cal.App.2d 453, 459, 180 P.2d 69, and this is the basis of the intimate acquaintance rule in question. The dictum in *People v. Mackey*, supra, 58 Cal. App. 123, 128, 208 P. 135, implying the restriction asserted by appellants is supported by no citation of authority and was not necessary to the decision in that case.

A medical witness specializing in nervous and mental diseases was called by respondent and the fact elicited that Provoo had been his patient. Counsel for respondent then said: "Doctor, then you consider yourself his doctor? I don't wish to intrude upon the privilege between you and your patient—do you consider him still your patient in having given to you things which are privileged?"

[6] The witness thereupon claimed the privilege. No motion to strike nor any request to instruct or admonish the jury was made by counsel for appellants. They now claim that calling the medical witness with knowledge that he would claim the privilege was misconduct. Conceding this to be true the conduct of counsel for respondent in asking the quoted questions of the witness was sufficient to put appellants' counsel on notice that respondent's attorney expected the witness to claim the privilege before calling him to the stand. In the face of this appellants' attorney took no action in the trial court where the matter could have been taken care of by striking the testimony, and by an admonition or instruction to the jury. It is too late under these circumstances to raise the question for the first time on appeal. 2 Cal.Jur. 281.

[7, 8] On motion for new trial appellants' counsel filed an affidavit in which the additional fact, which might not have been apparent to counsel at the trial, was alleged on information and belief that Provoo's visits to the medical witness were not for any condition affecting his credibility. In the first place the evidence was

not admitted for impeachment purposes and appellants although invited to submit an instruction on the limited purpose of this line of evidence failed to do so, as noted above. Secondly an affidavit on information and belief has no evidentiary value on motion for new trial. *Stickel v. San Diego Elec. Ry. Co.*, 32 Cal.2d 157, 170, 195 P.2d 416; *Sitkei v. Frimel*, 85 Cal.App. 2d 335, 338, 192 P.2d 820; 1 Cal.Jur. 672-673.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J.,
concur.



96 Cal.App.2d 778

ALLSTATE INS. CO. v. MILLER et al.

Civ. 17336.

District Court of Appeal, Second District,
Division 2, California.

April 3, 1950.

Action by the Allstate Insurance Company against Francis A. Miller, Jennie Reed and others, for a declaratory judgment as to plaintiff's liability under an automobile liability policy. The Superior Court for Los Angeles County, Arthur Crum, J., rendered a judgment for the plaintiff, and the defendants, Jennie Reed and others, appealed. The District Court of Appeal, McComb, J., held that the insured's false statement in his application to the effect that his motor vehicle operator's license had never been suspended rendered the policy void.

Judgment affirmed.

1. Declaratory judgment ⇨347

In insurer's action to determine liability under automobile liability policy, evidence supported finding that insured made a false and material representation of fact in applying for the policy which was relied upon by insurer in issuing it.

2. Insurance ⇨388(5)

Where applicant for automobile liability policy made false representation that his operator's license had never been suspended

and insurer issued policy in reliance on the statement, and after discovery of the misrepresentation insurer did no act recognizing validity of the policy, insurer did not waive right to rely on falsity of statement made and was not estopped to claim falsity as defense to obligation under the policy.

3. Appeal and error ⇨989

In determining whether there was substantial evidence to sustain trial court's finding, appellate court must disregard any conflicting testimony which trial judge did not believe.

4. Insurance ⇨285½

Where application for automobile liability policy recited that the policy was issued in reliance upon truth of facts stated by applicant, and applicant falsely represented that his operator's license had never been suspended, falsity of the statement rendered the policy void ab initio.

Novack & Haberkorn, of San Bernardino, for appellants.

C. F. Jorz, of Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal by defendants from a judgment in favor of plaintiff insurance company in an action for declaratory relief holding that plaintiff is not liable under its policy of insurance for the reason that the insured had made a material misrepresentation in his application for insurance.

Facts: On June 22, 1946, defendant Miller (who defaulted in the trial court and has not appealed), executed and delivered to plaintiff Allstate Insurance Company an application for a policy of automobile liability insurance. The application contained the following declaration: "Has any automobile license, or permit to applicant or to any of his household to drive an automobile ever been suspended, revoked or refused? Answer: No." At the time defendant Miller answered "No" to the foregoing question he knew his answer was false. The policy also provided: "By acceptance of this policy the named insured agrees that

the statements and the declarations are his agreements and representations; that this policy is issued in reliance upon the truth of such representations; that this policy embodies all agreements existing between himself and the Company or any of its agents relating to insurance." At the end of the application appeared the following: "I hereby declare the facts stated to be true and request the Company to issue the insurance policy, and any renewals thereof, in reliance thereon. Signed: Francis A. Miller." Immediately thereafter, there appears the following:

"This application signed:

10:00 A. M.	6	22	1946
	Month	Day	Year

Subject to conditions on reverse side, the Company hereby binds the insurance applied for:

Effective 10:00 A. M.	6	22	1946
	Month	Day	Year."

Thereafter plaintiff issued its policy effective June 23, 1946, insuring Mr. Miller against liability arising out of the operation of the automobile described in the policy for bodily injuries for any one person in an amount not to exceed \$10,000, and if four or more persons were injured in a total amount not to exceed \$40,000. It also insured him for property damage in an amount not to exceed \$5,000. The policy by its terms expired June 23, 1947.

Had plaintiff known that defendant Miller's automobile operator's license had been previously suspended or revoked for drunk driving, it would not have issued the policy to him. On May 3, 1947, Mr. Miller while driving the automobile covered by the policy was involved in a collision with an automobile driven by defendant Jay L. Dawson in which defendants Reed were riding as passengers. On May 20, 1947 (prior to plaintiff's having obtained knowledge of the falsity of Mr. Miller's statement in his application for insurance), plaintiff renewed the liability insurance policy for one year from the expiration of the policy theretofore issued which was June 23, 1947. On June 11, 1947, plaintiff learned that on Jan-

uary 14, 1946, Mr. Miller's operator's license had been suspended after his conviction of "drunk driving". On June 12, 1947, plaintiff wrote him as follows:

"June 12, 1947

"Mr. Francis A. Miller

"Victorville Army Air Field, Box 537

"Victorville, California

"Dear Sir:

"With respect to the automobile accident occurring on May 3, 1947 at Victorville Army Air Field in which you were involved while driving your automobile, you are hereby notified that the Allstate Insurance Company in investigating the said accident or any claim arising therefrom, or in negotiating for compromise settlement, or in making any settlement or in defending any suit against you or others, or in any way acting or failing to act, does not waive any of its rights or admit any obligations under the policy.

"We are making this reservation of rights because of your breach of the policy declaration that 'during the past two years no automobile license of the named assured or any member of his household, or permits to the named insured or to any of his household to drive an automobile, has been suspended, revoked or refused' and for other reasons.

"The service of this notice upon you does not deprive you of any rights you may have against the company.

"Very truly yours,

"Allstate Insurance Company

"J. B. Cadwell

"Ass't Claims Manager."

July 10, 1947, plaintiff notified defendant Miller of the cancellation of his policy of insurance. On September 23, 1947, all the present defendants filed an action in the Superior Court seeking to recover damages from Mr. Miller as a result of the automobile accident which occurred May 3, 1947. On April 21, 1948, the present action was instituted by plaintiff for declaratory relief, seeking to have the rights and obligations of the parties under the policy of insurance determined, and to have an adjudication that the policy was void ab initio.

The trial court found that: (1) Defendant Miller had made a false and material misrepresentation of fact in applying for the insurance policy; (2) Such representation was relied upon by plaintiff in issuing the policy; and (3) There was no estoppel or waiver as against plaintiff of the aforementioned false representation.

Question: Was there substantial evidence to sustain the trial court's findings set forth above?

[1] This question must be answered in the affirmative.

(1) Defendant Miller testified that at the time he answered the question in the application for insurance pertaining to whether or not his driver's license had ever been suspended or revoked, or a permit refused, he knew his answer was false. This evidence sustains the first questioned finding.

(2) Mr. Loewe in charge of the underwriting department of plaintiff testified that had plaintiff known that Mr. Miller's license had been suspended for drunk driving it would not have issued a policy to him. The second mentioned finding finds support in the above testimony.

[2] (3) Mr. Jorz, the assistant claim manager of plaintiff, testified that the first notice plaintiff had that Mr. Miller's license had been suspended for drunk driving was on June 11, 1947. Since there is no evidence that plaintiff did any act after June 11, 1947, recognizing the validity of the insurance policies or either of them which it had issued, there is no evidence to sustain a finding that plaintiff either waived the right to rely on the falsity of the statement made by Mr. Miller, or was estopped to claim the same as a defense to any obligation under the policy.

[3] We must of course disregard any conflicting testimony which the trial judge evidently did not believe. (See *Estate of Isenberg*, 63 Cal.App.2d 214, 215, 217, 146 P.2d 424.)

[4] Since the foregoing findings were sustained by the evidence the trial court properly applied this rule of law: When a statement in an application for insurance

is declared by the policy to be a warranty and the insured declares the statement is absolutely true, the falsity of such statement voids the policy *ab initio*. (*Bennett v. Northwestern National Life Ins. Co.*, 84 Cal.App. 130, 135, 257 P. 586 et seq.; *Craig v. United States Fidelity & Guaranty Co.*, 11 Cal.App.2d 644, 645, 54 P.2d 486 et seq.; *Emery v. Pacific Employers Ins. Co.*, 8 Cal.2d 663, 669, 67 P.2d 1046.)

Affirmed.

MOORE, P. J., and WILSON, J., concur.



96 Cal.App.2d 799

GLENS FALLS INDEMNITY CO. v. PERSCALLO (BULICH, Intervener).

Civ. 17054.

District Court of Appeal, Second District,
Division 1, California.

April 5, 1950.

Rehearing Denied April 20, 1950.

Hearing Denied June 1, 1950.

Action by Glens Falls Indemnity Company against Nick Perscallo for the unpaid balance on a note given for advances made by plaintiff, and for other relief. Steve Bulich intervened claiming ownership of a power shovel to be subjected to foreclosure of a chattel mortgage held by plaintiff. The Superior Court for Los Angeles County, John J. Ford, J., rendered an adverse judgment, and the defendant and intervener appealed. The District Court of Appeal, Drapeau, J., held that commercial frustration did not excuse the defendants' failure to perform a contract for the construction of a public highway.

Judgment affirmed.

I. Bills and notes 529

In bondsman's action against road contractor to recover unpaid balance of note given for advances, evidence supported court's finding as to amount of balance due on note.

2. Principal and surety ⇨183

In bondsman's action against road contractor to recover unpaid balance of note given for advances, a compromise payment to state for which highway was being constructed was included within power given to bondsman by bond.

3. Trial ⇨404(1)

In bondsman's action against road contractor to recover unpaid balance of note given for advances, an ultimate finding that contractor neglected to pay for labor and materials in accordance with his contract, and failed to complete his contract with state for construction of highway in accordance with contract terms, all in violation of terms of bond included a finding on impossibility of performance.

4. Appeal and error ⇨931(1)

Findings are to be liberally construed to support judgment of trial court.

5. Contracts ⇨323(1)

Excuse of commercial frustration, like that of impossibility preventing performance of a contract, is a conclusion of law to be drawn by the court from facts of each case.

6. Contracts ⇨309(1)

If possibility of governmental regulation is reasonably foreseeable, there can be no commercial frustration of a contract because of such regulation; and mere difficulty or unusual or unexpected expense does not establish frustration or impossibility of performance.

7. War and national defense ⇨10(1)

Where contract with state for construction of highway was dated December 13, 1941, and Japanese attacked the United States on December 7, 1941 with resulting large war orders, prohibitions against sale of materials necessary to contractor and issuance of inadequate priorities, contractor could not claim commercial frustration as defense to failure to perform his contract.

8. Interest ⇨39(1)

Law awards interest upon money from time it becomes due and payable if such time is certain or can be made certain by calculation.

9. Interest ⇨39(1)

Where bondsman made advances to enable road contractor to perform contract for construction of state highway, contractor's obligation to pay bondsman commenced when advancements were made and interest could be collected from time payment was due.

10. Chattel mortgages ⇨225(1)

Where buyer of power shovel assigned conditional sales contract to a relative whom he had employed for many years, and assignment was made two years after date of chattel mortgage, chattel mortgagee's right to close was superior to any rights of assignee, and assignee was entitled only to proceeds of the sale upon foreclosure in excess of amount due mortgagee.

11. Chattel mortgages ⇨17

A buyer's interest in a contract of purchase and sale may be made the subject of a chattel mortgage.

R. R. Colby and Joseph D. Taylor, Los Angeles, for appellant Perscallo.

Marshall Stimson and Noel Edwards, Los Angeles, for appellant Bulich.

John E. McCall, Los Angeles, for respondent.

DRAPEAU, Justice.

Plaintiff bonded the defendant Nick Perscallo for the faithful performance of a contract with the State of California to build a portion of the state highway. The defendant failed to complete his contract, and the plaintiff was required under the terms of the bond to pay for its completion. Plaintiff advanced money to the defendant for payments to workmen and for material. Then, after the defendant was put off the job, plaintiff compromised with the State for payments made by the State to contractors who finished the work.

Defendant delivered to plaintiff his promissory note for \$40,000, for part of plaintiff's advances. To secure payment of the note, defendant also delivered to plaintiff a chattel mortgage of construction machinery. Thereafter all of the machinery

was sold, except a power shovel, and the proceeds applied upon the note. This left only the shovel subject to the chattel mortgage.

Action was brought by the plaintiff for the unpaid balance of the note, and also for advances not included in the note.

Steve Bulich intervened, and alleged that the shovel belonged to him.

After trial these issues were submitted to the Court. Fifty-seven thousand thirty-one dollars and thirty-one cents (\$57,031.31) was found and adjudged due from defendant to plaintiff. This included the balance due on the note, interest, attorneys' fees, and other advancements.

As to the shovel, the Court found that the lien of the chattel mortgage was superior to the claimed ownership of the intervenor. It was therefore adjudged that the shovel be sold, and the proceeds applied to the amount found due on the note and secured by the chattel mortgage, \$25,588.61; any balance remaining to go to the intervenor.

From the judgment both defendant and intervenor have appealed.

Defendant contends: (1) that the evidence does not support the finding of the amount due on the note; (2) that the compromise payment to the State was not included within the powers given to plaintiff by the bond; (3) that the Court made no finding on defendant's presented issue of impossibility of performance of his contract with the State; and (4) that the Court erroneously allowed interest on advances not secured by the note, which included interest on the compromise payment.

[1,2] Examination of the record shows substantial evidence which supports the finding of the balance due on the note; examination of the provisions of the bond shows that the plaintiff had the power to compromise the State's claim.

[3,4] The finding on impossibility of performance is included within the finding of ultimate fact that the defendant "failed and neglected to pay for labor and materials in accordance with said contract and failed and neglected to complete the said contract

in accordance with its terms, all in violation of the terms of said bond," and findings are to be liberally construed to support the judgment. (2 Cal.Jur. 871.)

Defendant's contention as to impossibility of performance of the contract may be stated by quoting from his brief:

"The second defense was that the alleged contract with the State of California had been terminated and the performance excused by unanticipated circumstances designated as commercial frustration, without fault of the defendant; that the State of California cancelled the contract thereby releasing the defendant from all obligations thereon.

"The third defense was that because of large war orders, the prohibition against sale of materials necessary to defendant, the issuance of inadequate priorities, the performance of the contract by the defendant was made impossible; that the contract had been executed when the parties contemplated that the materials would be available *but the contemplated means of performance ceased thereafter to exist* and by reason thereof the defendant was discharged from further performing and the condition of the bond was not broken.

"The fourth defense alleged that it was impossible for the defendant to carry out the contract with the State except by violation of law and rule and regulations of war; that the performance of the contract was made impossible by the act of law."

[5] The excuse of commercial frustration, like that of impossibility, is a conclusion of law drawn by the court from the facts of a given case. *Mitchell v. Ceazan Tires, Ltd.*, 25 Cal.2d 45, 153 P.2d 53.

[6] If the possibility of governmental regulation is reasonably foreseeable there can be no commercial frustration of a contract. Mere difficulty, or unusual or unexpected expense does not establish frustration or impossibility of performance of a contract. *Dorn v. Goetz*, 85 Cal.App.2d 407, 193 P.2d 121; *McCulloch v. Liguori*, 88 Cal.App.2d 366, 199 P.2d 25; *Aristocrat Highway Displays v. Stricklen*, 68 Cal. App.2d 788, 157 P.2d 880; *Lloyd v. Murphy*, 25 Cal.2d 48, 153 P.2d 47.

[7] The contract was dated December 13, 1941. The Japs attacked the United States at Pearl Harbor December 7, 1941. For months before Pearl Harbor any American citizen should have been able to foresee the imminence of war with the axis powers. So the defense of commercial frustration does not help the defendant under the facts in this case.

With reference to interest on advances not included in the note, no determination of value was involved. The amounts advanced were definite and certain.

[8,9] The law awards interest upon money from the time it becomes due and payable, if such time is certain or can be made certain by calculation. *Pitzer v. Wedel*, 73 Cal.App.2d 86, 165 P.2d 971. Under the contract in this case the defendant's obligation to pay plaintiff commenced when the advancements were made. Interest may be collected from the time payment is due. *Upton v. Gould*, 64 Cal.App.2d 814, 149 P.2d 731. Nothing in *Perry v. Magnuson*, 207 Cal. 617, 622, 279 P. 650, cited by defendant, is contrary to this conclusion.

[10] Intervener contends that the pledge of the shovel was not good because it was being purchased on a conditional sales contract, which contract defendant assigned to him. The assignment was two years after the date of the chattel mortgage. Defendant and intervener were relatives; defendant had employed intervener for many years.

[11] A vendee's interest in a contract of purchase and sale may be made the subject of a chattel mortgage. *Pacific States Savings & Loan Co. v. Strobeck*, 139 Cal. App. 427, 33 P.2d 1063.

In an able memorandum of opinion the Trial Judge says: " * * * the evidence leads to the conclusion that the payment by the intervenor Steve Bulich of the balance due under said conditional sale contract was a payment made for and on behalf of defendant Perscallo by virtue of a loan of money by Bulich to Perscallo * * * Therefore, the assignment of the conditional sale contract by the vendor to Bulich avails Bulich nothing as against plaintiff,

except the right to any proceeds of the sale upon foreclosure in excess of the amount due plaintiff under the chattel mortgage (it being only a remote possibility that there will be any such excess in this case)."

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



96 Cal.App.2d 840

PEOPLE v. TIPTON.

Cr. 2154.

District Court of Appeal, Third District,
California.

April 6, 1950.

Norman W. Tipton was convicted in Sacramento County, B. F. Van Dyke, J., of robbery in the second degree and he appealed. The District Court of Appeal, Peek, J., held that return of stolen money to owner did not absolve defendant from guilt.

Judgment affirmed.

1. Criminal law ☞1131(4)

Where notice of appeal stated that appeal was from order denying motion for new trial as well as from judgment of conviction but there was nothing in record indicating that such motion was either made or denied, appeal from order would be dismissed.

2. Robbery ☞14

Return of stolen money to robbery victim did not absolve thief from guilt.

3. Constitutional law ☞70(3)

Power to fix punishment for any particular crime rests solely with legislature, and court could not say that imprisonment in state prison for robbery in the second degree was not justified because only the sum of \$3 was netted in the robbery.

Norman W. Tipton, in pro. per.

Fred N. Howser, Attorney General,
Doris H. Maier, Deputy and Gail A. Strader,
Deputy, Attorney General, for respondent.

BOWDEN v. SPIEGEL, Inc.

Civ. 14190.

District Court of Appeal, First District,
Division 2, California.

PEEK, Justice.

April 4, 1950.

[1] This is an appeal by defendant from a judgment convicting him of the crime of robbery in the second degree and sentencing him to prison for the term prescribed by law. While the notice of appeal states that the appeal is also from the order denying his motion for a new trial there is nothing in the record indicating that such a motion was either made or denied, therefore it is dismissed.

[2,3] By information defendant was charged with the crime of robbery. Following his plea of guilty thereto the matter was referred to the probation officer. Because of defendant's numerous prior convictions and his resulting ineligibility for probation said officer recommended that the same be denied. The judgment appealed from was thereupon entered.

The defendant, who appears in pro per, has not filed an opening brief but in response to communications from this court has filed two letters with the court which he requested be considered in lieu thereof in view of his inability to prepare and file a formal brief. From such letters it appears that he makes two contentions: First, that he should not have been convicted, since the money taken from the victim was returned, and second, that imprisonment in the state prison is not justified since only the sum of \$3.00 was netted in the robbery, which was returned.

There is no merit to either contention. As to the first, the return of the stolen property does not alter the fact that the crime was committed, *People v. James*, 20 Cal.App.2d 88, 66 P.2d 461, and as to the second, the power to fix the punishment for any particular crime is lodged solely with the legislature. In *re Todd*, 44 Cal. App. 496, 186 P. 790.

The judgment is affirmed.

ADAMS, P. J., and SPARKS, J., pro tem., concur.

Action by Pearl Bowden against Spiegel, Inc., also known as Federal Stores, a Delaware corporation, and First Doe, for alleged injuries resulting from oral threats of defendant's agent. The Superior Court of Contra Costa County, Hugh H. Donovan, J., sustained defendant's general demurrer and plaintiff appealed. The District Court of Appeal, Dooling, J., held that if wrongful quality of defendant's acts inducing physical harm through their effect on mind and nervous system is established, defendant is liable although such wrongful conduct consisted of mere spoken words.

Judgment reversed with directions to trial court to overrule demurrer.

1. Threats ⇐10

Where plaintiff alleged that defendant's agent telephoned plaintiff at neighbor's home late at night and stated that unless plaintiff came to defendant's store the next morning to pay her bill he would cause her a lot of trouble, that neighbor's entire family listened to plaintiff's end of telephone conversation, that plaintiff owed no money to defendant's store, that defendant's agent set out maliciously and with intent to vex, harass and annoy plaintiff without probable cause, and as a result plaintiff became ill, complaint stated a cause of action.

2. Torts ⇐6

If the wrongful quality of defendant's acts inducing physical harm through their effect on the mind and nervous system is established, defendant is liable whether such wrongful conduct consisted of acts alone or of acts accompanied by words, or mere spoken words alone.

Arthur Debeau Carr, Kenneth W. Donelson, Frances M. Newell, Mary Ann Winters, Antioch, for appellant.

Tinning & De Lap, J. Vance Porlier, Richmond, for respondent.

DOOLING, Justice.

Plaintiff appeals from an adverse judgment entered after the sustaining of a general demurrer to her first amended complaint without leave to amend.

The allegations of the first amended complaint may be summarized as follows: Defendant Spiegel, Inc., is a corporation operating retail stores under the name of Federal Stores. Defendant First Doe as agent of the corporate defendant on May 28, 1948, telephoned to the home of one Prator at about 11 p. m. and asked for plaintiff. Prator's daughter, who had answered the telephone, asked if it was an emergency call and First Doe replied that it was. The daughter then walked down the street to plaintiff's home and told plaintiff that there was an emergency telephone call for plaintiff at the Prator residence. When plaintiff reached the telephone she asked: "What is the matter?" and First Doe replied: "Please bear up. I know this is going to be a shock; it is as much of a shock to me to have to tell you as it will be to you." Plaintiff answered that she could take the message whereupon First Doe stated: "This is the Federal Outfitting Company—why don't you pay your bill?" Plaintiff attempted to explain that she owed nothing and First Doe replied that he was going to take her to court and that would cost her a lot of money—"unless you come into the Federal Store in Pittsburg tomorrow morning at ten, I am going to cause you a lot of trouble." The entire Prator family listened to plaintiff's end of the conversation. Plaintiff did not owe the company any money. First Doe acted as hereinabove set out maliciously and with intent to vex, harass and annoy plaintiff and with no probable cause. As a result plaintiff is sick and ill and will remain so for an indefinite time.

[1,2] That the above facts, if true, spell out a cause of action we have no doubt. In *Emden v. Vitz*, 88 Cal.App.2d 313, 198 P.2d 696, the defendants after locking plaintiff out of her apartment took

her to the apartment house office and there used toward her violent and abusive language as a result of which she suffered emotional distress and consequent physical illness for which she was awarded damages. On appeal the defendants argued, 88 Cal.App.2d 316, 198 P.2d 698, "that there can be no cause of action for personal injuries resulting from fright caused chiefly by spoken words alone." The court, after a review of authorities, stated, 88 Cal.App.2d page 318, 198 P.2d at page 700: "As these and other cases cited above amply illustrate, the nature of the wrongful conduct which induces physical harm through its effect on the mind and nervous system is generally immaterial. The determination whether or not given conduct is legally wrongful, of course, may involve factual distinctions of importance and substance (compare Rest, Torts, sec. 312 with *ibid.*, sec. 313); but once the wrongful quality is established, it matters not whether that conduct consisted of acts alone, or of acts accompanied by words, or of mere spoken words alone, for the legal inquiry in each case is thenceforth confined to the well-established channels of proximate cause and damages."

Sec. 312 Restatement of Torts, cited in the above quotation, reads:

"If the actor intentionally and unreasonably subjects another to emotional distress which he should recognize as likely to result in illness or other bodily harm, he is subject to liability to the other for an illness or other bodily harm of which the distress is a legal cause,

"(a) although the actor has no intention of inflicting such harm, and "

"(b) irrespective of whether the act is directed against the other or a third person."

The important elements are that the act is intentional, that it is unreasonable, and that the actor should recognize it as likely to result in illness. Given these elements the modern cases recognize that mere words, oral or written, which result in physical injury to another are actionable. *Grimes v. Gates*, 47 Vt. 594, 19 Am.Dec. 129 (threat of imprisonment); *Whitsel v. Watts*, 98 Kan. 508, 159 P. 401, L.R.A.

1917A, 708 (violent and threatening language); *Johnson v. Sampson*, 167 Minn. 203, 208 N.W. 814, 46 A.L.R. 772 (false oral charge by teachers of unchastity of school girl); *Erwin v. Milligan*, 188 Ark. 658, 67 S.W.2d 592 (indecent oral proposal to married woman); *Clark v. Associated Retail Credit Men*, 70 App.D.C. 183, 105 F.2d 62 (threatening and abusive letters); *Kirby v. Jules Chain Stores Corporation*, 210 N.C. 808, 188 S.E. 625 (threatening and abusive language); *Wilson v. Wilkins*, 181 Ark. 137, 25 S.W.2d 428 (oral threats of violence); *Barnett v. Collection Service Co.*, 214 Iowa 1303, 242 N.W. 25 (written threats and abuse); *Nickerson v. Hodges*, 146 La. 735, 84 So. 37, 9 A.L.R. 361 (practical joke causing shame and humiliation with consequent illness); *Malczewski v. New Orleans Ry. & Light Co.*, 156 So. 830, 101 So. 213, 35 A.L.R. 553 (offensive and insulting language); *La Salle Extension University v. Fogarty*, 126 Neb. 457, 253 N.W. 424, 91 A.L.R. 1491 (threatening letters); *Quina v. Roberts*, La.App., 16 So. 2d 558 (disparaging letter to plaintiff's employer); *Wilkinson v. Downton*, 1897, 2 Q.B. 57 (falsely telling woman her husband seriously injured); *Janvier v. Sweeney*, 1919, 2 K.B. 316 (false accusation of being a spy); *Bielitski v. Obadiak*, 65 Dom.L.R. (Sask.) 62 (false statement that plaintiff's son was suicide); *Prosser on Torts*, pp. 57-61; 52 Am.Jur. pp. 419-423.

We entertain no doubt that the intentional use of such an unreasonable method of attempting to collect a debt which proximately results in physical illness is actionable.

The briefs contain much discussion of whether the complaint would support a re-

covery on the theory of a violation of the right of privacy. Respondent contends that this tort cannot be committed by oral statements. The historic article on the subject by Brandeis and Warren (4 Harv.L.Rev. 193) suggests this limitation in the absence of special damage (p. 217) and there are dicta in *Melvin v. Reid*, 112 Cal.App. 285, 290, 297 P. 91, and *Metter v. Los Angeles Examiner*, 35 Cal.App.2d 304, 310, 95 P.2d 491, which state the rule baldly without including the exception for the case of special damage. If it were necessary to decide the question we would incline to repudiate this qualification as so broadly stated. The oral dissemination of private matter may be as rapid as the wagging tongue of gossip and as devastating as the printed page; and, to confine the question to the facts in hand, what logical distinction can be found between writing a letter to the Prator family telling them that plaintiff owes defendant a bill and is a deadbeat and summoning her to the telephone before the same family where her spontaneous replies to statements of defendant over the telephone will naturally disclose to the Prator family that she is being dunned for a bill after being summoned from her home at a late hour of the night? It would seem under these circumstances that the oral communication would be more damaging than a written one.

However since the complaint states a cause of action on the theory first discussed the decision of the other question becomes unnecessary.

Judgment reversed with directions to the trial court to overrule the demurrer.

NOURSE, P. J., and GOODELL, J., concur.

**WERNER v. SOUTHERN CALIFORNIA
ASSOCIATED NEWSPAPERS.**

L. A. 21132.

Supreme Court of California, in Bank.

April 14, 1950.

Rehearing Denied May 11, 1950.

Action for libel by Erwin P. Werner against Southern California Associated Newspapers, a California corporation. The Superior Court, Los Angeles County, Stanley N. Barnes, J., entered a judgment of dismissal on plaintiff's failure to amend his complaint after a demurrer thereto had been sustained, and the plaintiff appealed. The Supreme Court, Traynor, J., held that Civil Code, § 48a, providing for recovery of special damages only for libel in newspaper or slander by radio unless correction is requested and refused is not invalid under the due process clause of the Federal Constitution.

Judgment affirmed.

Carter and Schauer, JJ., dissented.

Prior opinion, 206 P.2d 952.

1. Constitutional law ⇨90

The abuse clause of constitutional provision that every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for abuse of such right, and that no law shall be passed to restrain or abridge liberty of speech or of press does not confer on person defamed a right to remedy of damages, but merely specifies that constitutional right of free speech does not automatically carry with it freedom from responsibility for such abuses as were recognized by common law or defined by legislature. Const. art. 1, § 9.

2. Constitutional law ⇨90

The constitutional provision that every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for abuse of such right, and that no law shall be passed to restrain or abridge liberty of speech or of press does not freeze law of defamation as of date of adoption of provision, but primary purpose of provision is to guarantee that freedom of speech shall not be restrained except to prevent abuse. Const. art. 1, § 9.

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3. Constitutional law ⇨90

Libel and slander ⇨1½

The statute providing for recovery of special damages only for libel in newspaper or slander by radio unless correction is requested and refused is not violative of constitutional provision that every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for abuse of such right, and that no law shall be passed to restrain or abridge liberty of speech or of press. Civ.Code, § 48a; Const. art. 1, § 9.

4. Constitutional law ⇨308

Libel and slander ⇨1½

The danger of excessive recoveries of general damages in libel actions and public interest in free dissemination of news justify limitation of recovery for libel to special damages when retraction has not been demanded and refused, so that statute providing for recovery of special damages only for libel in newspaper or slander by radio unless correction is requested and refused is not unconstitutional as denial of due process of law. Civ.Code, § 48a; U.S. C.A.Const. Amend. 14.

5. Libel and slander ⇨33

At common law it was conclusively presumed that general damages resulted from publication of libel.

6. Constitutional law ⇨307

The legislature can attack evils of unfounded litigation by abolishing causes of action altogether, such as civil actions for alienation of affections, criminal conversation, seduction, breach of promise to marry, and certain classes of actions based on negligence.

7. Constitutional law ⇨70(3)

The legislature must choose between conflicting policies, and court cannot presume that in reaching its decision the legislature acted upon improper motives.

8. Constitutional law ⇨211

A classification is reasonable within equal protection clauses of federal and state constitutions only if there are differences between classes and differences are

reasonably related to purposes of statute. Const.Cal. art. 4, § 25; U.S.C.A.Const. Amend. 14.

9. Constitutional law ☞211

While a statute cannot be limited to a specific class without reason, equal protection clauses of federal and state constitutions do not prohibit legislature from striking the evil where it is felt the most. Const.Cal. art. 4, § 25; U.S.C.A.Const. Amend. 14.

10. Constitutional law ☞249

Libel and slander ☞1½

The statute providing for recovery of special damages only for libel in newspaper or slander by radio unless correction is requested and refused is not violative of equal protection clauses in that newspapers and radio stations are granted privileges denied to others, since legislature could reasonably conclude that danger of excessive damages is greatest in defamation actions against newspapers and radio stations, and could properly consider that retraction widely circulated by newspaper or radio station would have greater effectiveness than retraction by individual. Civ.Code, § 48a; Const.Cal. art. 4, § 25; U.S.C.A.Const. Amend. 14.

11. Constitutional law ☞211

The legislature can make a classification for purpose of applying statute, not to group classified, but to every one except that group. Const.Cal. art. 4, § 25; U.S.C.A.Const. Amend. 14.

12. Constitutional law ☞249

Libel and slander ☞1½

The encouragement of dissemination of news would be sufficient purpose to sustain under the equal protection clauses the statute providing for recovery of special

damages only for libel in newspaper or slander by radio unless correction is requested and refused. Civ.Code, §§ 47, subds. 1, 2, 4, 5, 48a; Const.Cal. art. 4, § 25; U.S.C.A.Const. Amend. 14.

Morris Lavine, Los Angeles, for appellant.

O'Melveny & Myers, Louis W. Meyers, Sidney H. Wall and Pierce Works, Los Angeles, for respondent.

Price, MacDonald & Knox, Harry L. Price, Oakland, Calkins, Hall, Linforth & Conard, Reginald H. Linforth, Cooper, White & Cooper, George A. Helmer, San Francisco, John Hamlyn, Sacramento, Cosgrove, Clayton, Cramer & Diether, T. B. Cosgrove, Binford & Binford, Howard Binford, Lawler, Felix & Hall, John Hall, Flint & MacKay, H. S. MacKay, Jr., Edward L. Compton, Los Angeles, McEnerney & Jacobs, Garret McEnerney II, San Francisco, and Stephen W. Downey, Sacramento, amici curiæ on behalf of respondent.

TRAYNOR, Justice.

Plaintiff appeals from a judgment of dismissal of his action for libel, entered upon his failure to amend his complaint after a demurrer thereto had been sustained. Plaintiff alleged in his complaint that defendant published in its newspapers false charges that he had been convicted of a felony and sentenced to prison therefor, that the falsity of these charges was known or should have been known to defendant, and that defendant published the charges with intent to injure, disgrace, and defame him. Defendant's demurrer was sustained on the ground that plaintiff did not allege that he had complied with the provisions of Civil Code section 48a¹ or

1. "1. In any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded and be not published or broadcast, as herein-after provided. Plaintiff shall serve upon the publisher, at the place of publication or broadcaster at the place of broadcast, a written notice specifying the

statements claimed to be libelous and demanding that the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication or broadcast of the statements claimed to be libelous.

"2. If a correction be demanded within said period and be not published or broadcast in substantially as conspicuous a manner in said newspaper or on said

that he suffered special damage as a result of the publication. Plaintiff contends that section 48a is unconstitutional.

[1] Article I, section 9 of the California Constitution provides: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. * * *" Plaintiff contends that under this section a person who defames another must be fully responsible for any damage caused thereby, and that the substitution of a retraction for all but special damages is an unconstitutional attempt to relieve newspapers and radio stations from full responsibility for the abuse of the right of free speech. Defendant contends that the abuse clause of section 9 does not confer on a person defamed a right to the remedy of damages, but merely specifies that the constitutional right of free speech does not automatically carry with it freedom from responsibility for such abuses as were recognized by the common law or defined by the Legislature. We agree with defendant's contention. To hold otherwise would result in freezing the law of defamation as it was when the constitutional provision was originally adopted in 1849.

[2] The quoted provision is an almost exact duplicate of Article VII, section 8 of the New York Constitution of 1821.

broadcasting station as were the statements claimed to be libelous, in a regular issue thereof published or broadcast within three weeks after such service, plaintiff, if he pleads and proves such notice, demand and failure to correct, and if his cause of action be maintained, may recover general, special and exemplary damages; provided that no exemplary damages may be recovered unless the plaintiff shall prove that defendant made the publication or broadcast with actual malice and then only in the discretion of the court or jury, and actual malice shall not be inferred or presumed from the publication or broadcast.

"3. A correction published or broadcast in substantially as conspicuous a manner in said newspaper or on said broadcasting station as the statements claimed in the complaint to be libelous,

Substantially the same language is found in the constitutions of 43 states. Chafee, *Free Speech in the United States*, p. 5, n. 2. The remaining states have a shorter guaranty similar to that in the United States Constitution, in which the "abuse" exception has been necessarily implied. See, *Schenck v. United States*, 249 U.S. 47, 52, 39 S.Ct. 247, 63 L.Ed. 470. In none of these jurisdictions has the provision been construed as freezing the law of defamation as of the date of its adoption. Indeed, its primary purpose is to guarantee that freedom of speech shall not be restrained except to prevent abuse.

[3] Since 1872 the Legislature has consistently acted on the principle that it is free to change the law of defamation. Many of the amendments have limited or abolished remedies theretofore available to persons defamed. Thus before 1945, the year of enactment of section 48a as presently worded, the Legislature had extended the absolute privilege with respect to statements in judicial, legislative, and other official proceedings, and the qualified privilege with respect to reports of such proceedings, Code Amendments 1873-1874, p 184; it had extended the qualified privileges of section 47 of the Civil Code to fair and true reports of public meetings, Stats.1895, p. 168; it had enacted the original version of section 48a limiting the liability of newspapers, when the publica-

prior to receipt of a demand therefor, shall be of the same force and effect as though such correction had been published or broadcast within three weeks after a demand therefor.

"4. As used herein, the terms 'general damages,' 'special damages,' 'exemplary damages' and 'actual malice,' are defined as follows:

"(a) 'General damages' are damages for loss of reputation, shame, mortification and hurt feelings;

"(b) 'Special damages' are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other. * * *

tion was made without malice through misinformation and mistake, and a retraction was demanded and published. See *City and County of San Francisco v. Industrial Acc. Comm.*, 183 Cal. 273, 279, 191 P. 26. As early as 1886 this court recognized the power of the Legislature to extend absolute privileges and thus abolish all remedies for defamation in certain situations. *Hollis v. Meux*, 69 Cal. 625, 629, 11 P. 248, 58 Am.Rep. 574. Moreover, the courts have invoked the applicable code sections as amended to determine the rights of the parties without in any way intimating that the Legislature was powerless to reduce the remedies available at common law for defamation. *Harris v. Zanone*, 93 Cal. 59, 70, 28 P. 845; *Ball v. Rawles*, 93 Cal. 222, 236, 28 P. 937, 27 Am.St.Rep. 174; *Gosewisch v. Doran*, 161 Cal. 511, 513-514, 119 P. 656, Ann.Cas.1913D, 442; *Brewer v. Second Baptist Church*, 32 Cal.2d 791, 799, 197 P.2d 713; *Behrendt v. Times-Mirror Co.*, 30 Cal.App.2d 77, 88, 85 P.2d 949; *Harris v. Curtis Publishing Co.*, 49 Cal. App.2d 340, 349, 353, 121 P.2d 761. Given the view that the Legislature has taken of its own powers with regard to the law of defamation and the courts' acceptance of that view, it is clear that the abuse clause of the Constitution was intended, not to guaranty a remedy to those injured, but only to make clear that the right of free speech does not guaranty immunity from liability to those who abuse it. See, *Los Angeles County v. Southern Cal.Tel. Co.*, 32 Cal.2d 378, 392, 196 P.2d 773. Accordingly, section 48a of the Civil Code is not rendered invalid by section 9 of Article I of the California Constitution.

It is also clear that section 48a is not invalid under the due process clause of the United States Constitution. "Except as the Constitution otherwise provides, the Legislature has complete power to determine the rights of individuals. See, *Delaney v. Lowery*, 25 Cal.2d 561, 568, 154 P.2d 674. It may create new rights or provide that rights which have previously existed shall no longer arise, and it has full power to regulate and circumscribe the methods and means of enjoying those rights, so long as there is no interference with constitutional

guaranties." *Modern Barber Colleges v. California Emp.Stab.Comm.*, 31 Cal.2d 720, 726, 192 P.2d 916, 920. "* * * the Constitution does not forbid creation of new rights or the abolition of old ones recognized by the common law to attain a permissible legislative object." *Silver v. Silver*, 280 U.S. 117, 122, 50 S.Ct. 57, 74 L.Ed. 221, 65 A.L.R. 939; *Langdon v. Sayre*, 74 Cal.App.2d 41, 168 P.2d 57.

[4] There are at least two bases on which the Legislature could reasonably conclude that the retraction provisions of section 48a provide a reasonable substitute for general damages in actions for defamation against newspapers and radio stations, namely, the danger of excessive recoveries of general damages in libel actions and the public interest in the free dissemination of news.

[5] General damages are allowed for "loss of reputation, shame, mortification and hurt feelings", Civ.Code § 48a, but the extent of such injuries is difficult to determine. At common law it was conclusively presumed that general damages resulted from the publication of a libel. "The practical result is that the jury may award not only nominal damages, but substantial sums in compensation of the supposed harm to the plaintiff's reputation, without any proof that it has in fact occurred." *Prosser, Torts*, § 92, p. 797. The Legislature could reasonably conclude that recovery of damages without proof of injury constitutes an evil.

[6] It is settled that the Legislature may attack the evils of unfounded litigation by abolishing causes of action altogether. Thus statutes abolishing civil actions for alienation of affection, criminal conversation, seduction and breach of promise to marry have generally been upheld. *Langdon v. Sayre*, 74 Cal.App.2d 41, 168 P.2d 57; see, annotation, 158 A.L.R. 617, and cases cited. The purpose of such legislation has been stated by the New York Legislature as follows: "The remedies heretofore provided by law for the enforcement of actions based upon alleged alienation of affections, criminal conversation, seduction and breach of contract to marry,

having been subjected to grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damage to many persons wholly innocent and free of any wrongdoing, who were merely the victims of circumstances, and such remedies having been exercised by unscrupulous persons for their unjust enrichment, and such remedies having furnished vehicles for the commission or attempted commission of crime and in many cases having resulted in the perpetration of frauds, it is hereby declared as the public policy of the state that the best interests of the people of the state will be served by the abolition of such remedies." Civil Practice Act, § 61-a et seq. Similarly it has been held that the dangers of unfounded actions based on negligence justify legislative abolition of certain classes of such actions. "We are not unaware of the increasing frequency of litigation in which passengers carried gratuitously in automobiles, often casual guests or licensees, have sought the recovery of large sums for injuries alleged to have been due to negligent operation. * * * Whether there has been a serious increase in the evils of vexatious litigation in this class of cases, where the carriage is by automobile, is for legislative determination, and, if found, may well be the basis of legislative action further restricting the liability. Its wisdom is not the concern of courts." *Silver v. Silver*, 280 U.S. 117, 122-123, 50 S.Ct. 57, 58, 74 L.Ed. 221, 65 A.L.R. 939; see also, annotation, 111 A.L.R. 1011, and cases cited.

These cases involved the danger of imposing liability when there had been no wrong. The same principles are applicable to the danger of imposing excessive liability when no actual damages have been proved. Moreover, in the common law of slander, as distinct from libel, there is ample precedent for denying any recovery unless special damages are proved. "All other slanderous words, no matter how grossly insulting or defamatory they may be, which cannot be fitted into the arbitrary categories listed above [imputation of a serious crime or a loathsome disease or affecting plaintiff in his business, trade, profession or office], are actionable only upon proof

of 'special' damage—special in the sense that it must be supported by specific proof, as distinct from the 'general' damage presumed to follow in the case of libel or the kinds of slander already considered." Prosser, *Torts*, § 92 p. 805. Although this distinction between libel and slander has been attacked as the irrational result of historical accident, "one reason that the law has remained as it stands is that there is violent dispute as to the direction in which it should move. Assuming that the distinction between libel and slander is a thing without reason and to be abandoned, at least four proposals have been made as to the basis on which the two might be united [only the first two are quoted here]:

"1. To require, in all cases, proof of actual damage as essential to the existence of a cause of action. This suggestion, of course, has been a popular one with publishers. It undoubtedly would do away with the serious evil of the abuse of the action of defamation as a weapon of extortion; but it is open to the important objection that proof of actual damage is impossible in many cases where, from the character of the defamatory words and the circumstances of publication, it is almost certain that it must have occurred."

"2. To make all defamation, oral or written, actionable without proof of damage. This, in substance, is the present law of Louisiana, where it seems to be administered without undue difficulty. Opposed to this is the obvious argument that much defamatory language, particularly in the case of hasty spoken words, is trivial, harmless, and unworthy of redress; that the opportunities for extortion would be vastly increased; and that in the interest of freedom of speech some safety-valve must be left open for the expression of unflattering views." Prosser, *Torts*, § 92, pp. 808-809.

In view of the conflicting rules of liability presented by the law of defamation itself and the recognition in other situations that the Legislature may abolish causes of action to prevent unfounded litigation, we cannot say that the Legislature could not reasonably conclude that the danger of excessive recoveries of general damages in

libel actions justified limitation of recovery to special damages when a retraction has not been demanded and refused.

Nor can we take exception to the second basis upon which the Legislature could justify its limitation of recovery to special damages, namely, the public interest in the free dissemination of news. In view of the complex and far-flung activities of the news services upon which newspapers and radio stations must largely rely and the necessity of publishing news while it is new, newspapers and radio stations may in good faith publicize items that are untrue but whose falsity they have neither the time nor the opportunity to ascertain. The Legislature may reasonably conclude that the public interest in the dissemination of news outweighs the possible injury to a plaintiff from the publication of a libel, and may properly encourage and protect news dissemination by relieving newspapers and radio stations from all but special damages resulting from defamation, upon the publication of a retraction. See, *Allen v. Pioneer Press Co.*, 40 Minn. 117, 120, 41 N.W. 936, 3 L.R.A. 532, 12 Am.St.Rep. 707; *Hall, Preserving Liberty of the Press by the Defense of Privilege in Libel Actions*, 26 Cal.L.Rev. 226. Plaintiff contends, however, that no public interest is served by the publication of false news and that it is desirable to enforce full responsibility as a deterrent to careless or malicious publication. He contends that the statute was enacted, not to encourage dissemination of news or to lessen the evils of excessive recoveries, but to grant newspapers and radio stations special privileges.

[7] Certainly there are forceful arguments in favor of the policy plaintiff advocates. See, *Morris, Inadvertent Newspaper Libel and Retraction*, 32 Ill.L.Rev. 36, 45; *Paton, Reform and the English Law of Defamation*, 33 Ill.L.Rev. 669. It is for the Legislature, however, to choose between conflicting policies, and this court may not presume that in reaching its decision it acted upon improper motives. " * * *

a judiciary must judge by results, not by the varied factors which may have determined legislators' votes. We cannot undertake a search for motive in testing con-

stitutionality." *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220, 224, 69 S.Ct. 550, 552; *Goesaert v. Cleary*, 335 U.S. 464, 466-467, 69 S.Ct. 198.

This court cannot invoke the due process clause to invalidate a legislative policy that it may deem unwise without exercising judicial censorship directed not at the constitutionality of legislation but at its wisdom, a censorship whose dangers Mr. Justice Holmes clearly envisaged: "I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions." *Baldwin v. State of Missouri*, 281 U.S. 586, 595, dissent, 50 S.Ct. 436, 439, 74 L.Ed. 1056, 72 A.L.R. 1303. This view has found increasing acceptance by the United States Supreme Court. "This Court beginning at least as early as 1934, when the *Nebbia* case was decided, [*Nebbia v. People of State of New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469], has steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases. [*Adair v. United States*, 208 U.S. 161, 28 S.Ct. 277, 52 L.Ed. 436, 13 Ann.Cas. 764; *Coppage v. State of Kansas*, 236 U.S., 1, 35 S.Ct. 240, 59 L.Ed. 441, L.R.A.1915C, 960]. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. [Citations.] Under this constitutional doctrine the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and in-

dustrial conditions which they regard as offensive to the public welfare." Lincoln Federal Labor Union No. 19129, A. F. of L. v. Northwestern Iron & Metal Co., 335 U.S. 525, 536-537, 69 S.Ct. 251, 257, 6 A.L.R.2d 473.

"Despite evidence to the contrary, respondents see no evil to be corrected by this legislation. We are asked to agree with respondents and call the statute arbitrary and unreasonable.

"Looking through the form of this plea to its essential basis, we cannot fail to recognize it as an argument for invalidity because this Court disagrees with the desirability of the legislation. We rehearse the obvious when we say that our function is thus misconceived. We are not equipped to decide desirability; and a court cannot eliminate measures which do not happen to suit its tastes if it seeks to maintain a democratic system. The forum for the correction of ill-considered legislation is a responsive legislature." Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220, 224, 69 S.Ct. 550, 552.

The responsiveness of a legislature reflects the alertness of the electorate, and legislation ill-considered in a climate of indifference may continue to flourish in such a climate to the dismay of interested citizens whose numbers may be small. If these few then turn impatiently to the courts, however, abandoning the hard task of dispelling the general lethargy, they accomplish nothing to improve legislation, for if courts are called upon to set their judgment as to what is wise against the popular judgment they may summarily put an end to certain laws that may be foolish but also to certain laws that may be wise, and particularly to laws that may be wise in the long run although they appear foolish at the moment. "Most laws dealing with economic and social problems are matters of trial and error. That which before trial appears to be demonstrably bad may belie prophesy in actual operation. It may not prove good, but it may prove innocuous. But even if a law is found wanting on trial, it is better that its defects should be demonstrated and removed than that the

law should be aborted by judicial fiat. Such an assertion of judicial power deflects responsibility from those on whom in a democratic society it ultimately rests—the people." Mr. Justice Frankfurter concurring in A. F. L. v. American Sash & Door Co., 335 U.S. 538, 553, 69 S.Ct. 258, 265, 6 A.L.R.2d 481.

Plaintiff then contends that section 48a violates the equal protection clause of the United States Constitution and section 25 of Article IV of the California Constitution in granting to newspapers and radio stations privileges denied to others, thus depriving plaintiffs defamed by newspapers or radio stations of rights enjoyed by plaintiffs defamed by others. These provisions were recently reconsidered in Los Angeles County v. Southern Cal. Tel. Co., 32 Cal. 2d 378, 196 P.2d 773, where the court said in quoting from People v. Western Fruit Growers, 22 Cal.2d 494, 140 P.2d 13, "Problems of classification under the California constitution are thus similar to those presented by the federal equal protection of the laws clause of the 14th Amendment. Under either provision, the mere production of inequality which necessarily results to some degree in every selection of persons for regulation does not place the classification within the constitutional prohibition. The discrimination or inequality produced, in order to conflict with the constitutional provisions, must be "actually and palpably unreasonable and arbitrary", or the legislative determination as to what is a sufficient distinction to warrant the classification will not be overthrown. [Citations.] When a legislative classification is questioned, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of existence of that state of facts, and the burden of showing arbitrary action rests upon the one who assails the classification." 22 Cal.2d 494, 506, 140 P.2d 13, 20." 32 Cal.2d 378, 390, 196 P.2d 773, 781.

[8] A classification is reasonable, however, only if there are differences between the classes and the differences are reasonably related to the purposes of the statute. Accounting Corp. of America v. State Bd.

of Accountancy, 34 Cal.2d 186, 208 P.2d 984, and cases cited; see, Tussman and ten Broek, *The Equal Protection of the Laws*, 37 Calif.L.Rev. 341, 346. "As a matter of principle and in view of my attitude toward the equal protection clause, I do not think differences of treatment under law should be approved on classification because of differences unrelated to the legislative purpose. The equal protection clause ceases to assure either equality or protection if it is avoided by any conceivable difference that can be pointed out between those bound and those left free. This Court has often announced the principle that the differentiation must have an appropriate relation to the object of the legislation or ordinance. See, for example, *Mayflower Farms v. Ten Eyck*, 297 U.S. 266, 56 S. Ct. 457, 80 L.Ed. 675; *Smith v. Cahoon*, 283 U.S. 553, 51 S.Ct. 582, 75 L.Ed. 1264. In the latter case a motor vehicle regulation was struck down upon citation of many authorities because 'such a classification is not based on anything having relation to the purpose for which it is made.' 283 U.S. 553, 567, 51 S.Ct. 582, 587 [75 L. Ed. 1264]. If that were the situation here, I should think we should reach a similar conclusion." Mr. Justice Jackson, concurring in *Railway Express Agency v. People of State of New York*, 336 U.S. 106, 115, 69 S.Ct. 463, 468. It is therefore necessary to determine whether the classification of newspapers and radio stations apart from others bears a reasonable relationship to the objectives the Legislature sought to achieve by enacting section 48a.

It is contended that if the statute is designed to eliminate the danger of recoveries of excessive general damages, it is too narrow in that it does not attack the danger generally but only in litigation against newspapers and radio stations. Conversely, it is contended that if it is designed to encourage the free dissemination of news, it is too broad in that its protection is extended not only to those who may in good faith disseminate defamatory material but also to those who disseminate deliberate and malicious falsehoods. There are persuasive analogies, however, that support the validity of the classification in either case.

[9, 10] Certainly a statute cannot be limited to a specific class without reason. *Missouri, Kansas & Texas Ry. Co. of Texas v. May*, 194 U.S. 267, 269, 24 S.Ct. 638, 48 L.Ed. 971; cf. *Del Mar Canning Co. v. Payne*, 29 Cal.2d 380, 175 P.2d 231, with *Ferrante v. Fish & Game Commission*, 29 Cal.2d 365, 175 P.2d 222. The Legislature could reasonably conclude that defamation suits against newspapers and radio stations constituted the most conspicuous example of the danger it sought to preclude. It is not prohibited by the equal protection clause from striking the evil where it is felt most. *Goesaert v. Cleary*, 335 U.S. 464, 466, 69 S.Ct. 198; *Railway Express Agency v. People of State of New York*, 336 U.S. 106, 110, 69 S.Ct. 463. In considering an analogous situation involving legislation limiting the right to recover damages for negligence the United States Supreme Court said, "* * * there is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied—that the Legislature must be held rigidly to the choice of regulating all or none. [Citations.] In this day of almost universal highway transportation by motor-car, we cannot say that abuses originating in the multiplicity of suits growing out of the gratuitous carriage of passengers in automobiles do not present so conspicuous an example of what the Legislature may regard as an evil, as to justify legislation aimed at it, even though some abuses may not be hit. [Citations.] It is enough that the present statute strikes at the evil where it is felt and reaches the class of cases where it most frequently occurs." *Silver v. Silver*, 280 U.S. 117, 123-124, 50 S.Ct. 57, 59, 74 L.Ed. 221, 65 A.L.R. 939. Similarly in this case, we cannot say that the Legislature could not reasonably conclude that because of the business they are engaged in, newspapers and radio stations are the most frequent objects of defamation actions and that the danger of excessive damages in actions against them is greatest because of their reputed ability to pay. See, *Morris, Inadvertent Newspaper Libel and Retraction*, 32 Ill.L.Rev. 36, 43; cf., *Packard v. Moore*, 9 Cal.2d 571, 578-580, 71

P.2d 922, discussing rule of inadmissibility of evidence that defendant is insured in personal injury actions.

Moreover, in balancing the danger of recoveries of excessive general damages against leaving plaintiffs with no effective remedy for injury to their reputations, the Legislature could properly take into consideration the fact that a retraction widely circulated by a newspaper or radio station would have greater effectiveness than a retraction by an individual and could thus class newspapers and radio stations apart. "Now, as far as vindication of character or reputation is concerned, it stands to reason that a full and frank retraction of the false charge, especially if published as widely and substantially to the same readers as was the libel, is usually in fact a more complete redress than a judgment for damages." *Allen v. Pioneer Press Co.*, 40 Minn. 117, 124, 41 N.W. 936, 938, 3 L.R.A. 532, 12 Am.St.Rep. 707. "* * * exculpation in the eyes of the world is not accomplished by quiet entry of a judgment on the musty rolls of a court. The judgment must be publicized, if those who have read the libel are to know of its adjudged falsity. Unless the community is both small and interested, so that news of the judgment is spread throughout it verbally, the plaintiff's vindication depends upon the mercy of the press. The vanquished defendant may not mention the judgment. Even his competitors—if he has any—may keep silent, out of fear of advertising a weapon which may be used against them when next they boggle." *Morris, Inadvertent Newspaper Libel and Retraction*, 32 Ill.L.Rev. 36, 38.

[11] The Legislature can make a classification for the purpose of applying a statute, not to the group classified, but to everyone except that group. Thus a Michigan statute prohibits females from acting as bartenders unless they are the wives or daughters of male owners of bars. In upholding this statute the Supreme Court said, "Since bartending by women may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventive measures, the legis-

lature need not go the full length of prohibition if it believes that as to a defined group of females other factors are operating which either eliminate or reduce the moral and social problems otherwise calling for prohibition. Michigan evidently believes that the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight. This Court is certainly not in a position to gainsay such belief by the Michigan legislature. If it is entertainable, as we think it is, Michigan has not violated its duty to afford equal protection of its laws. We cannot cross-examine either actually or argumentatively the mind of Michigan legislators nor question their motives. Since the line they have drawn is not without a basis in reason, we cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling." *Goesaert v. Cleary*, 335 U.S. 464, 466-467, 69 S.Ct. 198, 200. Thus the equal protection clause did not require Michigan to exclude all women or none from bartending, for the reasons for exclusion were not so compelling for one group as for the others. Similarly, in this case, the Legislature could stop short of substituting a retraction for general damages in all cases, because it could reasonably conclude that in those cases where it did so provide a retraction would be a more effective substitute than in those cases the statute does not reach.

[12] Section 48a may also be sustained under the equal protection clause on the theory that its purpose is to encourage the dissemination of news. Although it extends its protection to those who may deliberately and maliciously disseminate libels, the Legislature could reasonably conclude that it was necessary to go so far effectively to protect those who in good faith and without malice inadvertently publish defamatory statements. The argument that the statute denies equal protection of the laws because it goes too far is substantially akin to the argument that it violates the due process clause and is equally specious. The legisla-

tion abolishing heartbalm suits, for example, was designed, not to protect those who deliberately or maliciously alienated the affection of one spouse for another, but to insure that innocent defendants will not be sued. Again, guest statutes were designed not to protect negligent drivers but to insure that innocent drivers will not be subjected to the hazards of a trial with the possibility of an erroneous conclusion on the facts. There are many examples in the law of defamation in which the defendant's state of mind, his intent, or his negligence is immaterial to the question of liability. Thus, absolute privilege exemplifies the belief that in some case the public interest in freedom of expression outweighs the harm that may be done to the persons defamed. See, Prosser, Torts, § 94, p. 823; Civil Code § 47(1), (2), (4), (5). "The rule exists, not because the malicious conduct of such persons ought not to be actionable, but because, if their conduct were actionable, actions would be brought against them in cases in which they had not spoken falsely and maliciously; it is not a desire to prevent actions from being brought in cases where they ought to be maintained, but the fear that if the rule were otherwise, numerous actions would be brought against persons who were acting honestly in the discharge of a duty. It may be urged, of course, that a false statement, known to be untrue, and dictated by malice, should always be the subject of a civil remedy. But this bald method of stating the question assumes both the untruth and the malice. If by any process of demonstration, free from the defects of human judgment, the untruth and malice could be set above and beyond all question of doubt, there might be ground for contending that the law should give damages to an injured person. But this is not the state of things under which this question of law has to be determined. Whether statements were in fact untrue, and whether they were dictated by malice, are, and always will be, open questions, upon which opinions may differ, and which can only be resolved by the exercise of human judgment. And the real question is whether it is proper on grounds of public policy to remit such ques-

tions to the judgment of a jury. The reasons against doing so are simple and obvious. A participant in judicial proceedings may be utterly free from malice, and yet in the eyes of a jury be open to that imputation; or he may be cleared by the jury of the imputation, and may yet have to encounter the expense and distress of a harassing litigation. With such possibilities hanging over his head, he cannot be expected to speak with that free and open mind which the administration of justice demands." Veeder, *Absolute Immunity in Defamation*, 9 Col.L.Rev. 463, 469-470.

Conversely, when the primary interest is regarded as being that of the plaintiff in his reputation, strict liability has been imposed. See, Prosser, Torts, § 93, p. 816, and cases cited. This imposition of liability without fault, even in cases where actual damage appears doubtful, see, e. g., *Hulton & Co. v. Jones* [1909] 2 K.B. 44, affirmed [1910] A.C. 20, has been forcefully defended on the grounds that "Any attempt by the law to distinguish between the motives of those who defame others would make the rules too intricate and provide too many possibilities of escape", Paton, *Reform and the English Law of Defamation*, 33 Ill.L.Rev. 669, 670, and that it is necessary to impose strict liability effectively to discourage negligent and intentional libels. See, *Morris, Inadvertent Newspaper Libel and Retraction*, 32 Ill.L.Rev. 36, 45; cf., *In re Marley*, 29 Cal.2d 525, 175 P. 2d 832.

Thus in cases both of absolute privilege and strict liability the importance of protecting one interest or another has been considered sufficient to justify the broadest immunity or liability to insure the desired immunity or liability. This court is not in a position to weigh the relative importance of the conflicting interests involved, and even if it were it should not attempt to do so. "Courts can fulfill their responsibility in a democratic society only to the extent that they succeed in shaping their judgments by rational standards, and rational standards are both impersonal and communicable. Matters of policy, however, are by definition matters which demand the resolution of conflicts of value, and the

elements of conflicting values are largely imponderable. Assessment of their competing worth involves differences of feelings; it is also an exercise in prophecy. Obviously the proper forum for mediating a clash of feelings and rendering a prophetic judgment is the body chosen for those purposes by the people. Its functions can be assumed by this Court only in disregard of the historic limits of the Constitution." Mr. Justice Frankfurter, concurring in *A. F. L. v. American Sash & Door Co.*, 335 U.S. 538, 557, 69 S.Ct. 258, 267, 6 A.L.R.2d 481.

We cannot say that in balancing the interests of defamed plaintiffs against the interests of the public in the dissemination of news or the avoidance of the dangers of excessive general damages, the Legislature reached an unconstitutional compromise in enacting section 48a.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

From the writings of the world's wisest men we have the assurance "that a good name is rather to be chosen than great riches", Proverbs XXII:1; and

"Good name in man and woman, dear my lord,

Is the immediate jewel of their souls;

Who steals my purse steals trash; 'tis something, nothing;

'Twas mine, 'tis his, and has been slave to thousands;

But he that filches from me my good name,
Robs me of that which not enriches him,
And makes me poor indeed."

Shakespeare. *Othello*, Act III, Sc. 3.

But the thief can be forced to return my purse and its contents, pay all expenses incurred by me in pursuit of it, and even though he apologizes profusely, he can be sent to prison for committing the theft. Whereas a newspaper or radio station may *wilfully and maliciously* defame my reputation, hold me up to contempt, hatred, ridicule and obloquy, cause me to be shunned and avoided, and then by a mere retrac-

tion which may not be seen or heard of by more than one per cent of those who read or heard of the defamation, escape with the payment of such out-of-pocket loss as I may be able to prove to the satisfaction of a jury, but all others guilty of such defamation may be held liable for exemplary, as well as general and special damages. This is the effect of the majority holding in this case. To say that I can not agree with such sophistry is a gross understatement. I challenge its soundness from the standpoint of both reason and authority.

There is no doubt in my mind but that the statute here involved, Section 48a of the Civil Code, is unconstitutional in that it traverses both the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States. Criminals in California are treated with more uniformity and equality than an innocent plaintiff who has been defamed. The criminal law draws a distinction between a defendant who has been guilty of a crime committed through negligence and one who has been guilty of a crime committed with malice. Although the above-mentioned section draws a very definite distinction between members of the same class, and to my mind an unreasonable and arbitrary one, it does not draw any distinction between those guilty of unintentional but negligent defamation and those guilty of wilful and malicious defamation.

Problems of classification under the California Constitution are similar to those presented by the federal equal protection of the law clause of the Fourteenth Amendment. Under either provision, the mere production of inequality which necessarily results to some degree in every selection of persons for regulation does not place the classification within the constitutional prohibition. The discrimination or inequality produced, in order to conflict with the constitutional provisions, must be "*actually and palpably unreasonable and arbitrary*". *People v. Western Fruit Growers*, 22 Cal.2d 494, 140 P.2d 13, 20. I submit that the legislation in question makes an actual, palpable, wholly unreasonable and arbitrary classification. Newspapers and radio broadcasts are singled out for the exten-

sion of a privilege which is not given to individuals, magazine publishers, or other periodicals, sky-writers, sound trucks, banner-bearing dirigibles, and bill-boards, and probably television and motion picture producers. On the other side of the picture, plaintiffs maligned and defamed by those others are given rights and privileges not extended to plaintiffs who have suffered at the hands of newspapers or the radio.

The majority hold that there are two reasons why the classification made by the section is a reasonable one. The first of those reasons is that newspapers and radio stations must be protected against verdicts for excessive damages. Assuming there is any basis for the asserted danger of awards of excessive damages, just why those *two* should be protected against excessive damages any more than magazines, the motion picture industry, or the others above mentioned, is far from clear. All are equally able to carry insurance designed to give such protection.

Moreover, there is no factual or legal basis for the assumption that excessive awards of damages will be made against newspapers or radio stations in actions for defamation of character by individuals who claim to have been libeled or slandered by publications or broadcasts. The assertion in the majority opinion that juries are disposed to make excessive awards of damages against newspapers and radio stations in actions of this character is not only an unjust reflection upon our jury system, but is factually and historically untrue. While the jury system still has its opponents, it cannot be denied that this system is so firmly embedded in our system of jurisprudence that the latter could not survive without it. It is nevertheless true that ever since the promulgation of the Magna Charta in the year 1215 to the present time there have been those who would destroy the jury system. These reactionary minds decry what they are pleased to refer to as evils of the system, and extol none of its virtues. Thus, the tendency of juries to award damages to those who have suffered injury or wrong as the result of the wilful, malicious or negligent acts of others is condemned by these opponents of the jury

system as an evil which should be abated. But should this reactionary philosophy be injected into our system of jurisprudence by permitting its use as a basis for the classification of tort-feasors? The answer to this question should be obvious to every unprejudiced mind. If the jury system is to remain as it has stood for over seven centuries, then it should be just as good for the newspaper or radio tort-feasor as any other, and its tendency to award damages, whether large or small, should not be made the basis of a classification which confers special privileges upon certain tort-feasors to the detriment of those injured or defamed by them. History conclusively disproves the assertion in the majority opinion that excessive awards of damages have been rendered against newspapers and radio stations in libel and slander actions. Of the fifty-five libel cases against newspapers (there are none against radio stations) which have come before this court and the appellate courts of this state which I have been able to find reported during the state's entire history, I find that nineteen judgments for plaintiff were affirmed. These judgments are as follows: *Wilson v. Fitch*, 1871, 41 Cal. 363, \$7,500; *Edwards v. San Jose Printing & Publishing Soc.*, 1893, 99 Cal. 431, 34 P. 128, 37 Am.St.Rep. 70, amount of damages not specified; *Gilman v. McClatchy*, 1896, 111 Cal. 606, 44 P. 241, \$500; *Taylor v. Hearst*, 1897, 118 Cal. 366, 50 P. 541, \$500; *Mize v. Hearst*, 1900, 130 Cal. 630, 63 P. 30, \$6,250; *Dunn v. Hearst*, 1903, 139 Cal. 239, 73 P. 138, \$500; *Graybill v. De Young*, 1903, 140 Cal. 323, 73 P. 1067, \$1,000; *Bohan v. Record Publishing Co.*, 1905, 1 Cal.App. 429, 82 P. 634, \$500; *Tingley v. Times Mirror Co.*, 1907, 151 Cal. 1, 89 P. 1097, \$7,500; *Ervin v. Record Publishing Co.*, 1908, 154 Cal. 79, 97 P. 21, 18 L.R.A., N.S., 622, amount of damages not specified; *Lewis v. Hayes*, 1918, 177 Cal. 587, 171 P. 293, \$1,750; *Waite v. San Fernando Pub. Co.*, 1918, 178 Cal. 303, 173 P.2d 591, \$3,000; *Scott v. Times-Mirror Co.*, 1919, 181 Cal. 345, 184 P. 672, 12 A.L.R. 1007, \$37,500; *Newby v. Times-Mirror Co.*, 1920, 46 Cal.App. 110, 188 P. 1008, \$7,500; *Earl v. Times-Mirror Co.*, 1921, 185 Cal. 165, 196 P. 57, \$25,000;

Stevens v. Storke, 1923, 191 Cal. 329, 216 P. 371, \$1,000; Lyon v. Fairweather, 1923, 63 Cal.App. 194, 218 P. 477, \$750; Gloria v. A. Colonia Portuguesa, 1933, 128 Cal.App. 640, 18 P.2d 87, \$21,000; Behrendt v. Times-Mirror Co., 1938, 30 Cal.App.2d 77, 85 P.2d 949, \$10,000.

The foregoing record belies the assertion in the majority opinion that there is "danger of excessive recoveries of general damages in libel actions" against newspapers. This record discloses that during the last hundred years only three judgments of over \$20,000 were upheld by the appellate courts of this state, one for \$10,000, and the remaining fifteen for lesser amounts. True, there were other libel actions in which verdicts were recovered against newspapers, but either new trials were granted or the judgments rendered on such verdicts were reversed on appeal in those cases. To rely upon such a record to justify a preferential classification of newspapers because of the "danger of excessive recoveries of general damages in libel actions", is like a drowning man grasping at a straw. The majority might with equal logic hold that the Times-Mirror Company is entitled to a preferential classification because five of the above-mentioned awards, and by far the largest, were against it. Furthermore, it might with equal justification be said that the Legislature could limit recovery to special damages in personal injury actions against railroads and power companies because of the tendency of juries to make large awards of general damages in personal injury actions against those corporations because of their reputed vast wealth. While a majority of this court might be disposed to uphold such a statute, I am disposed to believe that it would be stricken down by the Supreme Court of the United States as being in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. I submit that the argument advanced in the majority opinion in support of its preferential classification of newspapers and radio stations on the above-mentioned ground is wholly unsound and utterly lacking in either factual or legal foundation.

The second so-called reason given in the majority opinion to prove that this legislation is not a travesty on the equal protection clause, but is a reasonable classification, is that newspapers must be free to disseminate news. There is a remote possibility that this reason might hold water if applied to inadvertent newspaper libel but it can hardly be called a good reason where the problem is one of malicious libel. In an article cited by the majority, Morris, Inadvertent Newspaper Libel and Retraction, 32 Ill.Law Rev. 36, it is pointed out that in at least ten states, Alabama, Indiana, Kansas, Massachusetts, Michigan, Minnesota, North Carolina, North Dakota, Ohio, and Wisconsin, statutes purport to lessen the severity of the common law in cases in which *inadvertent* newspaper libel is retracted. All of the statutes apply to libel published "*in good faith*", leaving the rigors of the common law intact for the malicious libeler. He points out that "The statutes can be classified into two groups. In the first group the legislatures provided that plaintiff shall recover only actual damages, but did not define 'actual damages'. Courts have interpreted these statutes to mean that non-punitive damages shall be recovered—with the result that the common law is not changed. In the second group of statutes, the legislatures clearly indicated that they intended to eliminate general damages. In these jurisdictions, either the statutes have been held unconstitutional, or the scope of operation of the statutes has been so limited that only trifling, if any, change is effected.

"The significance of the legislation is its aim, not its accomplishment. * * * The statutes all suffer from a common defect. Each legislature attempted to eliminate the recovery of general damages. Why? I submit that the legislators were impressed with the exculpatory effect of retraction; they recognized the futility of attempting to vindicate the plaintiff by judgment after retraction, and the folly of taking money from newspapers to further that purpose. They then reasoned that since general damages operate to exculpate the plaintiff when the publisher has not retracted, and since

the plaintiff has no need of exculpation after retraction which can be served by a money judgment, general damages should not be allowed when the publisher has retracted. *The error in this reasoning lies in the fact that general damages are needed for purposes other than exculpation. The assessment of general damages solves an admonitory problem which does not disappear with retraction.* So the abolition of general damages is not justified on the ground that the exculpatory function cannot be served by their retention." [Emphasis added.]

The legislation here involved is certainly discriminatory in that it protects certain members of a class to the detriment of others. The requirement of proof of special damages means virtual abolition of legal responsibility for both inadvertent and malicious libel. It is a very rare situation where a plaintiff can trace and prove the special damage he has suffered from libelous matter printed in a newspaper or spoken over the radio about him. This does not mean that he may not have suffered sharply—but it does mean that he may never hear of business opportunities which would have been his had the "libelous stain" not appeared on his name plate. Those who read the libel may not read the retraction and if he loses business or professional opportunities which would otherwise have been his (although he does not know of them, or cannot prove his actual pecuniary loss as to them), he should be compensated for the probable damage he has suffered and that which he will suffer in the future. Surely Mr. Morris is right when he says that "The tendency toward flamboyance and haste in modern journalism should be checked rather than countenanced." The interest of the public in news cannot be said to outweigh the protection which every person is entitled to be given by the law to have his reputation remain unsmirched through malice or negligence. Under the holding in this case, newspapers and radio may freely malign any person and be liable for only special damages if the plaintiff asks for and receives a retraction, or if he does not ask for one. This will in effect allow these two

favorable means of publication to escape, in most instances, scot free, since the plaintiff will not be able to prove the exact special pecuniary loss he has suffered.

In *Osborn v. Leach*, 135 N.C. 628, 47 S.E. 811, 815, 66 L.R.A. 648, the same type of statute was held not to be unconstitutional as a denial of due process of law since "actual" damages were held to include all save punitive damages. Mr. Justice Douglas, concurring, felt that the statute was unconstitutional as a denial of equal protection of the law. He said: " * * * I feel constrained to say that, in my opinion, the so-called libel act is unconstitutional, inasmuch as it discriminates between the editor of a newspaper and the ordinary citizen. If I write a letter libeling an editor, that perhaps, at most, 10 people may see, and he libels me by printing identical charges against me that 10,000 people may see, I am subject to pains and penalties from which he is exempted by operation of the statute. Whatever other merits the act may have, I do not think that such discrimination can be sustained under the explicit provision of our Constitution. * * *"

In *Park v. Detroit Free Press Co.*, 72 Mich. 560, 40 N.W. 731, 1 L.R.A. 599, 16 Am.St.Rep. 544, a statute such as ours was held unconstitutional as a violation of due process of law, and the court said that a person's reputation was a species of property and that a retraction statute which left him with a remedy only when he could prove special damages was leaving him with no effective remedy inasmuch as special damages were impossible of proof in the majority of cases. The same result was reached in *Hanson v. Krehbiel*, 68 Kan. 670, 75 P. 1041, 64 L.R.A. 790, 104 Am.St.Rep. 422. In *Meyerle v. Pioneer Pub. Co.*, 45 N.D. 568, 178 N.W. 792, 795, the court held that the purpose of the statute was to give the publisher of a newspaper, "who through mistake or misapprehension in regard to the facts, in good faith publishes a libelous article, an opportunity to retract and thereby, as far as possible, undo the wrong which he unintentionally did to the party libeled." It was held that the plaintiff, after retrac-

tion, could not recover exemplary damages, but would be entitled to recover such general or special damages as would compensate him for the injury which remained unsatisfied after the publication of the retraction.

As an article in 23 So.Cal.L.Rev. 89 (1949) points out, "English and American courts have long recognized the admissibility of retractions to mitigate damages in libel actions. But every statute that has attempted to benefit publishers by substituting a retraction for plaintiff's right to recover general damages in libel actions against newspapers has been challenged on constitutional grounds. Two were held unconstitutional as violative of due process and equal protection (*Hanson v. Krehbiel*, supra; *Park v. Detroit Free Press Co.*, supra, approved in *McGee v. Baumgartner*, [121 Mich. 287], 80 N.W. 21, 22); two were judicially rewritten to include general damages (*Osborn v. Leach*, supra; *Meyerle v. Pioneer Pub. Co.*, supra), and *only one* was allowed to emerge completely unscathed." The *one* which emerged "completely unscathed" is the Minnesota statute involved in *Allen v. Pioneer-Press Co.*, 40 Minn. 117, 41 N.W. 936, 3 L.R.A. 532, 12 Am.St.Rep. 707, cited in the majority opinion. It must be noted that in the *Allen* case, decided by a divided court and sent back for a new trial, the statute involved provided that the plaintiff could still recover general damages, *even if the retraction were published, unless the defendant could show that the libelous publication was made in good faith and under a mistake as to the facts*. This holding the majority opinion does not mention. It, therefore, appears that the holding of the majority in this case is in conflict with every decided case involving a similar statute.

Even if I assume that the majority is correct in stating that a cause of action for libel or slander was not frozen in our Constitution ("Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; * * *", Art. I, sec. 9), I maintain that the person injured by such libel or slander has a cause of action guaranteed to him by the due process

clause of both Constitutions. Cal.Const., art. I, sec. 13, and the Fourteenth Amendment to the Constitution of the United States. If the Legislature should abolish causes of action of replevin and conversion (trover) leaving me thus remediless for the loss of my car, I would consider that I was being deprived of my property without due process of law, and I consider the loss of reputation a valuable property right which can not be taken from an individual without giving him a fully adequate legal remedy so that he may be compensated, so far as possible, for the loss he has suffered and which he will suffer from the wrong done him.

We may now assume that the Legislature (pushed by the powerful pressure groups which play such a shameful but important part in securing the adoption of special privilege legislation), having succeeded so well with its initial efforts (present statute held constitutional), may well decide next that all causes of action for libel and slander shall be abolished. In this connection, let me point out that the "guest" statutes and causes of action for alienation of affections and breach of promise to marry, etc., are *not* good illustrations of the power of the Legislature to abolish a cause of action for an injury. The guest does not have to ride in a car as a guest, and affection is an intangible attribute incapable of possession. From the beginning of time in this country it has been understood that marriage is a "commodity" that can not be forced on men and women. An entirely different factual situation is presented where an innocent person is defamed, either negligently or maliciously, and suffers irreparable injury to his professional, occupational or business reputation because of it. The least that can be done by the guilty one is to make such reparation in the form of money damages as will enable the maligned one to live until such time as he may again build up his reputation.

It has been held that a trade-mark and a trade-name are worthy of protection because through them the owner or possessor creates and preserves a "favorable reputation, to stimulate the sale of a product, and to distinguish it from a similar com-

peting products." *Sun-Maid Raisin Growers v. Mosesian*, 84 Cal.App. 485, 258 P. 630, 633. Injury to the standing and reputation of a business becomes an injury to the goodwill of the business, and infringement upon a trade-mark which results in injury to the goodwill of the business may be enjoined. *Hall v. Holstrom*, 106 Cal. App. 563, 289 P. 668. Words which are the subject of the goodwill and reputation of a business they designate are entitled to the same protection as that afforded to one who has the prior right to a trade-mark, a symbol, character or words which have no common meaning and which are artificial. *Eastern Columbia, Inc., v. Waldman*, 30 Cal.2d 268, 181 P.2d 865; *Barnes v. Cahill*, 56 Cal.App.2d 780, 133 P.2d 433; *Hoyt Heater Co. v. Hoyt*, 68 Cal.App.2d 523, 157 P.2d 657; *Jackman v. Mau*, 78 Cal.App.2d 234, 177 P.2d 599; *Weatherford v. Eytchison*, 90 Cal.App.2d 379, 202 P.2d 1040. And why are damages given in such cases? It is obvious that the *reputation* acquired by a business is in large measure responsible for the profits it makes. Why is a tremendous sum spent every year in advertising the good reputation built up over the years in the manufacture of certain products? If this money is lost because business is lost because of the libel or slander published by a newspaper or broadcast over the air, has the one so advertising lost nothing in the nature of property? Any professional man's income or profit depends on his reputation for honesty, integrity, fair dealing, ability and ethical practices, and he will suffer in the same indefinite, but nevertheless very substantial, way by its impairment or deprivation.

"There is no room for holding in a constitutional system that private reputation is any more subject to be removed by statute from full legal protection than life, liberty, or property. It is one of those rights necessary to human society that underlie the whole social scheme of civilization." *Park v. Detroit Free Press Co.*, 72 Mich. 560, 40 N.W. 731, 733, 1 L.R.A. 599, 16 Am. St.Rep. 544. "These damages (to a person's reputation) are in the nature of a property right; they have been said to con-

stitute property. See 17 C.J. 710, 829, 841. See, *Newell on Libel and Slander*, p. 841; *Pratt v. Pioneer Press Co.*, 35 Minn. 251, 28 N.W. 708; *Cruikshank v. Bennett*, 30 Misc. 232, 62 N.Y.S. 118; *Adams v. Scott* [33 S.D. 194, 145 N.W. 446]; 17 R.C.L. 430, 431; *Osborn v. Leach*, *supra* [45 N.D. 568, 178 N.W. 794].

When a cause of action arises it has a legal value as a chose in action—it is a species of property. Even where there is no legal measure of damages, as in case of slander or assault, the injured party has an indeterminate right to compensation the instant he receives the injury. The verdict of the jury and the judgment of the court thereon do not give, they only define, the right. Such right, when vested, is to the injured party, of the nature of property, and is protected, as property in tangible things, is protected. It cannot be annulled or changed by legislation, nor extinguished except by satisfaction, release or the operation of statutes of limitation. 1 *Sutherland on Damages*, sec. 7, p. 26.

In holding a similar statute unconstitutional, as being in violation of the due process provision of the Fourteenth Amendment to the federal Constitution, the Supreme Court of Kansas said: "From the writings of the world's wisest man we have the assurance 'that a good name is rather to be chosen than great riches.' Yet the possessor of this thing of greatest value, being despoiled of it, is left entirely without remedy for its loss by the statute in question, except in such rare cases as he shall be able to show some exact financial injury in the particulars named." *Hanson v. Krehbiel*, 68 Kan. 670, 75 P. 1041, 1042, 64 L.R.A. 790, 104 Am.St.Rep. 422.

From the time of the Declaration of Independence the people of this country have declared that unalienable rights are "Life, Liberty and the pursuit of Happiness." Both Constitutions, California and United States, declare that no person shall be deprived of any of these rights without due process of law. In order to preserve life, in most instances, it is necessary for men to work that they may provide for them-

selves and their families. No member of this court can deny that a good reputation is something to be highly prized and cherished. No member of this court can deny that one's reputation has a great deal to do with the position one holds—whether it be public office, a profession, a business, an occupation, or the social position one holds in his community, his state, or his country. The section of the Civil Code under consideration here evidently considers that a retraction published is a fair compensation for the inestimable, uncountable damage which newspapers and radio stations are capable of causing to an innocent person. A school teacher labeled, either negligently or maliciously, as a communist, may not lose her position, but she may lose an opportunity for advancement of which she will not be aware. A doctor, dentist, attorney, candidate for public office, an actor, actress, singer, businessman or woman—all of these may lose opportunities, clients, patients, positions, and business, because of the defamation. These lost opportunities will not, in the general course of events, come to the attention of the loser. He has suffered a loss for which the defamer should pay. The injured person is *not* compensated by a retraction which may not be read or heard by all who read or heard the defamatory words. We have all heard the expression used among our contemporaries that "where there is so much smoke there must be some fire". Since this expression has survived from the days of the Greek philosophers, Euphues and his Euphoebus, Arber's reprint, 1579, until the present, it would seem a fair assumption that people will go right on saying and believing it. This court, in holding this statute constitutional, is depriving the injured person of a property right. As was said in the Hanson case, *supra*: "It is suggested, however, that the retraction required by the act to be published is a fair compensation for the injury done, and a reinvestment of the libeled one with his good name. This being done, all has been accomplished that would be by a verdict of a jury, and hence that the retraction required by the legislative enactment is, if not 'due course of law,'

an ample substitute for it. It is not an easy task to deduce either from reason or the authorities a satisfactory definition of 'law of the land' or 'due course of law.' We feel safe, however, from either standpoint, in saying these terms do not mean any act that the Legislature may have passed if such act does not give to one opportunity to be heard before being deprived of property, liberty, or reputation, or having been deprived of either does not afford a like opportunity of showing the extent of his injury, and give an adequate remedy to recover therefor. Whatever these terms may mean more than this, they do mean due and orderly procedure of courts in the ascertainment of damages for injury, to the end that the injured one 'shall have remedy'—that is, proper and adequate remedy—thus to be ascertained. To refuse hearing and remedy for injury after its infliction is small remove from infliction of penalty before and without hearing."

The following statement in the majority opinion deserves some comment: "Moreover, in balancing the danger of recoveries of excessive general damages against leaving plaintiffs with no effective remedy for injury to their reputations, the Legislature could properly take into consideration the fact that a retraction widely circulated by a newspaper or radio station would have greater effectiveness than a retraction by an individual and could thus class newspapers and radio stations apart." This argument is clearly and concisely answered by Professor G. W. Paton, University of Melbourne, Australia, in his article "Reform and the English Law of Defamation," 33 Ill. Law Rev. 669. Professor Paton states that the law of torts exists to grant a certain security to a person's reputation, physical integrity and good, and, if that security be invaded, to award damages. The power of the press to destroy the reputation of an individual is so great that strict rules are necessary to secure a balance. He says that "It is true that there are speculative litigants whose one desire is to reap a golden recompense for some fancied slight: that sometimes a person, with no real reputation to lose, recovers damages

based on the view that he had a reputation: very occasionally a newspaper has suffered because a fictitious name it has chosen fits someone in real life. *All this is admitted, but the corollary of the great power of the modern press is a strict sense of responsibility for the reputation of those who lie at their mercy and, as it is Utopian to consider that such an attitude of mind can be induced save by the severest sanctions of the law, strict liability is justifiable by its effect.* It must be remembered that a newspaper has no professional privilege to traffic in the reputation of others." [Emphasis added.] The last statement in the just quoted article is to be found in libel cases against newspapers decided in this state prior to the enactment of the legislation here considered. It should be noted that rather than imposing stricter liability upon newspapers and radio stations because of the great power they possess to ruin the reputation of others, either carelessly or maliciously, the section provides for a lesser liability. To illustrate the utter futility of a newspaper or radio retraction, consider the case of a candidate for public office who has been publicly and falsely accused a few days before election of having committed several crimes, of being a person of low character and of dishonest nature. He requests a retraction which, if time permits, may be given before the election, or if time does not permit, after the election. He is not elected. He can not prove that the libel caused him to lose the election although he and his advisors are certain it was the cause. Consider, too, that he has lost the election because untrue defamatory matter was widely published about him and *that this may have been done maliciously for that very purpose.* Consider, too, that because of it, the possibility of a favorable outcome of any future election is very remote. Is this candidate for public office to have no restitution from the one guilty of the wrong? The majority opinion says "No". I do not agree.

The majority state that "This court is not in a position to weigh the relative importance of the conflicting interests involved, and even if it were it should not attempt to do so." It most assuredly is

the duty of this court to scrutinize carefully any legislation in order to determine whether it is unreasonable or discriminatory. The people have the right to expect that the members of this court will possess the courage and integrity necessary to declare unconstitutional any legislation which contravenes the rights of the people as set forth in the due process and equal protection clauses of both Constitutions. This court should invoke these constitutional guarantees to protect the rights of those who are wronged by such legislation and should not be servile to *any* interest or influence regardless of the power it wields.

The majority opinion quotes from a dissenting opinion written by the late Justice Oliver Wendell Holmes in the case of *Baldwin v. State of Missouri*, 281 U.S. 586, 50 S.Ct. 436, 74 L.Ed. 1056, 72 A.L.R. 1303, in which he speaks of the tendency of the Court to give over emphasis to the due process provision of the Fourteenth Amendment in striking down legislation. Mr. Justice Holmes was not there concerned with a statute conferring a special privilege upon a particular group such as we have here, but was concerned with a taxation matter. I have no doubt that the great liberal minded Mr. Justice Holmes, with his courage, wisdom and foresight, would be the first to speak out against special privilege legislation of this character in order that it might be struck down as violative of both the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

I have hereinbefore referred to pressure groups and their obvious effect upon legislation in this state. By this reference I do not mean to cast the slightest reflection upon the members of the California Legislature, past or present. Both my son and I have served as members of this body, and I am in a position to know that, considering the great variety and the tremendous importance of the problems presented, the time available for their consideration and solution, and the pressure exerted by different groups seeking special privilege legislation, the members of

the Legislature render a commendable public service and are entitled to the confidence, respect and commendation of the people of this state. But I am not so naive that I do not realize that they may yield to some of the pressure exerted, and with reference to the particular legislation here under consideration, that that pressure may have been of a most powerful nature. It is not unlikely that the constitutional prohibition against this legislation was considered by the Legislature and that that body concluded that this was a matter for the courts to determine. It is just as probable that the Legislature was not favored with the arguments here advanced against this legislation on constitutional grounds before adopting it. Since I feel so strongly that this statute violates the due process of law and equal protection provisions of both our state and federal Constitutions, I would be violating my solemn oath to support both of these Constitutions if I did not cast my vote as a member of this court to strike it down—and this I have done.

I would, therefore, reverse the judgment.

SCHAUER, Justice (dissenting).

It is only in respect to privilege as to deliberately false and malicious publications by newspapers that this dissent is directed.

I think that there is a substantial difference between, on the one hand, and inadvertently false defamation and, on the other hand, a defamation which is known to be false and which is wilfully and maliciously published. That difference, it seems to me, assumes legally significant importance when we examine the constitutional questions which are raised by the subject legislation. I agree in large measure with Justice Traynor's discussion of the constitutional principles involved but I do not agree that those principles extend to the protection of the publication of defamatory matter which is known to be false and which is deliberately and maliciously uttered.

Justice Traynor says, "There are at least two bases on which the Legislature could reasonably conclude that the retraction provisions of section 48a provide a

reasonable substitute for general damages in actions for defamation against newspapers and radio stations, namely, the danger of excessive recoveries of general damages in libel actions and the public interest in the free dissemination of news."

Considering the above stated two bases in relation to maliciously and deliberately uttered known-to-be-false defamations, I think that their substance completely vanishes. The first asserted base is "the danger of excessive recoveries of general damages in libel actions." But does the policy of the state consider, or permit this court to believe, that there is any danger of "excessive recoveries of general damages" in libel actions which are based on knowingly false, deliberate and malicious publications? Why does the law provide for punitive damages, as against other defamers, where the matter is known to be false and is deliberately, wilfully and maliciously published? If the state has any such policy as is suggested for base No. 1, why does it provide that in all libel cases other than against a newspaper or radio broadcasting company (under the conditions specified in Civil Code section 48a), where the conditions of malice, knowledge and wilfulness obtain, that punitive damages may be assessed?

Base No. 2 is stated in the majority opinion to be "the public interest in the free dissemination of news." But surely the license, whether limited or unlimited, to wilfully, knowingly and maliciously utter false and defamatory matter does not serve "the public interest in the free dissemination of news"; rather does it tend to defeat that interest by encouraging the malicious dissemination of matter known to be false.

It is contended, in defense of the majority position, that the legislation can be sustained "not because the malicious conduct of such persons ought not to be actionable, but because, if their conduct were actionable, actions would be brought against them in cases in which they had not spoken falsely and maliciously * * *. And the real question is whether it is proper on grounds of public policy to remit such questions to the judgment of a

jury." The example cited in the text as quoted by the majority opinion is the immunity given participants in a judicial proceeding. The argument is not persuasive to me. The most regular participants in judicial proceedings are judges. Judges of courts are public officers, responsible to the people; while they may not be sued for libel or slander as arising out of judicial acts, they are not self-selected or self-constituted, and they are subject to election and recall. The people have no such power over newspaper publishers who, conceivably, can be completely irresponsible. Likewise, as to other participants (than judges) in judicial proceedings, there is a fundamental difference between their relationship to such a public governmental proceeding and the relationship of a publisher to his private enterprise; so too, is there a very basic difference between a court, which is an institution of government, and a newspaper, which is a private enterprise. (And it is to be devoutly hoped that the difference shall never be destroyed.)

Furthermore, I think that section 9, article I, of our California Constitution is entitled to more significance in its application here than is accorded it by the majority. It provides that "Every citizen may freely, speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." I think that the clause "being responsible for the abuse of that right" has affirmative rather than mere negative significance. I think that responsibility for abuse of the right is a fundamental part of our concept of freedom of speech and press. It forms a part of the definition of the very liberty which is guaranteed. Unless there is responsibility for abuse of the right then such right becomes more than a "liberty"; it becomes a license. The malicious and deliberate publication of that which is known to be false, uttered for the sole purpose of injuring the subject, is not, in my estimation, within the freedom guaranteed by the Constitution. Rather is such a publication an "abuse of that

right" to which the liberty does not extend.

The courts have been most zealous to protect freedom of speech and press against *prior* restraint. There is no accepted principle of constitutional law which suggests that they should be so zealous to absolve from *subsequent* responsibility for a clear abuse of the liberty. Indeed, the very strictness of the rule against prior restraints bespeaks need of subsequent responsibility for abuses.

Even if we assume, notwithstanding the provisions of section 9, article I, relative to responsibility for abuse of the right, that the Legislature could completely abolish the cause of action for libel, such assumption does not save the statute here. The Legislature has not abolished a cause of action; neither has it undertaken to define an "abuse of that right" for which the publisher may be responsible. If the subject statute had extended the exemption to general damages only it would be far easier to defend. But by framing the statute to exempt both general and punitive liability for the most pernicious abuse to which a newspaper may be put, it seems that what the Legislature has really done is to create a special privilege for an arbitrarily selected class. The special privilege is exemption from liability for general and punitive damages for libel, whether deliberate and malicious or merely inadvertent, unless a retraction is requested and refused. The retraction, if demanded and published, may be followed immediately by a new defamation. By the express terms of the statute it extends the exemption to include the deliberate and malicious publication of known falsehoods. Since the privilege is extended to deliberately false and malicious publications it is, in effect, a license to defame. Such privilege or license is extended to, and only to, newspapers and radio broadcasting companies. The metropolitan daily and the rural weekly have the privilege; United States News and World Report, Time Magazine, Esquire, Fortune, etc., do not. What reasonable basis is there for giving the "newspaper," whether daily or weekly, such license to deliberately and

maliciously defame while withholding that license from magazines of every type? Why should magazines and publications generally, other than newspapers and radio broadcasting companies, be subject to punitive as well as general damages for malicious publications while the special class is exempt? Assuming that there is a reasonable basis for the classification insofar as inadvertent libel is concerned, I find none for such classification in relation to the special privilege to deliberately defame.

At the beginning of this discussion I pointed out that the majority opinion declares the proposition that "There are at least two bases on which the Legislature could reasonably conclude that the retraction provisions of section 48a provide a reasonable substitute for general damages in actions for defamation against newspapers and radio stations, namely, the danger of excessive recoveries of general damages in libel actions and the public interest in the free dissemination of news." It has been shown that both of those bases disappear when applied to deliberately false and malicious publications. And there is a still more fatal inadequacy in the majority position.

The fundamental part of their proposition is that the "Legislature could reasonably conclude that the retraction provisions * * * provide a reasonable substitute for general damages in actions for defamation against newspapers and radio stations." That proposition completely ignores the element of punitive damages. The statute relieves its beneficiaries from liability for punitive as well as general damages. What reasonable substitute is provided for punitive damages? Certainly not the retraction provision. In full compliance with the law and shielded by it the publisher could follow every retraction with a reiteration of the same or a still more calumnious defamation. There

is a sound policy behind the law which provides for exemplary damages in certain cases. ("[W]here the defendant has been guilty of oppression, fraud or malice * * * the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." Civil Code, § 3294.) If this law is good generally what reasonable basis is there for exempting "newspapers and radio stations" in relation to their deliberately false and malicious publications?

I reiterate that it is only in respect to the licensing, in effect, of deliberately false and malicious publications that this dissent is directed. I cannot think that the great body of reputable newspapers and radio broadcasting companies which serve our country and our people so well would ever stoop to the vicious practices which the statute would permit. But there is nothing to prevent vicious persons from entering the publishing business and from taking full advantage of the law as it is upheld. The reputable publishers themselves may in the long run suffer more from the nefarious practices of which the law permits and which it encourages than they would from defending a few libel actions against the unfounded charge of falsity and malice. Since the majority opinion affirms the judgment on the theory that section 48a is valid in its every element and application I do not discuss whether what I believe to be the invalid portions or applications of the statute could be deleted and the remainder upheld. Likewise, for the purposes of this dissent, I accept the implications of the majority that affirmance of the judgment depends on sustaining the statute in its entirety.

For the reasons above stated I would reverse the judgment.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.

35 Cal.2d 109

**MERCHANTS SERVICE CO. v. SMALL
CLAIMS COURT OF CITY & COUNTY
OF SAN FRANCISCO et al.**

S. F. 18069.

Supreme Court of California.

April 12, 1950.

The Merchants Service Company, a corporation, petitioned for a writ of mandate to compel Ivan L. Slavich, Clerk of the Small Claims Court of the City and County of San Francisco, to accept a claim for filing therein. From a judgment of the Superior Court, San Francisco County, Edward P. Murphy, J., granting a peremptory writ, defendants appealed. The Supreme Court, Spence, J., held that the claim was based on an assignment to petitioner and hence not cognizable in the small claims court.

Judgment reversed.

Prior opinion, Cal.App., 210 P.2d 543.

1. Mandamus ⇨163

Defendants, interposing demurrer to petition for writ of mandate submitted matter on applicant's papers. Code Civ.Proc. § 1094.

2. Courts ⇨175

A written agreement, acknowledging buyer's receipt of ring, for which payments were to be made to named company, followed by seller's written statement, relinquishing any interest in ring to such company and guaranteeing validity of sale contract, showed that company was assignee, rather than ordinary third party beneficiary, so that its claim against buyer for purchase price was not cognizable in small claims court and clerk thereof properly refused to file claim. Civ.Code, §§ 1559, 1641, 3528; Code Civ.Proc. §§ 117, 117b, f.

3. Courts ⇨175

The statute providing that no claim shall be filed or prosecuted in small claims court by assignee of claim does not confine prohibition to assignees for collection or for purposes of suit, but applies to every assignee, including any one who stands in original creditor's place. Code Civ.Proc. § 117f.

Fred N. Howser, Attorney General, Clarence A. Linn and B. Abbott Goldberg, Deputy Attorneys General, John J. O'Toole and Dion R. Holm, City Attorneys, and C. Wesley Davis, Deputy City Attorney, San Francisco, for appellants.

John H. Brill, San Francisco, for respondent.

SPENCE, Justice.

[1] Plaintiff petitioned the superior court for a writ of mandate to compel the clerk of the Small Claims Court in San Francisco to accept for filing therein a claim for \$14.13. Defendants interposed a demurrer to the petition, thereby submitting the matter "on the papers of the applicant." Code Civ.Proc., § 1094; Scannell v. Wolff, 86 Cal.App.2d 489, 491-492, 195 P.2d 536. The demurrer was overruled and the court ordered a peremptory writ to issue. From the judgment accordingly entered, defendants appeal.

[2] Plaintiff's claim was rejected by the clerk of the ground that it appeared to be based on an assignment. Section 117f of the Code of Civil Procedure provides that "No claim shall be filed or prosecuted in such small claims court by the assignee of such claim." An analysis of the two papers constituting plaintiff's claim—attached to the petition for a writ of mandate and designated Exhibits A and B—sustains the propriety of the clerk's action.

Exhibit A is on the form provided by the clerk for the use of claimants, consisting of a completed questionnaire and an affidavit and order as prescribed by section 117b of the Code of Civil Procedure. It thereby appears that Mrs. Wilma Bradford, defendant, is indebted to plaintiff, Merchants Service Company, in the sum of \$14.13 for money due under a written contract; that a demand was made and refused and nothing paid; and the residence of defendant and the place of business of plaintiff are given.

Exhibit B is the "written contract" to which reference is made in Exhibit A. It consists of a printed form containing questions calling for information respecting the

financial responsibility and resources of a prospective customer. Below this form it appears that the subject of sale was a "ladies ring" for the price of \$12.50 plus 38 cents sales tax and "Service and/or Excise Taxes" \$1.25, total \$14.13; and that the sale was on "Budget Account Terms \$1.00 each week Beginning January 17, 1948." Printed on the reverse side is the purchaser's agreement, signed by Mrs. Bradford, acknowledging "receipt * * * of [the] merchandise * * * described

* * *, for which payment is to be made to the Merchants Service Company, * * * called Creditor, in the sum there specified on the terms set forth." This agreement is reproduced in full below, omitting a form to be executed by co-signers or guarantors and which was not executed.¹

Immediately following and as a part of the same printed document appears a formal statement signed by Sol Michaels, showing him to "relinquish, disclaim, and quitclaim any right, title, or interest in and

1. "The undersigned hereby acknowledges receipt from the concern named of merchandise and/or services described on reverse side, for which payment is to be made to the Merchants Service Company, hereinafter called Creditor, in the sum there specified on the terms set forth. Receipt of said merchandise in good order, satisfactory fit and construction in every detail is hereby acknowledged by the undersigned.

"If any representation herein made by the Undersigned is false or if the Undersigned defaults in any payment or violates any of the conditions of this agreement, the unpaid balance hereunder shall immediately become due at the option of the creditor.

"Should Creditor institute action to recover the purchase price or any part of it, the title and right of possession of any merchandise referred to shall remain in the Creditor until paid for, with the right of repossession before or after judgment rendered, until satisfaction of such judgment. The Undersigned agrees to return the merchandise purchased and referred to on demand should the Undersigned be in default in any payments or have made any material misstatement in connection herewith, and agrees to pay the Creditor a reasonable amount for any actual damage suffered thereby. Should this contract be placed in the hands of an attorney or collection agency for collection or breach of contract, the Undersigned agrees to pay all actual court costs, collection expense including collection agency fee and attorney fees incurred, with or without suit.

"The Undersigned agrees to make all payments under this contract at the office of the Merchants Service Company. In the event of default by Undersigned in any of the obligations herein, Creditor may, without notice of demand, enter any premises where said merchandise may be found and take possession thereof and at its option sell said merchandise at

public or private sale, and the proceeds thereof, less the expense of repossessing and selling said merchandise, shall be credited upon the amount unpaid hereunder, or without such sale there may be credited upon the amount unpaid the fair market value of said merchandise at the time of such repossession, and in either event, in consideration of the use and depreciation of said merchandise, Undersigned agrees to pay forthwith any remaining unpaid balance hereunder. In no event shall Creditor be entitled to receive in excess of the original purchase price unless Creditor elects to reclaim the merchandise, in which event Undersigned shall be released from all further liability.

"The Undersigned hereby agrees that the period of the running of the statute of limitations on the within account will be extended ten (10) years from date hereof.

"The undersigned agrees to insure said chattels against loss by fire, theft, damage and mysterious disappearance in favor of the Creditor or its assignee and furnish Creditor or its assignee with a copy of the insurance policy. Should the Undersigned fail to furnish the Creditor of its assignee with a copy of its insurance policy, the Creditor or its assignee may insure the above described chattels at the expense of the Undersigned and the Undersigned agrees to pay the premium on said policy within thirty (30) days after demand thereof.

"The Undersigned hereby waives all right for a change of venue and expressly consents to any suit for collection being filed in San Francisco. Time is of the essence of this agreement.

"This contract may be assigned or sold and all rights and conditions of the Creditor or assignor shall inure to the benefit of the purchaser or assignee.

Signed: Mrs. Wilma Bradford
Dated Jan. 10, 1948 (Buyer)"

to the merchandise or demands there in described unto Merchants Service Company" and to "guarantee" the validity of "the above contract." This agreement by Michaels is likewise reproduced in full below.²

From these "papers" it is apparent that Mrs. Bradford purchased a ring from the seller, Sol Michaels, and that she was obligated to make "payment" therefor "to the Merchants Service Company." Such transaction, plaintiff maintains, evidences a contract of sale for its express benefit, Civ. Code, § 1559; *Hartman Ranch Co. v. Associated Oil Co.*, 10 Cal.2d 232, 244, 73 P.2d 1163, an original obligation in its favor, *J. F. Hall-Martin Co. v. Hughes*, 18 Cal.App. 513, 516, 123 P. 617, which it, as the primary creditor of the purchaser, was trying to enforce directly in the court having jurisdiction of its claim as so limited in amount, Code Civ.Proc., § 117. But such argument gives effect only to part one of Exhibit B above quoted, the agreement signed by Mrs. Bradford and establishing a debtor-creditor relationship between her and plaintiff; and it disregards the purport of part two of Exhibit B above quoted, the relinquishment signed by Sol Michaels, the merchant, as a

factor affecting the three-party undertaking and indicating the derivative basis of plaintiff's claim against the purchaser. A consideration of the two parts of the agreement together compels the conclusion that plaintiff's status is that of an assignee rather than that of the ordinary third party beneficiary, and that its claim is therefore not cognizable in the small claims court. *Schwartz, Inc., v. Burnett Pharmacy*, 112 Cal.App.Supp. 781, 785, 295 P. 508.

The writing signed by Michaels shows on its face that he was the original claimant against the purchaser by reason of his sale and delivery of the ring to her. It was only by reason of his relinquishment of his right to make a demand upon her for the purchase price that plaintiff's corresponding right against her arose, and so plaintiff was substituted for the normal creditor, the seller, in the transaction. Thus the writing executed by Michaels speaks in the past tense of "demands therein described" which are *relinquished* and *quitclaimed*; and it shows that the contract of sale had been consummated, for Michaels guaranteed that "the above contract (part one of Exhibit B, supra) is a valid, bona fide and

2. "We hereby relinquish, disclaim, and quitclaim any right, title, or interest in and to the merchandise or demands therein described unto Merchants Service Company. We guarantee that the above contract is a valid, bona fide and subsisting agreement; that all laws have been complied with; and that all signatures appearing thereon are genuine and are of the persons of whom they purport to be and that such persons are competent to make this contract. It is specifically represented that no part of this contract arose out of any delinquent account previously on our books; that all merchandise as set forth thereon as having been sold has been delivered to the Debtor; and/or that all services agreed to be performed have been rendered and completed to the personal satisfaction of the Debtor, after which I/we shall not be responsible for the payments on this contract. The debtor is not obligated to us or our assignee on prior purchases. Additional credit will not be granted to any Debtor until the balance on a prior contract has been paid in full or unless such additional credit has previously been approved by

Merchants Service Company. Should we violate this provision Merchants Service Company may elect to require us and we hereby agree to pay to Merchants Service Company any balance due it from the Debtor on a prior contract or Merchants Service Company may elect to collect and retain the entire balance due from the Debtor including the amount due from the Debtor of such unauthorized sale. We agree to act as agent to collect the money due on this contract until notified to the contrary by Merchants Service Company, and we shall immediately remit same to Merchants Service Company, and prior to such remittance shall hold such collection and/or deposit same in a place of or account separate and distinct from collections and/or funds of our own, and such receipt and/or collections shall be and remain the property of said Merchants Service Company. Merchants Service Company by, or through its agent, shall have a right to examine my and/or our books of account at any reasonable time.

(Firm Name) Sol Michaels
915 Pierce St."

subsisting agreement" (emphasis added), and that the merchandise sold had been delivered. The "demands therein described" constitute a chose in action, consisting of the right to receive from the buyer the deferred payments of the purchase price which became owing to the seller, Michaels, as soon as he delivered the ring. Such transfer of rights in connection with property ordinarily indicates an assignment, 4 Am.Jur. sec. 2, p. 229; In re Estate of Beffa, 54 Cal.App. 186, 189, 201 P. 616; see, also, Commercial Discount Co. v. Cowen, 18 Cal.2d 610, 614, 116 P.2d 599, and the studious avoidance of the word "assign" in the language of the relinquishment cannot affect its proper classification as an assignment. Moreover, Michaels' guarantees as to (1) the validity of the "subsisting" contract for payment of the purchase price and (2) the genuineness of "all signatures appearing thereon" are warranties that are typical of those which ordinarily accompany an assignment. (See 4 Am.Jur. sec. 100, pp. 308-309.)

While the writing signed by the purchaser (part one of Exhibit B, supra) shows a debtor-creditor relationship existing between her and Merchants Service Company, the same relationship must first have existed between her and the seller Michaels, for otherwise Michaels had no "demands" to relinquish. In short, the significant events in the three-party transaction clearly appear to have transpired in this sequence: (1) the purchaser's obligation to pay arose immediately upon delivery of the ring; (2) the ring had been delivered before Michaels signed the relinquishment; and (3) the debtor-creditor relationship between the purchaser and Merchants Service Company as evidenced in the writing over the buyer's signature (part one of Exhibit B, supra) came into being only because Michaels relinquished to the company the purchaser's obligation to pay him as seller of the ring. By signing the relinquishment, Michaels extinguished his right to sue for collection of the purchase price and this right was transferred to the company, so that it thereafter stood in the place of Michaels.

While plaintiff urges that the purchaser's original promise of payment ran in its favor, creating a primary obligation which could not be affected by Michaels' undertaking, such argument necessarily involves treatment of the two parts of the agreement covering the sale of the ring (Exhibit B, supra) as separate writings, having no bearing one on the other. However, that view cannot prevail, for the "papers" constituting the record here show this to be one entire transaction, and the three-party dealings evidenced thereby must be construed as a whole and given a normal interpretation consistent with their purport. Civ.Code, § 1641; 6 Cal.Jur. § 165, p. 258. As the two parts of this single transaction are so related and integrated one with the other, plaintiff's right to sue on the claim in question appears clearly to have accrued only as the result of Michaels' assignment thereof upon consummating the sale and delivery of the ring to the purchaser.

[3] Section 117f of the Code of Civil Procedure, supra, does not confine its prohibition, in use of the small claims court, to assignees for collection or assignees for the purposes of suit. Rather it prohibits the filing of a claim by any and every "assignee"; and as so used without limitation, the word suggests a broad meaning was intended to attach thereto and to include any one who stands in the place of the original creditor. So here, any realistic appraisal of the substance of the three-party transaction, Civ.Code, § 3528, shows that Michaels by his "relinquishment" thereby made to Merchants Service Company a present assignment of his claim against the purchaser arising out of his sale and delivery of the ring to her, a type of transaction coming within the express terms of section 117f of the Code of Civil Procedure; and the clerk of the small claims court was therefore justified in refusing to file plaintiff's claim.

The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

In re **SARGAVAK'S ESTATE.**
OHANNESON et al. v. LAMBRINIDOU
et al.
L. A. 20727.

Supreme Court of California, in Bank.
April 11, 1950.

Rehearing Denied May 8, 1950.

Proceeding in the matter of the estate of Ruby Sargavak, also known as Rebecca Ruby Sargavak, deceased, on petition of J. G. Ohanneson and others for probate of holographic instrument as a codicil to decedent's will, contested by Adrine Lambrinidou and others. The Superior Court, Los Angeles County, Kurtz Kauffman, J., entered an order admitting the instrument to probate and named contestant and another appealed. The Supreme Court, Per Curiam, held that instrument disclosed the intention to thereby make a testamentary disposition of property so as to justify admitting it to probate.

Order affirmed.

Traynor, Shenk and Edmonds, JJ., dissented.

For prior opinion see 203 P.2d 827.

1. Wills ⇨72

Before an instrument may be admitted to probate as a will, it must appear from its terms, viewed in the light of surrounding circumstances, that it was executed with testamentary intent.

2. Wills ⇨72

Testator must have intended by the particular instrument offered for probate to make a revocable disposition of his property to take effect upon his death.

3. Wills ⇨93

Extrinsic evidence is admissible, regardless of language of allegedly testamentary instrument, to show absence of testamentary intention, even though it does so by showing a different intention. Probate Code, § 105.

4. Wills ⇨93

Declarations made by testator at, before or after execution of instrument are admissible, if offered for the purpose of ascertaining the intent with which instrument was executed and not for the purpose of proving the meaning testator attributed to specific provisions of an admitted will. Probate Code, § 105.

5. Wills ⇨306

A written revocation of will may be overcome by evidence that revocation was not intended, but not by evidence that at some later time testator wished will to be operative.

6. Wills ⇨72

Holographic instrument leaving everything to named executor and attorney disclosed intention to thereby make a testamentary disposition of writer's property so as to justify admitting instrument to probate as a codicil to will previously executed by writer, notwithstanding evidence that writer intended instrument as an authorization to executor and attorney to eject pre-deceased husband's niece and her daughter from writer's home.

7. Wills ⇨81

Inclusion of non-testamentary provisions with those of a testamentary nature does not make instrument inoperative as a will.

Robert M. Dulin, Beverly Hills, Melvin E. Fink, Schell & Delamer and Charles E. Hobart, Los Angeles, for appellants.

C. W. Byrer, Los Angeles, and W. E. Cameron, Long Beach, for respondents.

PER CURIAM.

Contestants appeal from an order admitting a holographic instrument to probate as a codicil to a previously admitted witnessed will. Ruby Sargavak died March 22, 1947. By a formal will drawn by respondent Ohanneson as her attorney and executed July 9, 1945, she left all her property to the appellants. Respondent Mahdesian, as executor under that will, offered it for probate on March 31, 1947. On May 6, 1947, respondent Ohanneson offered the following instrument for probate as a codicil to that will:

"1566 W-29th St.
Los Angeles 7, Cal.
Sep 29, 1946
Sunday Evening

"To Whom It May Concern:

"I the writer-Mrs Ruby Sargavak wants everyone to know that she is writing these lines of her own free will—no one is put-

ting her or urging her to do it. She leaves everything she has to her Boy Sam Mahdesian & her layer, J. G. Ohanneson—she gives them power of attorney to divide what is left of her belongings to them. She specifically advises to give nothing what so ever to Mrs. Lillian Shooshan—she is no relation nor friend of hers—Mrs. Sargavak has been more than kind to her, just because she begged us to help her for a little time—Mrs. Sargavak would rather help her very own nieces & grand nieces & perfect strangers, who are truly in need of help. God has been good to us, she did not appreciate the goodness of the Lord to her. All honor & glory unto his High and Holy Name! Mrs. Ruby Sargavak.

P. S. It is 8 o'clock, I am very tired—
"Ruby Sargavak."

Appellants contested the admission of this instrument on the ground that testatrix did not intend it as a testamentary disposition of her property. They introduced without objection evidence to show that testatrix intended the instrument as an authorization to respondents to eject Mrs. Lillian Shooshan from the testatrix's house. Respondent Mahdesian testified to declarations of the testatrix that the allegedly dispositive provisions were intended only as a statement that her attorney and her executor were to dispose of her property according to the terms of the will of July 9, 1945. Respondent Ohanneson, as the only proponent of the codicil, offered no contradictory evidence, relying solely upon the allegedly clear language of the instrument. The trial court found that the instrument was executed with testamentary intent and admitted it to probate as a codicil to the will.

No question is raised as to compliance with Probate Code section 53 or as to Mrs. Sargavak's testamentary capacity. Appellants contend only that the uncontradicted evidence clearly discloses that the testatrix did not execute the instrument with

testamentary intent. Respondent, however, urges that the extrinsic evidence was improperly admitted and could not be considered on that issue. He contends that when a will is clear and unambiguous on its face, extrinsic evidence cannot be admitted to show that it was not a will. This contention cannot be upheld.

[1-3] Before an instrument may be probated as a will it must appear from its terms, viewed in the light of the surrounding circumstances, that it was executed with testamentary intent. The testator must have intended, by the particular instrument offered for probate, to make a revocable disposition of his property to take effect upon his death. In re Richardson's Estate, 94 Cal. 63, 29 P. 484, 15 L.R. A. 635; In re Estate of Spencer, 87 Cal. App.2d 591, 197 P.2d 351; Habergham v. Vincent, 2 Ves.Jr. 204; Succession of Torlage, 202 La. 693, 12 So.2d 683; Mayhew v. Wilhelm, 249 Mich. 640, 229 N.W. 459; In re McCune's Estate, 265 Pa. 523, 109 A. 156; In re Estate of Button, 209 Cal. 325, 331, 287 P. 964; In re Williams' Estate, Tex.Civ.App., 135 S.W.2d 1078; Clark v. Hugo, 130 Va. 99, 107 S.E. 730; Thompson, Wills, § 12. It bears emphasis that we are here concerned not with the meaning of the instrument, but with the intention with which it was executed.* Regardless of the language of the allegedly testamentary instrument, extrinsic evidence may be introduced to show that it was not intended by the testator to be effective as a will. In re Estate of Janes, 18 Cal.2d 512, 515, 116 P.2d 438; Austin v. First Trust & Savings Bank, 343 Ill. 406, 414, 175 N.E. 554; In re Kemp's Will, 7 W.W.Harr. 514, 37 Del. 514, 523, 186 A. 890; In re Estate of Soper, 196 Minn. 60, 264 N.W. 427; In re Estate of Kenyon, 42 Cal.App.2d 423, 109 P.2d 38. Thus, an instrument that clearly appears testamentary may nevertheless be shown by extrinsic evidence to have been executed in

* There is an analogy in the use of extrinsic evidence, including subsequent acts and declarations of the grantor, to prove delivery of a deed, likewise turning on a question of intention independent of the terms of the deed itself. Whitlow v.

Durst, 20 Cal.2d 523, 524-525, 127 P.2d 530; Donahue v. Sweeney, 171 Cal. 388, 391-392, 153 P. 708; Williams v. Kidd, 170 Cal. 631, 642, 151 P. 1, Ann. Cas.1916E, 703.

jest (*Nichols v. Nichols*, 2 Phill.Ecc. 180; *Trevelyan v. Trevelyan*, 1 Phill.Ecc. 149), or as a threat to induce action by an interested party (*Lister v. Smith*, 3 S. & T. 282), or under the misapprehension that the instrument was a mortgage, *In re Williams' Estate*, Tex.Civ.App., -135 S.W.2d 1078, or to induce the "legatee" to engage in illicit relations with the testator, *Fleming v. Morrison*, 187 Mass. 120, 72 N.E. 499, 105 Am.St.Rep. 386 or to relieve the maker from annoyance by a would-be legatee. *In re Estate of Siemers*, 202 Cal. 424, 435, 261 P. 298, see, 1 Page, Wills, § 53.

Respondent relies upon a dictum in *Re Estate of Pagel*, 52 Cal.App.2d 38, 42, 125 P.2d 853, that, although extrinsic evidence can be admitted to show that the writer did not intend the writing in question to operate as a will, such evidence cannot be admitted to show that he intended it to operate as an instrument different from what on its face it purports to be. Respondent therefore contends that the evidence is inadmissible because it shows that the testatrix intended to execute a power of attorney. The intention of the testatrix is here material only in showing that she did not intend that the instrument operate as a will. Since extrinsic evidence is admissible to show the absence of testamentary intention, it does not become inadmissible because it does so by showing another intention.

[4] The extrinsic evidence in this case consists for the most part of the oral declarations of the testatrix before and after the execution of the instrument in question. Such declarations, whether made at, before, or after the execution of the instrument are admissible, if offered for the purpose of ascertaining the intent with which the instrument was executed, *In re Estate of Siemers*, 202 Cal. 424, 435-436, 261 P. 298; *In re Kemp's Will*, 7 W.W. Harr. 514, 37 Del. 514, 523, 186 A. 890; *Fleming v. Morrison*, 187 Mass. 120, 122, 72 N.E. 499, 105 Am.St.Rep. 386; *Clark v. Hugo*, 130 Va. 99, 107 S.E. 730, 734; 6 Wigmore, Evidence, § 1736, p. 111; 1 Underhill, Wills, § 39, p. 48, and not for the purpose of proving the meaning the

testator attributed to specific provisions of an admitted will. *Colton v. Colton*, 127 U.S. 300, 8 S.Ct. 1164, 32 L.Ed. 138; *In re Estate of Pierce*, 32 Cal.2d 265, 274, 196 P.2d 1; *In re Estate of Farely*, 214 Cal. 199, 203, 4 P.2d 948; Prob.Code, § 105. "Such * * * declarations of intent to make a will are admissible when the attempt is not to explain an ambiguity but to show the testamentary character of a letter." *In re Estate of Spies*, 86 Cal. App.2d 87, 91, 194 P.2d 83, 85; *In re Estate of Janes*, 18 Cal.2d 512, 516, 116 P.2d 438; *In re Estate of Siemers*, 202 Cal. 424, 435, 261 P. 298; *In re Estate of Morrison*, 198 Cal. 1, 6-8, 242 P. 939; *In re Estate of Spitzer*, 196 Cal. 301, 306, 237 P. 739.

[5] *In re Estate of Smith*, 31 Cal.2d 563, 191 P.2d 413, is not inconsistent with the foregoing. That case involved an unequivocal express revocatory intent unaccompanied by any declaration or conduct of the decedent inconsistent therewith. There was no evidence against the showing of the solemnly expressed intent co-existent with the execution of the revocatory instrument. The evidence established only that testatrix informed other persons that she had made a will, the provisions of which were those of the instrument offered for probate. She did not refer to the earlier revocation and offered no explanation of her purpose in writing it. A written revocation can be overcome only by evidence that revocation was not intended, not by evidence that at some later time the testatrix wished the will to be operative. The evidence of the decedent's subsequent oral declarations and conduct was held inadmissible because it had no bearing or relevancy under the facts to show an intent different from that unequivocally expressed by the revocatory writing. None of it disclosed conduct, or influences, or state of mind at the time of the written revocation. Nor did the declarations refer to the previous revocation. The evidence there relied on merely supported an inference that the decedent considered her will operative. The majority of this court expressly recognized that the

effect of such a duly executed express revocatory instrument could not thus be overcome.

This appeal does not present a case in which the trial court erroneously excluded relevant extrinsic evidence. The evidence was admitted and considered by the trial court in determining whether the instrument offered for probate was executed with testamentary intent. The trial court concluded that "said decedent executed said instrument of date of September 29, 1946, with the intention to create a revocable disposition of her property to accrue and take effect only upon her death and passing no present interest" and that "said intent to make such testamentary disposition of her property existed at the time of the execution of said instrument."

It is true, as contestants assert, that the evidence of decedent's declarations relative to the execution of the instrument is uncontradicted and unimpeached. This evidence, however, is not so persuasive and unequivocal that it compels the conclusion that decedent did not intend to make the testamentary disposition of her property that the instrument directs. It only creates a conflict with other evidence introduced at the trial that supports the finding of the trial court.

Mrs. Lillian Shooshan was the niece of testatrix's deceased husband; she had been living with the testatrix on hostile terms. On the day the instrument was written she had been particularly quarrelsome, insisting that she had been wrongfully excluded from the wills of the testatrix and her husband. According to the testimony of her nurse, Mrs. Sargavak determined to have Mrs. Shooshan ejected from her house, and called respondent Mahdesian for that purpose. When she learned that he could not come that evening, she wrote the instrument in question. The nurse testified in detail concerning the circumstances under which it was written:

"Q. Did you call Mr. Mahdesian at that time? A. I called him that night. She asked me to call him and come and have them put out of the house.

"Q. By referring to them, who did she mean? A. Mrs. Lillian Shoostian [Shooshan] and Betty, her daughter.

"Q. You did call Mr. Mahdesian at her request? A. I did, and she called him also.

"Q. She called him? A. Yes.

"Q. Do you know what she said to him? A. She asked him to come over; she wanted these parties put out of her house because they had disturbed her so all day."

The nurse also testified:

"She said she had been so disturbed that day and was so very tired and worn out from trouble she had annoying her all day long with her niece and her niece's daughter; that she didn't want them to be in her will at all, and she was writing this to fix it so they would know she didn't want them to have anything to do with her will."

Respondent Mahdesian saw the testatrix the next day and discussed the situation with her (Rep.Tr., p. 27-29):

"Q. What happened when you got there Monday morning? A. It was just around eleven o'clock when I got there Monday morning and greeted her. She was in bed.

"Q. She says 'Where have you been? Why didn't you come yesterday?' Which I gave her the reason why I didn't. 'Well,' she says, 'I want you to help me. Don't you know I am in trouble?'

"I said, 'Now let me worry about your troubles. What is it?'

"She said, 'I want you to get Mrs. Shoostian out of the house right away. I can't stand her any more.'

"I said, 'What is the trouble?'

"She said, 'She is always harassing me, nagging me, and telling me why we didn't leave anything for her in Harry's will, her uncle's will; why we gave so much money to the churches and benevolent organizations,' and she said, 'That disturbs me. So I told her that is my own money. We can do whatever we want with our money.' She says, 'Again yesterday she disturbed

me and quarreled with me all day, so I have written something over here. I want you to take it and read it.'

"So I read it. I said, 'What do you want us to do?'

"She said, 'Put Lillian Shoostian out of the house right away.'

"I said, 'Mrs. Sargavak, Mrs. Shoostian [Shooshan] is your husband's niece. He has just passed away a short time ago, and if we put her out of the house people will say she was waiting for her husband to die to put the relatives out.' I said 'I will handle Mrs. Shoostian. Just leave that to me.'

"She said, 'Well, you know what best to do.'

"Now then, I looked at the instrument and I said, 'What do you want me to do with this?'

"She said, 'As I told you, Mrs. Shoostian has been bothering me and demanding money from me, and I am writing this and I want you to take it and any time you need it to use it.'

"I said, 'Now what do you mean by this, that you want to leave your belongings to your son, Sam Mahdesian and her attorney, J. George Ohanneson and give them power of attorney?'

"Well, she said, 'You are the executor of Harry's estate, and also you are the executor in my will, and Mr. Ohanneson is our attorney. I want you folks to prepare and take care of my estate, my affairs, in the way that you know I want it. And whenever Lillian Shoostian ever gives any trouble, I want you to have this.'"

[6] The foregoing testimony indicates only that decedent's annoyance with Mrs. Shooshan and her daughter prompted the writing of the instrument. If it was intended, as contestants assert, only as a notification to Mrs. Shooshan and her daughter that decedent "didn't want them to be in her will at all", the testimony offers no explanation for the statement that "She leaves everything she has to her Boy Sam Mahdesian & her layer J. G. Ohanneson." Nothing in the evidence before the trial court clearly negatives the testa-

mentary implication carried by those words. The impulse that prompted decedent to exclude Mrs. Shooshan from any share in her estate does not dispel the inference that at the same time she directed the disposition of her property to the two men who had served her and her husband as friends, counsel, and business advisers.

Although the testimony of Mahdesian and the nurse is uncontradicted, other evidence introduced at the trial supports the inference that Mrs. Sargavak intended to make the disposition of her property manifested by the terms of the instrument. Decedent and her husband knew Mahdesian since 1906. They frequently referred to him as "our boy" and "our son" and relied upon his aid and advice in the conduct of business matters. At the time she wrote the instrument offered for probate, decedent contemplated transferring title to her home to Mahdesian if he and his wife would live with her. Decedent and her husband knew Ohanneson since 1904. Ohanneson met and courted his wife at their home. Mrs. Sargavak assisted in the delivery of Mrs. Ohanneson's first child in 1913. Ohanneson represented the Sargavaks as their attorney. He was closely associated with Mr. Sargavak in religious and charitable activities. He was a constant visitor at Mrs. Sargavak's bedside during the extended illness that eventually caused her death.

[7] It cannot be said that it is unreasonable upon this evidence to conclude that Mrs. Sargavak, angered and harassed by Mrs. Shooshan, decided to leave her property to two men she had known for more than forty years and for whom she had demonstrated a warm personal affection. This purpose is clearly expressed by the terms of the instrument. It is not negated by evidence that she had an additional purpose, expressed in the letter and corroborated by the testimony upon which contestants rely, to avoid further annoyance from Mrs. Shooshan. The inclusion of non-testamentary provisions with those of a testamentary nature does not make the instrument inoperative as a will. In re Estate of Button, 209 Cal. 325, 331, 287 P. 964.

The order admitting the instrument to probate is affirmed.

SCHAUER, Justice.

I concur. It should be noted, however, that the majority holding here that "Regardless of the language of the allegedly testamentary instrument, extrinsic evidence may be introduced to show that it was not intended by the testator to be effective as a will. * * * Since extrinsic evidence is admissible to show the absence of testamentary intention, it does not become inadmissible because it does so by showing another intention", is irreconcilably inconsistent with the majority holding in *Re Estate of Smith* (1948), 31 Cal.2d 563, 568, 191 P.2d 413, 416, that evidence of "extraneous occurrences and declarations claimed to bear upon the intent to revoke" should not be received, "cannot overcome the valid [on its face] express revocation," and is "not admissible to show that an express [on its face] revocation clause was not intended to revoke a prior will."

There has been suggested no tenable basis for applying an exclusionary rule of evidence to the question of intent arising in the *Smith* case and a contrary rule to the same question in the case now before us. For the sake of uniformity of decision, either the majority holding of the *Smith* case should be squarely overruled or it should be followed here and all evidence on the subject of intent be held inadmissible.

TRAYNOR, Justice.

I dissent.

I concur in the opinion of the court that resort may always be had to extrinsic evidence to explain the actual intention with which an apparently testamentary instrument was executed and that the trial court properly admitted such evidence. In my opinion, however, that evidence, unequivocal, uncontradicted, and unimpeached, clearly demonstrates that Mrs. Sargavak did not intend by the letter of September 29, 1946 to direct the testamentary disposition of her property and the letter should not have been admitted to probate.

It is held that since the letter furnishes rational support for the finding of the trial court that it was executed with testamentary intent, the finding must be affirmed on appeal. The cases cited for the proposition that the extrinsic evidence was properly admitted, however, are also authority for the proposition that a finding of testamentary intent contrary to that evidence cannot be upheld even though it is supported by the terms and appearance of the questioned instrument. If the instrument cannot reasonably be found to be testamentary when read alone, there is no need to resort to extrinsic evidence. In most of the cited cases, not only was the language of the instrument indicative of testamentary intent, it was not indicative of any other. Nevertheless, when the evidence clearly demonstrates that the instrument so construed does not represent the true intention of the writer, it must be denied probate. In *re Estate of Kenyon*, 42 Cal.App.2d 423, 425, 109 P.2d 38; In *re Estate of Major*, 89 Cal.App. 238, 242, 264 P. 542; *Smith v. Smith*, 112 Va. 205, 70 S.E. 491, 33 L.R.A.,N.S., 1018; *Rennie v. Washington Trust Co.*, 140 Wash. 472, 249 P. 992; see 1 Underhill, Wills, § 39, pp. 47-48. Thus in the case of a law student who draws a practice will solely as a classroom exercise, uncontradicted evidence of this fact by the instructor and members of the class would overcome any indication of testamentary intent from the instrument itself. Although such an instrument might be written meticulously and in strict conformity with statutory requirements, it would not be entitled to probate, since the writer would not intend that it accomplish a testamentary disposition of his property.

Sometimes extrinsic evidence offered to contradict the apparently testamentary character of an instrument establishes that the decedent executed the instrument written in terms not his own, the legal import of which he neither realized nor intended, as in *Re Williams' Estate*, Tex.Civ.App., 135 S.W.2d 1078, where the decedent executed the instrument under the impression that it was a mortgage. Again, the evidence may establish that the decedent ex-

ecuted an instrument that met the formal requirements for a will, even that he intended that the instrument appear to be a will, but that his actual design was not that the instrument have testamentary effect, but that it serve a non-testamentary purpose not embodied in the instrument. *Lister v. Smith*, 3 S. & T. 282; *In re Estate of Siemers*, 202 Cal. 424, 435, 261 P. 298; *Fleming v. Morrison*, 187 Mass. 120, 123, 72 N.E. 499, 105 Am.St.Rep. 386. In *Fleming v. Morrison*, supra, the decedent, to induce a young woman to engage in illicit relations with him, executed a formal witnessed instrument designed to appear as a will, naming her as sole legatee. He showed it to her as his will, intending actually that it have no testamentary effect. The trial court, relying upon the testamentary appearance of the instrument, admitted it to probate. The appellate court reversed the order of admission, holding that it was error for the trial court to attribute any weight to the testamentary appearance of the instrument, since the decedent did not intend the instrument to be testamentary. See also *In re Estate of Kenyon*, 42 Cal.App.2d 423, 425, 109 P.2d 38. In each of the foregoing cases, the writer of the instrument did not thereby express or intend to express his actual intention; the terms of the instrument were designed to have no operative effect. The courts have therefore consistently held that when the evidence of the writer's actual intention is clear, convincing, and uncontradicted it is error to rely on evidence of a contrary intention appearing from the terms of the instrument alone. *Clark v. Hugo*, 130 Va. 99, 107 S.E. 730, 733; *In re Williams' Estate*, Tex.Civ.App., 135 S.W.2d 1078, 1082; *Estate of Kenyon*, 42 Cal.App. 2d 423, 425, 109 P.2d 38; *Rennie v. Washington Trust Co.*, 140 Wash. 472, 479, 249 P. 992; *In re Willing's Estate*, 212 Pa. 136, 61 A. 812, 814; *Succession of Torlage*, 202 La. 693, 698, 12 So.2d 683.

Often, however the evidence will indicate that the decedent sought to accomplish a specific purpose by the terms of the instrument and that this intention was expressed, although imperfectly, by the words chosen, but that the intention was non-testamentary.

That is this case. The court cannot disregard the terms of the instrument but must construe them together with the extrinsic evidence to determine their meaning. When the construction of the instrument is based solely on its terms without the aid of extrinsic evidence, or with the aid of extrinsic evidence that is without conflict, "it is the duty of an appellate court * * * to interpret the document independent of the construction given to it by the trier of the fact, and to make a final determination in accordance with the applicable principles of law." *In re Estate of Norris*, 78 Cal.App.2d 152, 159, 177 P.2d 299, 303; *In re Estate of Platt*, 21 Cal.2d 343, 352, 131 P.2d 825; *Union Oil Co. v. Union Sugar Co.*, 31 Cal.2d 300, 306, 318, 188 P.2d 470; *Trubowitch v. Riverbank Canning Co.*, 30 Cal. 2d 335, 339, 182 P.2d 182; *Western Coal & Mining Co. v. Jones*, 27 Cal.2d 819, 826-827, 167 P.2d 719, 164 A.L.R. 685; *First Trust & Savings Bank v. Costa*, 83 Cal. App.2d 368, 372, 188 P.2d 778; *In re Estate of O'Brien*, 74 Cal.App.2d 405, 407, 168 P.2d 432; *Lane-Wells Co. v. Schlumberger Well Surveying Corp.*, 65 Cal.App. 2d 180, 184, 150 P.2d 251; *Moffatt v. Tight*, 44 Cal.App.2d 643, 648, 112 P.2d 910; *Landres v. Rosasco*, 62 Cal.App.2d 99, 105, 144 P.2d 20.

In the present case, the extrinsic evidence is clear and unequivocal, uncontradicted and unimpeached. It demonstrates unmistakably that Mrs. Sargavak did not intend to direct a testamentary disposition of her property by the letter offered for probate. On the basis of that evidence, the letter should be denied probate notwithstanding the contrary finding of the trial court. See, *In re Kimmel's Estate*, 278 Pa. 435, 123 A. 405, 406, 31 A.L.R. 678.

The testimony of Mrs. Sargavak's nurse, set forth at length in the opinion of the court, demonstrates that the only motive for writing the letter was non-testamentary. No other construction can reasonably be placed on the testimony that:

"She said she had been so disturbed that day and was so very tired and worn out from trouble she had annoying her all day

long with her niece and her niece's daughter; that she didn't want them to be in her will at all, and she was writing this to fix it so they would know she didn't want them to have anything to do with her will."

Mrs. Sargavak again stated her motive for writing the letter, to respondent Mahdesian the following day:

"She said, 'She is always harassing me, nagging me, and telling me why we didn't leave anything for her in Harry's will, her uncle's will; why we gave so much money to the churches and benevolent organizations,' and she said, 'That disturbs me. So I told her that is my own money. We can do whatever we want with our money.' She says, 'Again yesterday she disturbed me and quarreled with me all day, so I have written something over here. I want you to take it and read it.'

As Mahdesian's testimony quoted in the opinion of the court indicates, Mrs. Sargavak wrote the letter with reference to the provisions of an existing will, to inform Mrs. Shooshan that she would receive nothing thereunder, and to empower Mahdesian to eject Mrs. Shooshan from her house. That she did not also intend thereby to direct the disposition of her property to Mahdesian and Ohanneson is unequivocally demonstrated by her answer to Mahdesian's query with respect to the allegedly dispositive provision:

"I said, 'Now what do you mean by this, that you want to leave your belongings to your son, Sam Mahdesian and her attorney, J. George Ohanneson and give them power of attorney?'

"Well, she said, 'You are the executor of Harry's estate, and also you are the executor in my will, and Mr. Ohanneson is our attorney. I want you folks to prepare and take care of my estate, my affairs, in the way that you know I want it. And whenever Lillian Shoostian ever gives any trouble, I want you to have this.'"

The declarations of the decedent before and after she wrote the letter preclude an inference that she intended thereby to make a testamentary disposition of her property. She had already executed a formal wit-

nessed will dated July 9, 1945. In her conversations with the nurse and with Mahdesian she continually referred to "my will," demonstrating her conviction that it was still operative.

It is undisputed that decedent's annoyance with Mrs. Shooshan and her daughter prompted the writing of the letter. That letter was intended as a notification to Mrs. Shooshan that she and her daughter would receive nothing under decedent's will. That purpose is clearly established by her statement to the nurse "that she didn't want them to be in her will at all, and she was writing this to fix it so they would know that she didn't want them to have anything to do with her will." To accomplish her purpose, Mrs. Sargavak did not have to change her will, since neither Mrs. Shooshan nor her daughter were mentioned therein. Her reference to the letter as a notification to Mrs. Shooshan and her daughter that she did not want them "to have anything to do with her will" demonstrates that she meant to affirm her will, not to revoke it. The existence of a previously executed and unrevoked formal will, to which the testatrix continually referred and which she still considered operative, reinforces the conclusion that she did not intend its revocation by an informal letter that made no reference thereto. In re Estate of Spencer, 87 Cal.App.2d 591, 598, 197 P.2d 351; White v. Deering, 38 Cal.App. 433, 438, 177 P. 516; In re Estate of Brannick, 172 Cal. 482, 157 P. 238; In re Estate of Hughes, 140 Cal.App. 97, 100-101, 35 P.2d 204.

This interpretation is confirmed by Mahdesian's uncontradicted testimony as to her explanation of the provision in the letter that she left everything to him and Ohanneson. Although that provision could be deemed dispositive if it stood alone, cf. McCloskey v. Tierney, 141 Cal. 101, 102, 74 P. 699, 99 Am.St.Rep. 33; Innes v. Potter, 130 Minn. 320, 153 N.W. 604, 3 A.L.R. 896, her explanation that "You are the executor of Harry's estate, and also you are the executor in my will, and Mr. Ohanneson is our attorney. I want you folks to prepare and take care of my estate, my affairs, in the

way that you know I want it" establishes that she wished her executor and her attorney to administer her estate under the terms of the will with which as executor and draftsman, respectively, they were familiar. Mahdesian was then acting as executor of her husband's will, and she was aware of an executor's responsibility for the administration of an estate until final distribution. Her purpose was not to make her executor and her attorney her legatees, but to provide them with an instrument that would demonstrate to Mrs. Shooshan that the latter would get none of the property that they were to distribute under her will.

The evidence makes it clear that Mrs. Sargavak did not intend to revoke her will, for her statements demonstrate that she regarded that will as still operative. Such was Mahdesian's understanding of her statements, although he would have been materially benefited by the interpretation urged by respondent Ohanneson. After the death of Mrs. Sargavak, Mahdesian tried unsuccessfully to get Mrs. Shooshan to leave the house, and then consulted Ohanneson as the decedent's attorney:

"Then I called the attention of this to Mr. Ohanneson. 'Mrs. Shoostian refuses to leave, and here is a paper written by Mrs. Sargavak to the effect that Mrs. Shoostian is not to get anything.'

"Then Mr. Ohanneson looked at it, studied it. 'No,' he said, 'Sam, that has another meaning, too.' He says, 'You and I are becoming the heirs to her estate.'

"My attitude in the matter was—I said, 'George, I cannot have a share in a thing like this.' I said, 'You have drawn Mr. Sargavak's and Mrs. Sargavak's will. You know what their desire was. You know what their wishes were. Mr. Sargavak earned that money and he has passed away, and I cannot give an interpretation to this power of attorney in this way. I cannot have any share.'

"Well, he says, 'that is up to you. If you don't want to have a part to it, you can waive your claim, but this is a codicil, and

half of it comes to you and half of it comes to me, and I am going to get my share.'

"My next statement to him was, 'George, when I shave in the morning I want to respect myself when I look in the mirror, and I can't do it taking advantage of a thing like this.'"

The trial court could not have reached its conclusion without disregarding the foregoing evidence. A trier of fact may disbelieve unimpeached testimony when its disbelief is warranted by the motives or interest of the witness or by contradictions appearing in the evidence, *Huth v. Katz*, 30 Cal.2d 605, 609, 184 P.2d 521, but here there is no basis for disbelief. The nurse had no apparent motive for falsifying her testimony, and respondent suggests none. Mahdesian would have been a legatee of an estate worth approximately \$24,000 if the letter were admitted to probate; he had nothing to gain by testifying to circumstances establishing that it was not intended as a will. The testimony of both witnesses was completely consistent with all the evidence adduced at the trial. Respondent offers no ground upon which the testimony could be disbelieved, nor does he even contend that it was false. "Testimony which is not inherently improbable and is not impeached or contradicted by other evidence should be accepted as true by the trier of fact." *Gomez v. Cecena*, 15 Cal.2d 363, 366, 101 P.2d 477, 478; *Southern Pacific Co. v. Railroad Commission*, 13 Cal.2d 125, 129, 87 P.2d 1052; *Nye & Nissen, Inc., v. Central Surety and Insurance Corp.*, 71 Cal.App.2d 570, 576-577, 163 P.2d 100; *Fidelity & Casualty Co. v. Abraham*, 70 Cal.App.2d 776, 782, 161 P.2d 689; *Cowan v. Hill*, 109 Cal.App. 656, 658, 293 P. 871. An examination of the letter in the light of the evidence leaves no room for any conclusion other than that it was not written with testamentary intent. I would therefore reverse the order admitting the letter to probate.

SHENK, and EDMONDS, JJ., concur.

Rehearing denied; SHENK, EDMONDS, and TRAYNOR, JJ., dissenting.

35 Cal.2d 49

LORENSON v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

No. L. A. 21155.

Supreme Court of California, in Bank.

April 4, 1950.

Harry M. Lorensen applied for a writ of prohibition to restrain the Superior Court in and for the county of Los Angeles from proceeding with the trial of petitioner and others under an indictment for conspiracy to commit robbery and assault with a deadly weapon and to pervert or obstruct justice or due administration of the laws. The Supreme Court, Edmonds, J., held that the evidence before the grand jury supported the indictment.

Petition for peremptory writ denied, and alternative writ discharged.

Carter, J., Gibson, C. J., and Traynor, J., dissented.

1. Indictment and Information $\Rightarrow$ 17

An indictment is mere accusation, presented by grand jury to competent court, charging a person with public offense. Pen.Code, § 917.

2. Indictment and Information $\Rightarrow$ 10

The duty to determine whether indictment should be found is lodged exclusively in grand jury, not courts. Pen.Code, § 921.

3. Indictment and Information $\Rightarrow$ 10

A court may not substitute its judgment for that of grand jury as to weight of evidence before such body, and if indictment is supported by some evidence, courts will not inquire into sufficiency thereof. Pen.Code, § 921.

4. Indictment and Information $\Rightarrow$ 137(4)

"Reasonable or probable cause," within statute requiring that indictment or information without reasonable or probable cause be set aside by court means such facts as would lead man of ordinary caution or prudence to believe and conscientiously entertain strong suspicion of accused's guilt, and may exist, though there may be some room for doubt. Pen.Code, §§ 872, 995, 1487(7).

See Words and Phrases, Permanent Edition, for other judicial constructions

and definitions of "Reasonable or Probable Cause".

5. Indictment and Information $\Rightarrow$ 10

Evidence before grand jury was sufficient to support indictment of police captain for conspiracy with others to commit robbery and assault with deadly weapon and to pervert or obstruct justice or due administration of laws. Pen.Code, §§ 92 et seq., 182, subd. 5, 921, 995.

6. Indictment and Information $\Rightarrow$ 10

Direct proof of formal understanding among parties to conspiracy is not required as basis of indictment or information therefor.

7. Conspiracy $\Rightarrow$ 47

To warrant conviction of conspiracy, state need not prove that parties thereto actually came together, mutually discussed their common design, and, after reaching formal agreement, set out on agreed course of conduct.

8. Conspiracy $\Rightarrow$ 44½

The extent of assent of minds involved in conspiracy may be inferred by jury from proofs of facts and circumstances apparently indicating, when taken together, that they are parts of same complete whole.

9. Indictment and Information $\Rightarrow$ 10

Grand jurors have discretion to determine whether evidence before them, in their judgment, would warrant conviction of accused by trial jury, and in that event should find indictment. Pen.Code, § 921.

10. Conspiracy $\Rightarrow$ 34

Generally, conduct constituting offense against public justice or administration of law, within statute defining criminal conspiracy, includes both malfeasance and non-feasance by an officer in connection with administration of his public duties and anything done by a person in hindering or obstructing an officer in performance of his official obligations. Pen.Code, § 182.

11. Conspiracy $\Rightarrow$ 34

A conspiracy with or among public officials not to perform their official duties to enforce criminal laws is "obstruction of

justice" and indictable offense at common law.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Obstruction of Justice".

12. Constitutional law ☞258

To comply with constitutional requirement of due process of law, crime for which defendant is being prosecuted must be clearly defined, but words in statute defining crime need only be well enough known to enable persons within its reach to understand and correctly apply them.

13. Constitutional law ☞258

A statute, to be sufficiently certain to comply with constitutional requirements, need not furnish detailed plans and specifications of acts or conduct prohibited thereby.

14. Criminal law ☞13

Though higher standards of certainty are required of penal, than of civil, statutes, a statute is sufficiently certain, if it employs words of long usage or with common law meaning, notwithstanding element of degree in definition as to which estimates might differ.

15. Conspiracy ☞34

Constitutional law ☞258

The penal code subsection, defining as criminal conspiracy acts committed with purpose to pervert or obstruct justice or the due administration of the laws, is not so vague and uncertain as to violate constitutional requirements of due process of law. Pen.Code, §§ 92 et seq., 182, subd. 5.

16. Indictment and Information ☞110(10)

An indictment in statutory language for conspiracy to commit robbery and assault with deadly weapon and to pervert or obstruct justice or due administration of laws was not vague, indefinite or uncertain, as it fairly informed accused of acts charged to such extent as to enable him to defend himself. Pen.Code, §§ 182, subd. 5, 952.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Deputy County Counsel, W. E. Simpson, District Atty., Jere J. Sullivan and Robert Wheeler, Deputy District Attys., Los Angeles, for respondent.

EDMONDS, Justice.

Harry M. Lorensen and twelve other persons were indicted for conspiracy to commit robbery, to commit assault with a deadly weapon and to pervert or obstruct justice or the due administration of the laws. The present proceeding to restrain the Superior Court, by writ of prohibition, from proceeding with the trial of the action, is prosecuted chiefly upon the ground that there was insufficient evidence before the grand jury to show that Lorensen committed any crime.

From the testimony presented to the grand jury, it appears that Alfred Pearson was the principal employee of the Sky Pilot Radio Shop located in a residential district of Los Angeles. His general reputation as an unreliable business man was not bettered by newspaper publicity to the effect that he had obtained title to the home of a Mrs. Phillips by legal proceedings arising out of a controversy over a repair bill of less than \$10. The accounts of his dealings with Mrs. Phillips, coupled with stories of his assertedly unfair business practices in other transactions, had brought about a general wave of indignation in the neighborhood.

For some time prior to Pearson's difficulties with Mrs. Phillips, Lorensen, a captain in the Police Department of Los Angeles, had been assigned to duty with the Police Commission. He had directed the arrest and prosecution of Pearson on several criminal charges. Pearson was acquitted in each of these cases with the exception of one in which he was fined \$500 for a violation of the federal law administered by the Office of Price Administration.

Each man intensely disliked the other. At one time Pearson sued Lorensen and several other persons, claiming damages because of an asserted conspiracy to ruin his business. Lorensen made no effort to conceal his ill will toward Pearson and re-

Russell E. Parsons, Los Angeles, for petitioner.

peatedly voiced his hatred and enmity toward the radio man.

"Mickey" Cohen is a shadowy character in this picture of the situation at the time of the events which are the basis for the challenged indictment. According to testimony presented to the grand jury, Cohen is a well known hoodlum of Los Angeles and a generally nefarious character. The indictment is based upon evidence tending to show that Lorensen interested himself in Mrs. Phillips' difficulties with Pearson and enlisted as aids in his purpose to help her, and punish Pearson, a lawyer and seven of "Mickey's" henchmen.

The overt acts of Lorensen and those indicted with him took place within about 24 hours before a severe beating of Pearson on a Saturday afternoon. The story commences with a conversation between Lorensen and Jerome Weber, an attorney, which took place the previous morning. See *Weber v. Superior Court*, Cal.Sup., 216 P.2d 871. At that time, Lorensen asked Weber whether he would represent Mrs. Phillips in a suit to set aside the sale of her home to Pearson. When Weber agreed to act as her attorney, Lorensen stated that he would talk with Mrs. Phillips and make an investigation for the purpose of obtaining facts to be used in the prosecution of the action.

Lorensen then went to the Wilshire Police Station and discussed Mrs. Phillips' case with Acting Captain Swan. While commenting upon Pearson, Swan remarked that if Pearson came to the Wilshire Station he would be thrown down the stairs. Lorensen then called upon Mrs. Phillips, telling her he was sure her home could be recovered and that Jerome Weber would do the legal work without charge. Lorensen then saw Weber, who said he would take the case without fee.

In the afternoon, Lorensen received a telephone call from an unknown person who told him that there would be pickets in front of Pearson's store the next day carrying banners stating in substance: "Don't patronize Mr. Pearson. He took a widow's home away for this repair bill, eight (or) nine dollars." Lorensen made no official report of this conversation.

On the following morning, James Rist, one of Cohen's associates, ordered four signs painted with wording to the effect that Pearson had taken a widow's home for a \$9.00 repair bill. The signs were delivered to Rist about 10 a. m. of that day.

Less than one hour later, Rist with David Ogul visited the radio shop and asked for Pearson. He was not there. When they found him in the shop about 2:30 p. m., they told him that they represented a magazine and wished to hear his version of the controversy between him and Mrs. Phillips. As they were unable to identify themselves, Pearson ordered them to leave. When Rist objected, Pearson threatened to call the police, stating at the same time that a recording had been made of their conversation. Ogul and Rist then left.

At 3:15 p. m., Pearson received a telephone call from someone who represented himself as the editor of a Los Angeles newspaper. The supposed editor apologized for conduct of Ogul and Rist, stated that they were reporters for his paper and requested an interview on their behalf. Pearson agreed to an interview with the same or other reporters. As was his custom, Pearson made a recording of this conversation.

About 30 minutes later, Rist and Ogul, with Eli Lubin and another person, returned to the radio shop. One of the men carried a camera. Pearson informed them of the conversation with the editor and said that he would give them an interview. He then played a portion of the recorded telephone conversation for them. When Pearson invited the four men behind a partition where the recording device was located, without any warning, they beat him about the head and body with a gun, clubs, iron rods and other heavy objects. Pearson's arm was broken and his head cut in five places. They tore telephones from the wall and after taking the machine which contained the record of the conversation with the "editor", made their escape in an automobile which was double-parked in front of the store.

Because of a minor traffic violation, officers in a passing patrol car gave chase. Tire irons, a gun, and a riding crop were

thrown from the speeding car. In response to a radio call for assistance, four police cars responded. When the automobile was overtaken, the officers found that it had seven occupants, Rist, Ogul and Lubin, Frank Niccoli, Louis Schwartz, Harold Meltzer, and Edward Herbert, all associates of Cohen. After the men were arrested and while they were being searched, an amateur photographer took pictures of the party. The officers with their prisoners arrived at the Wilshire Station about 4:25 p. m.

At approximately 4:10 p. m., which places the conversation just at the time of the beating of Pearson and the pursuit of the men who had attacked him, Jerome Weber called the Wilshire Station and asked if anyone had been arrested in connection with a disturbance at Pearson's place of business. Upon being informed by Officer Barkley that no such person had been brought in, Weber requested that the booking of any one arrested on that charge be delayed until he had arrived at the station. Burton Mold, see *Mold v. Superior Court*, Cal.Sup., 216 P.2d 874, interrupted Weber's conversation and asked Barkley, to whom he was known, if Dave Ogul and two others, whom he named, had been arrested because of a disturbance of the peace or a fight. When he was told that they were not at the station, Mold asked Barkley to extend every courtesy to Weber, as he and Weber were very good friends.

Just before Weber and Mold were talking with Barkley, Lorenson received a telephone call at his home from a man who identified himself as a newspaper reporter. Lorenson stated that he thought that his caller gave the name of Beacon or Bacon, but no reporter having either name was ever located. The alleged reporter asked Lorenson, "Have you heard about any trouble out at Pearson's, the Sky Pilot radio repair man?" Lorenson replied that he had not, and the supposed reporter said, "I understand he got beat up and they took him to the station." According to the testimony of Lorenson fixing the time of this conversation, it occurred before the seven arrested men reached the station. No report of the incident had then been made by the arresting officers. Lorenson then called the Wil-

shire Station and spoke to the Desk Sergeant and Officer Shea of the Detective Bureau. After asking Shea if any arrests had been made of pickets at Pearson's radio shop, Lorenson said, "It would be too bad if some pickets got in trouble by being pushed around or getting pushed around at Pearson's place."

Within a few minutes after the arrested men arrived at the Wilshire Station, Acting Captain Swan, with whom Lorenson had discussed the Pearson case on the day before, called from his home concerning the arrest. When he was informed that arrests had been made, Swan had the names of the men read to him, and asked if they had any connection with the Sky Pilot Radio Shop. He was told that the arrests concerned Pearson's business. Swan then gave instructions to immediately release the prisoners and get them out of the station without attracting attention before Pearson could arrive to identify any of them.

In this conversation Swan directed that the tire irons, guns, recording device, and other objects which had been turned in as evidence, be returned to the prisoners. He also ordered Officer Wolfe, on duty at Wilshire Station, to caution the arresting officers not to talk about the incident. Wolfe accordingly informed those officers that they should destroy their notes concerning the arrest, say nothing about the incident and, if questioned, deny that an arrest had been made. Wolfe told the officers that the release was being effected because of a captain connected with the Police Commission who had a grudge against Pearson.

Swan subsequently informed one of the Los Angeles newspapers that no arrests had been made as a result of the Pearson beating, adding that he knew nothing of the affair. He later stated that some legitimate business men, all of whom had permits to carry guns, had been arrested by mistake but had been released. When Mrs. Pearson appeared at the Wilshire Station to identify the prisoners, she was informed by Swan that no prisoners had been brought in and that no arrests had been made.

Some hours later, Swan telephoned to Lorenson and told him of Pearson's claim

that he had been attacked as the result of Lorensen's activities. He also stated that the arrested men had been released. At no time during this conversation did Lorensen inquire as to why the men were released without being booked.

Despite Swan's instructions to the arresting officers to deny the arrest, and Cohen's attempts to purchase the pictures taken on the street at the time the seven men were being searched, photographs of the group were published in a newspaper with a story concerning the Pearson affray. Shortly afterward, the district attorney presented all of this testimony, with Pearson's account of the attack upon him, to the grand jury, which returned an indictment against Lorensen, Swan, Wolfe, Weber and Mold. Cohen and the seven men arrested when the automobile in which they endeavored to escape was overtaken were also named as defendants.

Lorensen attacks this indictment principally upon the ground that there was no evidence presented to the grand jury which connects him with the conspiracy in which he is asserted to have been a participant. He declares that the evidence shows no conduct by him which constitutes a crime, and that he should not be required to stand trial upon the charge against him.

[1-3] An indictment is but an accusation, presented by the grand jury to a competent court, charging a person with a public offense. Pen.Code, sec. 917; *Greenberg v. Superior Court*, 19 Cal.2d 319, 121 P.2d 713; *People v. Goldenson*, 76 Cal. 328, 19 P. 161. The duty of determining whether or not an indictment should be found is lodged exclusively in the grand jury and not in the courts. The Legislature has stated that duty as follows: "The grand jury ought to find an indictment when all the evidence before them, taken together, if unexplained or uncontradicted, would, *in their judgment*, warrant a conviction by a trial jury." Pen.Code, sec. 921; emphasis added. A court may not substitute its judgment as to the weight of the evidence for that of the grand jury. "If there is some evidence to support the indictment the courts will not inquire into its sufficiency (see cases collected in 59 A.L.R. 573)."

Greenberg v. Superior Court, supra [19 Cal.2d 319, 121 P.2d 715].

At common law, and for many years in this state, an indictment returned by a grand jury was unimpeachable. *People v. Tinder*, 19 Cal. 539, 81 Am.Dec. 77; see *In re Kennedy*, 144 Cal. 634, 78 P. 34, 67 L.R. A. 406, 103 Am.St.Rep. 117, 1 Ann.Cas. 840. But in the *Greenberg* case this court considered a transcript of the testimony before the grand jury which included no evidence even remotely supporting the charges made in the indictment. The court held that "when no evidence has been presented to connect him with the commission of the crime charged, * * * unless there is some rational ground for assuming the possibility that he is guilty", the indictment is void and it confers no jurisdiction upon a court to try him for the offense. (Emphasis added.)

In the *Greenberg* case, the defendants were charged with conspiracy to defraud an insurance company. There was no evidence presented to the grand jury concerning *Greenberg* which, directly or indirectly, tended to show any act by him either connected or unconnected with the alleged conspiracy. The sole evidence relating to *Greenberg* was the nonresponsive answer of an insurance investigator who stated: "* * * I have heard the name *Greenberg*." The decision holding the indictment to be void because it was unsupported by any evidence has in no way restricted the discretion placed in the grand jury by section 921 of the Penal Code. Rather, the court expressly recognized that exclusive discretion, and condemned only "arbitrary indictments unsupported by any evidence."

[4] By section 995 of the Penal Code, an information, and, since 1949 an indictment, "must be set aside by the court [if the defendant] has been indicted without reasonable or probable cause" or "committed without reasonable or probable cause." The term "probable cause", as used in this connection, was defined in *People v. Nagle*, 25 Cal.2d 216, 222, 153 P.2d 344, 347, in which it was pointed out that the evidence which will justify a prosecution need not be sufficient to support a conviction. As

stated by Justice Carter, "Section 872 of the Penal Code provides that the defendant must be held to answer if 'it appears from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof.' Section 1487(7) of the Penal Code provides that a party is entitled to discharge upon habeas corpus proceedings where he has 'been committed on a criminal charge without reasonable or probable cause'; 'sufficient cause,' therefore, means no more than that. *People v. Putnam*, 20 Cal.2d 885, 129 P.2d 367; *Cleugh v. Strakosch*, 9 Cir., 109 F.2d 330; *In re Martinez*, 36 Cal.App.2d 687, 98 P.2d 528. 'Reasonable or probable cause' means such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused. 'Reasonable or probable cause' may exist although there may be some room for doubt."

[5] From the facts upon which the indictment of Lorenson is based, certain inferences reasonably may be drawn. The grand jury could infer from the events which transpired that an understanding or agreement had been entered into among Lorenson, Cohen and his associates, Weber, Mold, Swan and other members of the Police Department, to assault and rob Pearson and also to obstruct the administration of justice in the litigation between him and Mrs. Phillips. Certainly the evidence justifies the conclusion that the recording machine was stolen from Pearson in order to protect those persons who took part in the conversations which were recorded. Also, the inference reasonably may be drawn that Lorenson and police officers of the Wilshire Station were to furnish protection to the participants in the conspiracy by refusing to disclose the identity of Pearson's attackers, if they were arrested, and to effect their release from custody. The conduct of Lorenson, Weber and Mold subsequent to the arrest may well have been in furtherance of the conspiracy and to carry out its unlawful object, as well as to protect the parties to it from detection.

The telephone conversations, considered in their relation to the time when the beat-

ing was administered to Pearson, fit into a common scheme or plan by Lorenson, Weber, Mold and the arrested men. The grand jurors had a right to disbelieve explanations or denials of the defendants, *McFarland v. Superior Court*, 88 Cal.App. 2d 153, 198 P.2d 318, and the evidence presented in connection with the attack upon Pearson was ample to justify at least the suspicion that the crime charged in the indictment had been committed by Lorenson and the other persons named in it.

[6-8] Direct proof of a formal understanding between parties to the conspiracy is not required as the basis of an indictment or information. "[I]t was not necessary for the state to prove that the parties actually came together, mutually discussed their common design, and after reaching a formal agreement set out upon their previously agreed course of conduct. The extent of the assent of minds which are involved in a conspiracy may be, and from the secrecy of the crime usually must be, inferred by the jury from the proofs of the facts and circumstances which, when taken together, apparently indicate that they are parts to the same complete whole. *People v. Jones*, 136 Cal.App. 722, 29 P.2d 902; *People v. Benenato*, 77 Cal.App.2d 350, 175 P.2d 296." *People v. Burton*, 91 Cal.App.2d 695, 708, 205 P.2d 1065, 1073.

[9] According to Lorenson, the grand jury should have concluded that the seemingly related events were unconnected and occurred by mere happenstance. But assuming that the facts are consistent with such a construction of them, the conduct shown by the record does not, as a matter of law, require it. Certainly it cannot be said that there is no basis for a strong suspicion of guilt. Such a conclusion is not unreasonable nor one which could not be held by a man of ordinary caution or prudence. The testimony as to the events shown by the record provide the basis for an inference that there was a broad plan in which Lorenson was an active participant. "Without explanation or contradiction of those facts by the defendant, * * and which the grand jury had a right to disbelieve, the jurors had the discretion to determine, 'in their judgment' whether the

evidence would 'warrant a conviction by a trial jury.' In that event * * * the jury 'ought to find an indictment,' as it did. We may not interfere with that discretion of the grand jury, or weigh the evidence adduced to determine its sufficiency." *McFarland v. Superior Court*, 88 Cal.App. 2d 153, 158, 198 P.2d 318, 321.

The petitioner relies upon the statement in *Dong Haw v. Superior Court*, 81 Cal. App.2d 153, 183 P.2d 724, to the effect that mere association does not make a conspiracy; there must be evidence of some participation or interest in the commission of the offense. But the only links connecting *Dong Haw* with the alleged conspiracy was his parental relation to the other actors, his ownership of the building in which a Chinese Social Club was located, and ownership of a truck used to deliver some liquor. Other than as landlord, he had no connection with the club which was being closed by police order, and it affirmatively appeared that a letter bearing his name was not signed by him or with his knowledge or consent. There was no evidence, direct or circumstantial, tending to prove that *Dong Haw* had ever participated in the bribery, if that crime was committed, or from which it reasonably might be inferred that he was interested in obtaining any favor from the police department.

In the present case, *Lorenson's* acts may well have been in furtherance of a common plan to accomplish an unlawful purpose. A conclusion that the conversations and the arrangements made by him were not merely a series of strange coincidences, but a part of that plan, has much more foundation than mere suspicion. Indeed, it is a logical inference which reasonably may be drawn from the testimony regarding his conduct in connection with that of the other persons named as conspirators. Here it cannot be said, as in the *Greenberg* case, that there is "no evidence even remotely supporting the charges made against petitioner"; on the contrary, there is some "rational ground for assuming the possibility that he is guilty." Clearly, the indictment of *Lorenson* is not "unsupported by any evidence."

Lorenson attacks the statute making criminal conspiracy an offense upon the ground that it is so vague and uncertain as to be violative of the constitutional requirements of due process. He also contends that the indictment is equally vague and indefinite.

[10] Section 182 defines as criminal conspiracy acts committed with the purpose " * * * to pervert or obstruct justice, or the due administration of the laws." Generally speaking, conduct which constitutes an offense against public justice, or the administration of law includes both malfeasance and nonfeasance by an officer in connection with the administration of his public duties, and also anything done by a person in hindering or obstructing an officer in the performance of his official obligations. Such an offense was recognized at common law and generally punishable as a misdemeanor. Now, quite generally, it has been made a statutory crime and, under some circumstances, a felony. *Burdick, Law of Crimes* [1946], vol. 1, p. 382, et seq.; 20 Cal.Jur. 347-354.

[11] In California, the statutes relating to "Crimes Against Public Justice" are found in Part I, Title VII, of the Penal Code. Bribery, escapes, rescues, perjury, falsifying evidence, and other acts which would have been considered offenses against the administration of justice at common law are made criminal by legislative enactment. Section 182, subdivision 5, is a more general section making punishable a conspiracy to commit any offense against public justice. The meaning of the words "to pervert or obstruct justice, or the due administration of the laws" is easily ascertained by reference either to the common law or to the more specific crimes enumerated in Part I, Title VII. A conspiracy with or among public officials not to perform their official duty to enforce criminal laws is an obstruction of justice and an indictable offense at common law. *People v. Tenerowicz*, 266 Mich. 276, 253 N.W. 296. In the same category is a conspiracy to obtain the release of a person charged with a felony by presenting a

worthless and void bail bond. Such a conspiracy has been held to be a perversion of the due administration of the law, and an offense within the meaning of subdivision 5 of section 182 of the Penal Code. *People v. Ambrose*, 31 Cal.App. 460, 160 P. 840.

[12,13] To comply with the constitutional requirement of due process of law, the crime for which a defendant is being prosecuted must be clearly defined, but it is only necessary that the words used in the statute be well enough known to enable those persons within its reach to understand and correctly apply them. "To make a statute sufficiently certain to comply with constitutional requirements, it is not necessary that it furnish detailed plans and specifications of the acts or conduct prohibited." *People v. Smith*, 36 Cal.App. Supp.2d 748, 752, 92 P.2d 1039, 1042.

[14] Although higher standards of certainty will be required of penal than of civil statutes, *Levy Leasing Co. v. Siegel*, 258 U.S. 242, 42 S.Ct. 289, 66 L.Ed. 595, a statute is sufficiently certain if it employs words of long usage or with a common law meaning, "notwithstanding an element of degree in the definition as to which estimates might differ." *Connally v. General Const. Co.*, 269 U.S. 385, 46 S.Ct. 126, 128, 70 L.Ed. 322; *International Harvester Co. v. Kentucky*, 234 U.S. 216, 34 S.Ct. 853, 58 L.Ed. 1284; *Nash v. United States*, 229 U.S. 373, 33 S.Ct. 780, 57 L.Ed. 1232. For example, the courts have upheld statutes employing such terms as: "to make diligent effort to find the owner", *Pacific Coast Dairy v. Police Court*, 214 Cal. 668, 8 P.2d 140, 141, 80 A.L.R. 1217; "unreasonable speed," *Ex parte Daniels*, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172; "unjustifiable physical pain or mental suffering" *People v. Curtiss*, 116 Cal.App.Supp. 771, 300 P. 801, 802; "practice law", *People v. Ring*, 26 Cal.App.Supp.2d 768, 70 P.2d 281; and "to the annoyance of any other person", *People v. Beifuss*, 22 Cal.App.Supp.2d 755, 67 P.2d 411, 412.

[15,16] Considering the well-settled meaning at common law of the words "to pervert or obstruct justice, or the due administration of the laws", the other and

more specific provisions in the Penal Code concerning "Crimes Against Public Justice", and the relative certainty of words employed in statutes which have been held valid, it cannot be said that subsection 5 of section 182 of the Penal Code is unconstitutional. For substantially the same reasons, the indictment against *Lorenson* is not vague, indefinite, or uncertain and it complies with the statutory requirement for such an accusation. Section 952 of the Penal Code allows an indictment to be stated "in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused." *Lorenson* was indicted in the terms of the "enactment describing the offense", and the grand jury has fairly informed him of the acts of which he is accused to the extent which will enable him to defend himself. *People v. Emmons*, 13 Cal.App. 487, 492, 110 P. 151.

The petition for the peremptory writ of prohibition is denied, and the alternative writ is discharged.

SHENK, SCHAUER and SPENCE, JJ.,
concur.

CARTER, Justice.

I dissent.

The factual basis on which it is sought to hold petitioner may be outlined as follows: Alfred Pearson worked in a radio store in Los Angeles. He became heartily disliked by the people in the neighborhood of the store because of his unfair dealings in connection with the repair and sale of radios. Some members of the Los Angeles police force, including petitioner, who were disturbed by complaints made to them concerning Pearson's practices, also disliked him. One particular alleged incident that was highly provocative consisted of the taking by Pearson of a widow's (Mrs. Phillips') home for an \$8.09 radio repair bill. The tension created by the public's feeling of animosity was increased by a feature story in a local newspaper concerning that incident. On the afternoon of Saturday, March 19, 1949, Pearson, while at the radio

shop, was severely beaten by a group of men, some of whom are the other persons also indicted with petitioner, and are associates of Michael Cohen, a defendant. Those men took a wire recording machine from the shop when they left after the assault and battery inflicted on Pearson. The charge of conspiracy to commit that battery and theft of the recorder arises out of that incident. Apparently the theft of the recording machine is related to an incident occurring earlier the same afternoon when two men (of the assaulting group) made calls on Pearson, representing themselves as reporters desiring Pearson's side of the story concerning Mrs. Phillips and the loss of her home. Pearson took a recording on the wire recorder of the conversation on those visits and advised his visitors that he had done so.

After leaving the radio shop in a car, the men were pursued by a radio police patrol car, not because of the assault and theft, but for a traffic violation observed by the officers in the patrol car. A gun, tire irons, and other articles were thrown from the pursued car and finally the occupants surrendered and were arrested under menace of the armed officers in the patrol car. The suspects were taken to a police substation (Wilshire Station), and were released after being there a short time. They were not booked, and the articles discarded by them were returned to them. An amateur photographer had taken photographs of the field arrest, and there is evidence that after the release, an attempt was made by Cohen to purchase those pictures from a local newspaper with the idea of suppressing them. The circumstances relating to the release of the suspects, and the attempt to suppress the pictures, constitute the *sole* basis of the charge of conspiracy to obstruct and pervert justice against petitioner and others embraced in the indictment here under attack.

In order to connect petitioner Lorensen (a captain in the Los Angeles police force and assigned to "downtown" duty with the police commission) with the conspiracy, the prosecution refers to evidence that Lorensen did not like Pearson; Pearson had sued Lorensen and others charging a conspiracy

to ruin his business; at the instance of Lorensen, Pearson had been arrested several times, but Pearson was not convicted except in one case; on the Friday before the day of the assault, Lorensen asked Jerome Weber, see *Weber v. Superior Court*, Cal.Sup., 216 P.2d 871, an attorney, to represent Mrs. Phillips in connection with an effort to recover her home and said he would talk to Mrs. Phillips about it, and thereafter went to the Wilshire substation and talked to the Acting Captain (Swan) in charge, about Pearson and the Phillips matter; thereafter Lorensen spoke to Mrs. Phillips concerning the employment of Weber and then obtained Weber's agreement to take the case. On Friday afternoon, Lorensen received a telephone call from a person whose name he did not recall, saying there would be pickets at the Pearson radio shop the next day publicizing the Phillips affair, however, the call was from Mr. Satchell, representative of the West Adams Merchants' Association, for he testified that he had called Lorensen that afternoon to inquire whether it would be illegal to peacefully picket Pearson's place. Rist, one of Cohen's associates and a defendant, obtained picket signs Saturday morning. After the suspects had been arrested, but before arriving at the Wilshire Station, Weber called the station and inquired whether any one had been arrested in connection with a disturbance at Pearson's place and, on being informed that no one had been brought in, requested that he be informed if any one was, in order that he could come to the station before they were booked. Burt Mold, another defendant, see *Mold v. Superior Court*, Cal.Sup., 216 P.2d 874 was at Weber's office at the time and interceded in the telephone conversation to request that courtesies be extended to Weber, he knowing some of the officers at the station, and inquiring as to whether one of the assaulting group (Ogul) had been brought in. About the time of this call, Lorensen received a telephone call from a man representing himself to be a newspaper reporter asking if he had heard of the trouble at Pearson's and he was told of it. He thought the reporter's name was Beacon or Bacon. Lorensen then called the

Wilshire Station and asked if they had any pickets from Pearson's, and stated that it would be "too bad if some pickets got in trouble by being pushed around or getting pushed around at Pearson's place". Later that afternoon, Lorenson called Benson, a newspaper reporter, and asked what the "deal" was on Pearson. Benson said six men had been arrested and released, to which Lorenson replied "Oh", and said Pearson was no good. The direct cause of the release of the suspects was a telephone order to the station from Acting Captain Swan. The officer at the station (Wolfe) receiving that call told the arresting officers to release the prisoners because "the thing was bigger" than any one of them—that it was done for a captain downtown connected with the police commission who had a grudge against Pearson. The following morning Swan called Lorenson and said Pearson blamed the latter for the attack on him and that the arrested suspects had been released. Lorenson did not ask why they had been released. The photographs of the arrest were shown to Swan by the newspaper having them and he expressed surprise and concern.

In connection with the statement by officer Wolfe to the arresting officers, it appears that his reference to a "downtown" captain who had a grudge against Pearson *was merely his conclusion from an unrevealed source*, for while the suspects were at this station, he received a telephone call from Acting Captain Swan who was in charge of the station. *(There is no evidence that he was called by Lorenson.)* It was Swan who told him to release the men—get them out of the station quickly and in a manner that they would not be observed. *He did not say anything about a "downtown" officer who had a grudge against Pearson and gave no reason for the release order.* Wolfe said he "gave" them (the arresting officers) what he thought was a "logical" explanation for the release order which opinion was based on nothing more than his knowledge that Lorenson did not like Pearson. *He felt that he had to give some explanation to preserve the morale of the force.*

Lorenson's duties *required him to investigate complaints by people claiming to have been cheated and many of such were against Pearson.*

Summarizing, it appears that Lorenson disliked Pearson, this dislike arising from several incidents occurring in the course of his duties as police officer, and he was taking some steps to have Mrs. Phillips' interests protected against Pearson's avarice. Thus, the most that may be inferred is that he had a motive to participate in retaliation against Pearson and that he knew something was afoot (*what, does not appear, except possibly lawful picketing*) concerning Pearson, and that he instructed an officer at Wilshire Station that such lawful "pickets" should not be badly treated.

In an endeavor to make a case from the evidence presented to the grand jury, the majority opinion indulges in unsupportable inferences and magnifies certain facts out of proportion to their true significance. For illustration, on the latter score, it is said petitioner "hated" and "intensely" disliked Pearson. There is no evidence of that; only dislike is shown. The arrests of Pearson by petitioner on former occasions carries no imputation of hate. They were made on *complaints by citizens* and in the line of petitioner's special police duties. There is not a scintilla of evidence that petitioner enlisted "the aid of the other defendants to punish Pearson". It is not true that the person who called Lorenson on Friday afternoon about picketing Pearson was unknown. Petitioner merely said he did not recall his name, and, as above stated, the caller was one of Pearson's neighbors, a member of a merchants' association, and one of the group who were incensed at Pearson's dealings. It is said, in connection with petitioner's reference to a call by a reporter concerning trouble at Pearson's store, that no such person as "Beacon or Bacon" was shown to be a reporter. Petitioner had no obligation to make such a showing.

The majority infers that the recording machine was taken to protect the persons assaulting Pearson, but that does not con-

nect petitioner with crime. Even if the grand jury may disbelieve petitioner's denials, there still is nothing left. An inference of guilt cannot be deduced from a denial thereof. The majority concedes that there was only a "suspicion" or a "strong suspicion" that petitioner was involved, and then quotes from *McFarland v. Superior Court*, 88 Cal.App.2d 153, 198 P.2d 318, 321, that "without explanation or contradiction of those facts", they are enough. But here we have *both explanation and contradiction*. As I said before, we have nothing more than a possible motive on petitioner's part coupled with a foreknowledge that something was going to happen. That foreknowledge was clearly and adequately explained.

Clearly the majority is relying upon nothing more than suspicion which is neither "reasonable or probable cause" as required by the 1949 amendment to section 995 of the Penal Code, nor is it "some" evidence as is required by *Greenberg v. Superior Court*, 19 Cal.2d 319, 121 P.2d 713. While it is true that the evidence before the grand jury need not be equal to that required for a conviction—eliminate all reasonable doubt, see *Greenberg v. Superior Court*, *supra*; *People v. McRae*, 31 Cal.2d 184, 187 P.2d 741; *People v. McGee*, 31 Cal.2d 229, 187 P.2d 706; *People v. Tallman*, 27 Cal.2d 209, 163 P.2d 857; *People v. Mitchell*, 27 Cal.2d 678, 166 P.2d 10; *People v. Nagle*, 25 Cal.2d 216, 153 P.2d 344, still it must do more than establish a mere conjecture, surmise, or suspicion. As stated in *Dong Haw v. Superior Court*, 81 Cal.App.2d 152, 158, 183 P.2d 724, 727, involving a test of an indictment on prohibition: "*Conspiracies cannot be established by suspicions*. There must be some evidence. *Mere association does not make a conspiracy*. There must be evidence of some participation or interest in the commission of the offense."

Statements from *Greenberg v. Superior Court*, *supra*, are urged as support for the claim that any evidence, however tenuous or remote, that may relate both to the petitioner and the crime charged, will support the indictment. I cannot agree with this interpretation of our decision therein. It

is true that this court there stated that the testimony before the grand jury "upon which the indictment was based contains no evidence even remotely supporting the charges made against petitioner", 19 Cal.2d at page 321, 121 P.2d at page 715, and that "If there is some evidence to support the indictment the courts will not inquire into its sufficiency." 19 Cal.2d at page 322, 121 P.2d at page 715. These statements should not be construed as requiring the denial of the writ whenever any evidence concerning the petitioner has been presented to the grand jury. Evidence that will support an indictment must be relevant to the commission of the crime charged. Evidence that does no more than establish that the petitioner and the alleged perpetrators of the crime knew each other, or that only places the petitioner on the periphery of the events that are the basis of the indictment is no evidence within the meaning of the *Greenberg* case. See, *Dong Haw v. Superior Court*, *supra*, 81 Cal.App.2d at page 158, 183 P.2d 727. An indictment is supported by "some" evidence only when that evidence connects the petitioner with the commission of the crime.

We should not lose sight of the fact that this indictment was based on an alleged conspiracy. The only evidence that will support such an indictment is evidence that will connect the petitioner with the "promotion of the venture" that is the basis of the indictment. *United States v. Falcone*, 2 Cir., 109 F.2d 579, 581. Without such evidence, acts done by other persons, with whom there is evidence of petitioner's lawful association, cannot be permitted to support an indictment. In this connection, the remarks of Mr. Justice Jackson in *Krulewitch v. United States*, 336 U.S. 440, 69 S.Ct. 716, 723, are particularly pertinent:

"As a practical matter, the accused often is confronted by a hodge podge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy ex-

isted. The naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction. * * *

"A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its merits in the minds of jurors who are ready to believe that birds of a feather are flocked together."

Viewing the evidence most favorable to the prosecution, it can only be said that wrongdoing by someone was established and that petitioner was in some insubstantial way generally associated with some of the wrongdoers and placed on the periphery of the events that constituted the wrongdoing. Petitioner disliked Pearson because of the latter's alleged unfair practices; he engaged petitioner Weber, Cal. Sup., 216 P.2d 871, to represent a plaintiff (Mrs. Phillips) in a case against Pearson based upon those practices. There is evidence that he was informed that Pearson's shop was going to be picketed by irate housewives. There is no evidence that he knew that the picketing would not be peaceful or that it would not be conducted by housewives. There is evidence that he subsequently learned that the picketing had resulted in injury to someone and the arrest of the pickets, but there is no evidence that he was then aware of their identity or that he took any action to obtain their release as charged in the indictment. None of these acts were unlawful or unusual. They do not constitute even "some" evidence of a conspiracy. The evidence falls short of showing any agreement between petitioner and others to engage in the perpetration of a crime. It does no more than establish that he, among many others besides the conspirators, disliked a person against whom a conspiracy was brewing and that he had some foreknowl-

edge and knew some of the conspirators. There is no evidence within the meaning of the Greenberg case. See, *People v. Yant*, 26 Cal.App.2d 725, 736, 80 P.2d 506; *People v. Rodriguez*, 37 Cal.App.2d 290, 99 P.2d 363; *People v. Zoffel*, 35 Cal.App. 2d 215, 95 P.2d 160; *People v. Weber*, 7 Cal.App.2d 620, 622, 46 P.2d 222; *People v. Jordan*, 24 Cal.App.2d 39, 51, 74 P.2d 519; *People v. Long*, 7 Cal.App. 27, 93 P. 387; *People v. Stevens*, 68 Cal. 113, 8 P. 712; *People v. Savinovich*, 59 Cal.App. 240, 210 P. 526.

Turning to the statutory requirement of reasonable or probable cause, Penal Code, sec. 995, we find the general rule stated: "The term 'probable' has been defined to mean 'having *more evidence for* than against; supported by evidence which inclines the mind to believe, yet leaves room for doubt.' * * * In other words, to authorize a committing magistrate to hold a defendant to answer, the facts which are stated before him must induce a reasonable *probability* that all the acts have been done which constitute the offense charged, that the crime charged was committed by the accused, * * *." 7 Cal. Jur. 982. [Emphasis added.] *Not only is there not more evidence for guilt than against*, but there is none of guilt.

The majority opinion in this case holds that "suspicion" or "possibility of guilt" is all that is required to support a grand jury indictment. This is akin to holding that guilt by association should be the rule, instead of the philosophy underlying all American jurisprudence that before a person can be charged with crime, there must be reasonable and probable cause as a basis for such charge.

As there is no evidence whatever connecting petitioner with the crime charged in the indictment in this case, I would grant the writ of prohibition prayed for.

GIBSON, C. J., and TRAYNOR, J., concur.

35 Cal.2d 68

**WEBER v. SUPERIOR COURT IN AND
FOR LOS ANGELES COUNTY.**

No. L. A. 21156.

Supreme Court of California, in Bank.

April 4, 1950.

Jerome Weber applied for a writ of prohibition to restrain the Superior Court in and for the county of Los Angeles from proceeding with the trial of petitioner under an indictment for conspiracy to commit assault with a deadly weapon and robbery and to pervert or obstruct justice or due administration of the laws. The Supreme Court, Edmonds, J., held that the evidence before the grand jury justified the indictment.

Petition for peremptory writ denied, and alternative writ discharged.

Carter, J., Gibson, C. J., and Traynor, J., dissented.

1. Indictment and Information ☞10

Evidence before grand jury justified indictment of attorney for conspiracy with others to commit assault with deadly weapon and robbery and to pervert or obstruct justice or due administration of laws. Pen.Code, § 182.

2. Prohibition ☞28

On application for writ of prohibition to restrain Superior Court from proceeding with trial under indictment for conspiracy, question of accused's guilt or innocence is not before Supreme Court, which cannot consider quantum of evidence necessary to sustain conviction, but only question whether grand jurors, as men of ordinary caution or prudence, could conscientiously entertain reasonable suspicion that a public offense, in which accused participated, was committed.

3. Indictment and Information ☞10

Grand jurors have discretion to determine, in their judgment, whether evidence before them would warrant trial jury's conviction of accused, and, in such event, should find indictment.

4. Prohibition ☞28

The Supreme Court may not interfere with grand jury's discretion in determining whether evidence before them would warrant trial jury's conviction of ac-

cused, nor weigh evidence to determine its sufficiency, in prohibition proceeding to restrain Superior Court from proceeding with trial under indictment returned.

Isaac Pacht, Pacht, Warne, Ross & Bernhard, Clore Warne and Bernard Reich, Beverly Hills, for petitioner.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Deputy County Counsel, W. E. Simpson, District Atty., Jere J. Sullivan and Robert Wheeler, Deputy District Attys., Los Angeles, for respondent.

EDMONDS, Justice.

Jerome Weber, together with Harry M. Lorensen and eleven others, was indicted for conspiracy to commit assault with a deadly weapon, robbery, and to pervert or obstruct justice or the due administration of the laws, all in violation of section 182 of the Penal Code. His application for a writ of prohibition to restrain the Superior Court from proceeding with the trial of the action presents the same questions as those decided in *Lorensen v. Superior Court*, Cal.Sup., 216 P.2d 859.

[1] The facts are fully stated in the opinion in the *Lorensen* case. From them it may be inferred that Weber's activities were related to and in furtherance of a general conspiracy to pervert and obstruct justice to which Weber, Lorensen and other police officers were a party. Weber's request of Officer Barkley to delay booking of any suspects in connection with a disturbance at Pearson's place of business, and the fact that this request was made almost simultaneously with the attack upon Pearson, reasonably support that conclusion. In considering overt acts of Weber in connection with the entire series of events shown by the record, the grand jury was fully justified in concluding that these occurrences were a part of a common scheme or plan to which Weber was a party.

[2] It cannot be said that such a conclusion is unreasonable or arbitrary. Under the test applied in the *Greenberg* case, " * * * there is some rational ground

for assuming that [petitioner] is guilty". *Greenberg v. Superior Court*, 19 Cal.2d 319, 121 P.2d 713, 715. Perhaps, when the conduct of Weber is explained to a trier of fact, he will not be convicted, but the question of his guilt or innocence is not now before this court. The present issue does not concern the quantum of evidence necessary to sustain a judgment of conviction but only the question as to whether the grand jurors, acting as men of ordinary caution or prudence, could conscientiously entertain a reasonable suspicion that a public offense had been committed in which Weber participated.

[3,4] As stated in *Lorenson v. Superior Court*, it cannot be said the indictment is such an obvious and flagrant disregard of the fundamental rights of the petitioner that the expense, effort and delay of a trial would be an unfair burden upon him. *Rescue Army v. Municipal Court*, 28 Cal.2d 460, 466, 171 P.2d 8. The circumstances shown by the evidence before the grand jury allow the inference that, either there was a broad plan of which the actions of Weber were a part, or that his activities are unrelated to those of Lorenson, Swan, Cohen, Mold, Wolfe, and the seven Cohen associates. "Without explanation or contradiction of those facts by the defendant, * * * and which the grand jury had a right to disbelieve, the jurors had the discretion to determine, "in their judgment" whether the evidence would "warrant a conviction by a trial jury." In that event * * * the jury "ought to find an indictment," as it did. We may not interfere with that discretion of the grand jury, or weigh the evidence adduced to determine its sufficiency." *McFarland v. Superior Court*, 88 Cal.App.2d 153, 158, 198 P.2d 318, 321." *Lorenson v. Superior Court*, Cal.Sup., 216 P.2d 859.

The petition for the peremptory writ of prohibition is denied, and the alternative writ is discharged.

SHENK, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

Petitioner, Weber, is one of the group named in the indictment against Lorenson. *Lorenson v. Superior Court*, Cal.Sup., 216 P.2d 859, supra. The factual background is the same in both cases.

It will be recalled from the *Lorenson* case that Weber is an attorney at law practicing in Los Angeles. On the day before the assault on Pearson, he was requested by Lorenson to take Mrs. Phillips' case against Pearson, and agreed to do so. He knew Cohen socially, but he was not his counsel and they were merely casual acquaintances. About 4:10 Saturday afternoon, March 19, 1949, after the arrest of Cohen's associates, but before they had been brought to the Wilshire Station, Weber called that station and inquired whether any one had been arrested in connection with a disturbance at Pearson's place. Taking the testimony of the officer receiving Weber's telephone call, and Weber's later visit to the station, as we must, that is, the evidence must be viewed in a light most favorable to support the indictment, we find that Barkley testified: "He [Weber] asked me if there had been two or three suspects brought in from some kind of a disturbance of the peace or fight or something, and I told him that I didn't know of any and, furthermore, if they had been brought in for disturbing the peace or anything like that they would probably be taken downstairs and not up to the detective bureau as it was not a felony.

"Q. What did he say? A. He said, 'Well, if they are brought in will you hold up the booking until I arrive?' * * * And at that time another voice got on the phone, one which I recognized.

"Q. And whose voice was that? A. That was Burt Burton [Burt Mold].

"Q. Who is Burt Burton? A. Well, from all my—all that I know of him was that he was in the clothing business down here, I believe it is in the 300 block on Main Street. I bought several suits from his store. And he asked me substantially the same questions.

"Q. That Weber had? A. Yes.

"Q. Did he say anything about the identity of any of the persons who might be involved? A. He did, yes.

"Q. What did he say about that? A. He mentioned two or three names.

"Q. Would you recognize any of them if you heard them? A. I would recognize one, or two, possibly. I wouldn't, however, be positive of all three of them.
* * *

"Q. Eli Lubin? A. That could have been one of them. Now, I am not positive of it. * * *

"Q. Harold Meltzer? A. That could have been one of them.

"Q. Dave Ogul? A. That was one. I am sure of that. * * *

"Q. Did he [Mold] say anything about his having any knowledge of why they might be brought in? A. I asked him about that and he said he didn't know exactly, that it was over some kind of a beef—a little disturbance of the peace or a fight or something. * * *

"Q. Did you later see Burton [Mold]? A. Yes.

"Q. How much later? A. Oh, I would say anywhere from five to fifteen minutes, maybe, after the suspects left the office.

"Q. And was Weber with him? A. He was.

"Q. That is Jerry Weber, a lawyer? A. Jerry or Jerome, or something like that. He introduced himself as a lawyer.
* * *

"Q. What conversation did you have with those gentlemen? A. Well, they came up to this desk in the outer office, or the counter—(indicating) * * * They came right up here, and when they walked up I was sitting back here talking to this girl, and I walked up to the desk and talked to them. And I still didn't connect the two deals together. They were referring to two or three suspects being brought in over a disturbance of the peace. And at the time I walked up to the desk I asked him where they were brought in from, and when he told me that it was from a radio shop, Sky Pilot or something like

that, I immediately connected the two then, and I told him that there was no one booked."

Weber testified that a person who said he was Pearson telephoned him about 4:00 p. m. stating that you have some "blank-blank pickets" and you better get them away or there would be some "heads bashed". He also stated that a newspaper reporter had telephoned him about the assault but from the evidence it may be inferred that such call was after Weber had called Wilshire Station. Mold, an intimate friend of Weber, who usually dropped in to see him, was present when Weber called the Wilshire Station and spoke to officer Barkley whom he knew, and introduced Weber stating that he would appreciate any favors extended him. He asked if any suspects in connection with Pearson had been bought in and specifically referred to Ogul.

The foregoing establishes nothing more than a suspicion that Weber had a connection with the conspiracy, and all that appears is that he knew Cohen and Lorenson and had some foreknowledge that something had occurred at Pearson's, and was counsel for Mrs. Phillips in a controversy between her and Pearson. Even if his testimony that he received knowledge of this trouble at Pearson's by the telephone call from a person representing himself as Pearson is disbelieved, the case is no stronger. Mere fore-knowledge that some trouble is brewing and his acquaintance with the alleged conspirator Cohen is not enough. In the course of his representation of Mrs. Phillips against Pearson, he had adequate reason for being interested in any developments touching Pearson and accordingly in contacting the Wilshire Station.

There is absolutely no evidence connecting petitioner with the commission of any crime, and, therefore, the indictment against him is wholly unsupported.

I would grant the writ of prohibition prayed for by him.

GIBSON, C. J., and TRAYNOR, J., concur.

35 Cal.2d 73
**MOLD v. SUPERIOR COURT IN AND FOR
LOS ANGELES COUNTY**
No. L. A. 21157.

Supreme Court of California, in Bank.
April 4, 1950.

Burt Mold, also known as Burt Burton, applied for a writ of prohibition to restrain the Superior Court in and for the county of Los Angeles from proceeding with the trial of applicant under an indictment for conspiracy to commit assault with a deadly weapon and robbery and to pervert or obstruct justice or due administration of laws. The Supreme Court, Edmonds, J., held that the evidence supported the indictment.

Petition for peremptory writ denied, and alternative writ discharged.

Carter, J., Gibson, C. J., and Traynor, J., dissented.

1. Indictment and Information ⇨10

The grand jury's duty, in determining whether one of several persons should be indicted for conspiracy, was to decide whether evidence was sufficient to justify reasonable man in suspecting that a public offense, to which such person was a party, had been committed.

2. Indictment and Information ⇨10

Evidence before grand jury supported indictment of one of several persons for conspiracy to commit assault with deadly weapon and robbery and pervert or obstruct justice or due administration of laws. Pen.Code, § 182.

3. Indictment and Information ⇨10

Which of two logical inferences should be drawn from substantial evidence tending to prove that crime was committed, so as to justify indictment, is grand jury's, not court's, duty to decide.

4. Prohibition ⇨9

When indictment does not rest on arbitrary action and evidence adduced before grand jury affords some rational ground for possibility that person indicted is guilty of crime charged, a court will not prevent his trial by granting writ of prohibition.

Joseph Scott and J. Howard Ziemann, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Deputy County Counsel, W. E. Simpson, District Atty., Jere J. Sullivan and Robert Wheeler, Deputy District Attys., Los Angeles, for respondent.

EDMONDS, Justice.

Burt Mold, also known as Burt Burton, is one of those indicted with Lorenson, Weber, and ten other persons for conspiracy to commit assault with a deadly weapon, robbery, and to pervert or obstruct justice or the due administration of the laws, all in violation of section 182 of the Penal Code.

The facts concerning Mold's activities in furtherance of the alleged conspiracy are fully stated in *Lorenson v. Superior Court*, Cal.Sup., 216 P.2d 859. He contends, as do Lorenson and Weber, that because the indictment is unsupported by any evidence, he is entitled to a writ of prohibition to restrain the Superior Court from proceeding, as to him, with the trial of the action.

Mold's connection with Jerome Weber is not definitely shown, but it may be inferred that their relationship was more than that of attorney and client. They were intimate friends and Mold was a frequent caller at Weber's office.

Mold was in Weber's office at the time of the attack upon Pearson. Although the arrested suspects did not arrive at the Wilshire Station until approximately 4:25, according to the testimony, Weber called the station twenty minutes earlier to inquire if anyone had been arrested in connection with a disturbance at Pearson's place of business. Upon being informed that there had been no arrest, Weber requested that the booking of any such persons be delayed until he could arrive at the station. Mold then asked Barkley, to whom he was known, if Dave Ogul and two other persons whom he named had been arrested because of a disturbance of the peace or a fight. When told that no such persons had been brought into the station, Mold re-

quested Barkley to extend every courtesy to Weber, as he and Weber were very good friends.

Considering these facts in connection with the series of events which occurred in the light of the entire circumstances, the grand jury concluded that there was probable cause for believing that Mold was connected with a general conspiracy to which Lorenson, Weber, Swan, Cohen Wolfe, and the seven Cohen associates were parties. Certainly, there is some evidence to support that determination.

[1] As stated in the Lorenson case, it was the duty of the grand jury to decide whether the evidence was sufficient to justify a reasonable man in suspecting that a public offense had been committed to which Mold was a party. It is Mold's contention that the only reasonable interpretation of the facts is that his presence in Weber's office at the time of the attack upon Pearson was merely an unfortunate coincidence. He argues that he took part in the conversation with Barkley only as a favor to Weber and with no knowledge of the existence of any conspiracy. The grand jury should have decided, he insists, that his inquiry as to the arrest of Ogul and the two others, the men who beat Pearson only a few minutes before the conversation, was only an ill-timed happenstance. Instead of taking this view of the evidence, the jurors concluded that there is reasonable and probable cause for believing that Mold's actions were not innocent and accidental, but a part of a broad and general scheme to which Mold, as well as the other defendants, was a party.

[2-4] Considering, as a whole, the evidence before the grand jurors, it cannot be said that the indictment voted by them was arbitrarily founded or unsupported by

any evidence. Certainly, an inference that Mold's activities were done knowingly and deliberately is as reasonable as one that they merely comprise a chapter of accidents. As stated in the Lorenson case, it is the duty of the grand jury, and not of the courts, to decide which of two logical inferences should be drawn from substantial evidence tending to prove that a crime was committed. When the indictment does not rest upon arbitrary action and the evidence adduced affords some rational ground for the possibility that the person named in the indictment is guilty, a court will not prevent a trial of the defendant.

The petition for the peremptory writ of prohibition is denied, and the alternative writ is discharged.

SHENK, SCHAUER and SPENCE, JJ.,
concur.

CARTER, Justice.

I dissent.

Mold's part in the factual setting appears in my dissenting opinion in *Lorenson v. Superior Court*, Cal.Sup., 216 P.2d 859. It is apparent therefrom that there is no evidence connecting Mold with the conspiracy. He was a close friend of Weber, casually knew Cohen, and apparently, from his remarks when he took part in Weber's telephone call to the Wilshire Station, he knew some of Cohen's associates, for he mentioned them at that time. Clearly, as in the Lorenson and Weber cases, there is no evidence connecting Mold with the conspiracy.

I would, therefore, grant the writ of prohibition prayed for by him.

GIBSON, C. J., and TRAYNOR, J., con-
cur.

35 Cal.2d 165

PEOPLE v. HOOPER.

Cr. 5038.

Supreme Court of California

April 19, 1950.

Henry Hooper pleaded guilty to a charge of murder. The Superior Court, Stanislaus County, B. C. Hawkins, J., determined that murder was of first degree and specified death as punishment, and an automatic appeal from judgment took place. The Supreme Court, Schauer, J., held that the evidence was sufficient to sustain conviction of murder in the first degree.

Affirmed.

1. Homicide ☞253(1)

Evidence was sufficient to sustain conviction for murder in the first degree. Pen. Code, §§ 190, 1192.

2. Criminal law ☞1177

Where evidence tended to show that murder was wilful, deliberate and premeditated by means other than poison, torture or lying in wait, defendant was not prejudiced by trial court's failure to designate type of first degree murder of which it found defendant guilty. Pen.Code, §§ 190, 1192.

3. Criminal law ☞980(2)

Where defendant entered a plea of guilty to a charge of murder, the fact that trial court referred to hearing, in which degree of offense was determined and punishment was specified, as one in mitigation of punishment and in determination of degree, did not infer that trial judge believed that defendant had burden of showing mitigating circumstances to reduce murder from first to second degree. Pen. Code, §§ 190, 1192.

4. Criminal law ☞980(2)

In determining degree of an offense and punishment to be imposed, after a plea of guilty, it is duty of trial court to consider matters in aggravation as well as in mitigation of offense. Pen.Code, §§ 190, 1192.

Frank Loria, Modesto, for appellant.

Fred N. Howser, Attorney General, and
Doris H. Maier, Deputy Attorney General,
for respondent.

SCHAUER, Justice.

Defendant Henry Hooper pleaded guilty to the charge of murdering Mrs. Lilly Calvert. The trial court determined that the murder was of the first degree (see Pen. Code, § 1192) and specified death as the punishment (see Pen.Code, § 190). On this automatic appeal from the judgment we have concluded that no ground for reversal or modification appears.

Defendant's principal contention is that there is insufficient evidence of deliberation and premeditation (the only theory upon which the murder could be of the first degree). Defendant himself did not take the stand and the only evidence on this crucial question is the following testimony as to his behavior:

Defendant and Mrs. Calvert had known one another for at least two months (the precise length of time does not appear) preceding the killing. He had been a frequent visitor at her home. Mrs. Calvert lived with her two sons, Hurley, aged 14, and Bobby, who was younger. Mrs. Calvert once said that she and defendant planned to marry; later on she told defendant that she did not want to see him again because she objected to his excessive drinking.

About 5:30 p.m. on February 10, 1949, the day of the killing, Mrs. Calvert had a telephone conversation with defendant, in the course of which she told him not to come to her house. What defendant said to her in this conversation does not appear. Mrs. Calvert at once telephoned the police; this call was made at 5:42 p.m. There is no evidence of what she reported, but an officer was sent to her home "to investigate." Before the officer arrived defendant came to the Calvert home and, without knocking or requesting admission, forced open the screen door, which was hooked, and the wooden door, which was secured with a bolt latch; these doors led into

the kitchen. Defendant said, "I just want to show you my check." Mrs. Calvert replied, "I don't want to see the check." The police officer who had been sent to the Calvert home then arrived. Mrs. Calvert pointed out the door fastenings which defendant had broken and told the officer that "she didn't want to have charges made against him; she said she would like to be as nice to him as she could, but he wouldn't leave her alone * * * She said, 'All I want Henry to do is leave my house.' * * * [Defendant] said, 'O. K., I will leave, I will leave with the policeman.'" The officer "told him not to come back to the house any more" and the two men left together.

At about 6 p. m. defendant again came to the door. Mrs. Calvert, Bobby, Hurley and a neighbor, Mrs. Mary Perry, were present. Defendant knocked and Bobby admitted him. Mrs. Perry described defendant's second visit as follows: Defendant walked toward Mrs. Calvert; "I stepped between, I thought if he did anything to her I would try to keep him from hurting her * * * [H]e kind of was crying and talking [and] he says 'you mistreat me, you mistreat me, you and Mrs. Perry you mistreat me,' and I says 'no, Henry, I don't do anything to you' and he kept on, he was just like he was crazy or something, he kept coming and when he got to her he caught both of us and grabbed both of us just like that (indicating), like somebody going crazy; I says 'I haven't done anything Henry, I wouldn't do anything to you * * *.'" Mrs. Calvert said to defendant, "I want you to stay away from my house * * * Henry, go on. You pack a gun, you are crazy. I am so nervous I don't know what to do." Defendant replied, "This is not your house, you can't demand me to stay out of this house because it is none of yours." (Mrs. Calvert rented the house from Mrs. Perry.) Mrs. Perry said, "True enough the place belongs to me, * * * but Mrs. Calvert has the house rented. But if that's the way you feel about it tonight, I demand that you go off the property and don't come back any more." After further urging by Mrs. Perry defendant left. She walked with him to the alley. He said, "Mrs. Perry, I will promise

you I won't put my foot back on this place again," and went down the alley. Mrs. Perry returned to the Calvert home. She repaired the damaged door fastenings and told the children not to admit defendant if he returned. In about 15 minutes defendant again knocked at the kitchen door and identified himself. Mrs. Perry said, "Henry, you promised me you weren't going to come back on the property no more. Now, what do you want now?" Defendant replied, "I want my radio." (Defendant had lent the radio to Mrs. Calvert and, according to Bobby, "always would take it and bring it back.") Both Mrs. Perry and Mrs. Calvert said, "The law will give you the radio tomorrow" and urged defendant to leave. Defendant again broke open the screen door. He battered down a panel of the wooden door, saying nothing, while Mrs. Perry was "pleading with him not to tear the door open." Defendant pointed a shot gun through the broken panel at Mrs. Calvert. The two boys seized the barrel of the gun and urged him not to shoot. They were unable to deflect the barrel and defendant shot Mrs. Calvert as she went from the kitchen into the living room. Hurley telephoned the police. (This call was received at 6:45 p. m.) Meanwhile defendant went around the house and again shot Mrs. Calvert; this second shot was fired through a living room window.

When and where defendant obtained the shot gun does not appear. Three neighbors of Mrs. Calvert testified that shortly before the shooting defendant had gone to their respective homes and unsuccessfully attempted to borrow a gun; defendant represented to one of these men that he planned to go hunting; to another he said that he wanted a gun because "he had a little beef across the street." After killing Mrs. Calvert defendant disappeared for nine days, eluding a police dragnet, then voluntarily surrendered.

[1] It was for the trier of fact to decide, from the above evidence, whether defendant's behavior was the result of rash, hastily conceived impulse or of cool, fixed purpose. The fact that he appeared to Mrs.

Perry to act "like somebody going crazy" when, for no apparent reason, he wept and accused her and Mrs. Calvert of mistreating him, does not, as defendant contends, necessarily show that he was incapable of premeditated thought and deliberate action. Although the record does not clearly disclose a reason for defendant's behavior, it does disclose a course of conduct commencing with harassment of Mrs. Calvert, persisted in, and growing in violence until it culminated in her murder. Defendant continued his efforts to obtain a gun until he did so, despite the fact that at least three of his attempts were unsuccessful. He returned armed to the Calvert home although he had repeatedly been ordered and requested to stay away and had twice agreed to do so. His statement, on his third visit of the evening, that he wanted his radio appears to have been only a pretext to gain entry to the house. When he was refused admittance he broke open the doors. He persisted in his effort to shoot Mrs. Calvert despite the protests and physical resistance of her children. Having shot her once he did not cease his murderous behavior; as she went through the house he went around it and shot her again. Upon this record we cannot say that the trial court's determination lacks evidentiary support.

[2] Defendant contends that the trial court erred in failing to designate the type of first degree murder of which it found defendant guilty. Nothing in the law, under the circumstances of this case, requires such a specific finding. The only type of first degree murder which the evidence tends to show, is wilful, deliberate and premeditated murder by means other than poison, torture or lying in wait. Since defendant's brief is based on the assumption that this is the type of first degree murder of

which he was convicted it is not true, as he asserts, that he has been "materially" or at all prejudiced by the trial court's failure expressly to designate the type of murder.

[3,4] Defendant points out that the trial court referred to the hearing as one "in mitigation of punishment" and urges that this characterization of the hearing shows that the court mistakenly believed that defendant had the burden of showing mitigating circumstances to reduce the murder from first to second degree, contrary to such cases as *People v. Thomas* (1945), 25 Cal.2d 880, 896, 156 P.2d 7. The record, however, does not establish that the trial judge had any such misconception as to the burden of showing deliberation and premeditation; he referred to the hearing as one "in mitigation of punishment [and] for *determination* of the degree." (Italics added.) We cannot assume that his references to "mitigation of *punishment*" indicated misapprehension as to the law concerning burden of proof of the *degree* of the offense. Rather, there being nothing in the record establishing the contrary, we must assume in favor of upholding the judgment that the court performed its duties in accord with the applicable law as stated in *People v. Gilbert* (1943), 22 Cal.2d 522, 528, 140 P.2d 9: "In determining the degree of an offense and the punishment to be imposed, after a plea of guilty, it is the duty of the trial court to consider matters in aggravation as well as in mitigation of the offense * * *"

For the reasons above stated, the judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SPENCE, JJ., concur.

35 Cal.2d 115

SAMUELS v. HITE,
L. A. 21445.

Supreme Court of California, in Bank.
April 13, 1950.

Roy M. Samuels, a qualified elector and taxpayer of Belvedere Township, brought original petition for a writ of mandate to require Benjamin S. Hite, as Registrar of Voters of the County of Los Angeles, State of California, to omit the name of Frank F. Solis, as candidate for the office of justice of the peace of a class A justices' court of Belvedere Township, from the official ballot. The Supreme Court, Schauer, J., held that candidate for office of justice of peace of a class A justices' court who had not been admitted to practice of law in state for a period of at least two years at time of the election was not eligible for the office, notwithstanding that he would have been admitted to practice for two years before commencement of the term of office.

Peremptory writ issued.

Carter, J., dissented.

1. Officers ⇐18

To be "eligible" for office when time of eligibility is not specified by applicable statute or Constitution, a candidate must be qualified at time of election; the word eligible meaning capable of being chosen, the subject of selection or choice.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Eligible".

2. Justices of the peace ⇐4

A candidate for office of justice of peace of a justices' court of class A, who would not at time of election have been admitted to practice of law in state for two years as required by statute, was not "eligible" for the office, notwithstanding that he would have been admitted to practice for two years before commencement of the term of office. Code Civ.Proc. §§ 103g, 156, 157, 159, 159a; Const. art. 6, § 23.

Caryl Warner, Warner & Jackson, John W. Swink, and Cecil W. Collins, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, Edward H. Gaylord, Los Angeles, and C. Cal.Rep. 215-216 P.2d-45

H. Langstaff, Deputy County Counsel, Sacramento, for respondent.

Frank F. Solis, in pro. per., for real party in interest.

SCHAUER, Justice.

Petitioner, a qualified elector and taxpayer of Belvedere Township, seeks mandate to require respondent Hite, as registrar of voters of Los Angeles County, to omit the name of Frank F. Solis, as candidate for the office of justice of the peace of the Class A justices' court of Belvedere Township, from the official ballot. Petitioner contends that Solis does not have the qualification for office prescribed by section 159a of the Code of Civil Procedure. We have concluded that this contention is correct.

Section 159a (Code Civ.Proc.) provides, "No person shall be eligible to the office of justice of the peace, of a justices' court of Class A, unless he shall have been admitted to practice before the Supreme Court of this state, for a period of at least two years, and shall have had not less than two years actual practice of law in this State; provided that the provisions of this section shall not apply to an incumbent, or to the election of an incumbent in such judicial position."

Mr. Solis is not an incumbent. He was admitted to practice on January 4, 1949. Thus he is not now, and will not at the time of the election (June 6, 1950) have been, admitted to practice for two years, but he will have been admitted to practice for two years when the term of office begins (January 8, 1951).

[1] The courts of the various states have differed as to whether, when the time for existence of conditions of eligibility for office is not specified by the applicable statute or constitution, the conditions must be present at the time of election or merely when the term of office begins. (88 A.L.R. 812; 143 A.L.R. 1026.) In this state, however, it has long been the law that a candidate, to be "eligible" (when the time of eligibility is not expressed), must be qualified at the time of election; the word "eligible" means "capable of being chosen—the subject of selection or choice." (Searcy,

v. Grow (1860), 15 Cal. 117, 121; in accord are Sheehan v. Scott (1905), 145 Cal. 684, 686, 79 P. 350, and Bowring v. Dominguez (1935), 3 Cal.2d 167, 170, 44 P.2d 299; see also People v. Leonard (1887), 73 Cal. 230, 234, 14 P. 853; Helwig v. Payne (1925), 197 Cal. 524, 528, 241 P. 884; People v. Purdy (1897), 21 App.Div. 66, 47 N.Y.S. 601 (N.Y.); People v. Purdy (1897), 154 N.Y. 439, 442, 48 N.E. 821, 61 Am.St.Rep. 624.) Ward v. Crowell (1904), 142 Cal. 587, 76 P. 491, relied upon by respondent, is distinguished in the Sheehan case, supra.

[2] The fact that, unlike section 159a (Code Civ.Proc.), other provisions of law expressly prescribe that a candidate's qualifications shall exist "preceding his election" (Cal.Const., art. VI, § 23; Code Civ.Proc., §§ 156, 157, 159, 103g) does not change the settled judicial definition of the word "eligible."

It is therefore ordered that a peremptory writ of mandate issue forthwith.

GIBSON, C. J., and SHENK, ED-MONDS, TRAYNOR, and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

The majority opinion is out of harmony with the weight of authority and will clearly lead to anomalous results.

By the weight of authority, when a statute says a person must possess certain qualifications "to be eligible to office" and does not fix the time when the qualifications must be possessed, such qualifications are determined as of the time he takes office, not at the date of the election. 42 Am.Jur., Public Officers, §§ 39-40; 88 A.L.R. 812; 143 Id. 1026.

If contrary to the above rule, as held by the majority, it is said that the time of election controls, then we would have the anomalous and unsupportable conclusion that a person qualified as a *practicing attorney at the time of election could take and hold the office of judge even though he was disbarred between his election and the time of taking office*. That necessarily follows for the sole time to test a candidate's quali-

fications under the majority rule is the time of election. That opinion states: "the word 'eligible' (in referring to time of eligibility) means '*capable of being chosen—the subject of selection or choice.*'" If it means that, it cannot mean some other time, namely, when office is taken. It follows that the eligibility requirement of having practiced law for a specified time is wholly inadequate to fulfill the public policy of having duly qualified attorneys in the judicial office.

There are cases that express the minority view adopted by the majority here, yet even under the reasoning employed to support that view, it cannot be applied where, as here, the only deficiency is lack of time. It is said: "The reasoning supporting this view (that of the majority opinion) is that the electors in making the choice should be confined to the selection of such persons only as are not then under any legal disqualification to exercise the powers and duties of the office so that they can then know that when the choice is made and legally declared the object for which the election was held has been accomplished, and that there is no legal obstruction in the way to prevent their will from becoming effective. This rule has been applied to such offices as that of governor, attorney general, tax assessor, tax collector, county or district attorney, marshal, sheriff, mayor, alderman, and other offices.

"As stated above, the language used in the Constitution or statute is of first importance in determining when the qualification to office must exist. Where the provision there appearing refers to holding of office, rather than to eligibility to office, in defining the qualifications, the courts are inclined to hold that the qualifications are to be determined at the time of the commencement of the term or of the induction into office, rather than at the time of the election." 42 Am. Jur., Public Officers, § 40. Here the candidate is an attorney licensed to practice and there is no reason to suppose that he will not continue to be such until he takes office, if elected. If he loses that status between the election and the time he assumes office, then he cannot hold the office.

The foregoing furnishes adequate ground for distinguishing the cases cited in the ma-

majority opinion and there are other differences. The sole case announcing the broad rule of the majority is the old case of *Searcy v. Grow*, 15 Cal. 117, decided in 1860, and it did not give any consideration to authorities elsewhere. In *Sheehan v. Scott*, 145 Cal. 684, 79 P. 350, the charter expressly provided that the candidate must have been a resident five years prior to the election. *It is thus no authority* in support of the majority here. The same express requirement was present in *Bowring v. Dominguez*, 3 Cal.2d 167, 44 P.2d 299, and that case clearly brought out the distinction between an express provision requiring the existence of eligibility before election and a provision which is not express. The court said in 3 Cal.2d at pages 169-171, 44 P.2d at page 300: "Respondent McCloskey, however, contends that under this section of the Constitution, it is sufficient if the elected candidate has been admitted to practice for the required five years before the commencement of the term of office to which he is elected. A number of authorities are cited in support of this contention. Most of these are from foreign jurisdictions, but even they, when carefully analyzed, fail to support the position of respondent McCloskey. *Ward v. Crowell*, 142 Cal. 587, 76 P. 491, is the sole California case cited by said respondent. It involved the right of the defendant therein to hold the office of county surveyor of San Diego county. It was contended that he was ineligible to hold the office because he did not at the time of his election hold a licensed land surveyor's certificate, although he received such a certificate before his term of office commenced. In discussing defendant's right to the office the court said (142 Cal. at page 589, 76 P.2d 491, 492): 'However, in section 135 of the county government act (page 489) it is provided that "the county surveyor must be a licensed land surveyor of the state, and must make any survey that may be required by the court," etc., and upon this provision the contention is based that appellant could not legally hold the office, because at the time of his election he was not a licensed land surveyor. *It will be observed that in this provision there is no reference to the time*

of the election of the county surveyor in office, or to his qualifications at that time, as there is in the provision above quoted relating to a district attorney, and as there is to other officers in other provisions of the law. It refers merely to a county surveyor, and means only that one not having the certificate cannot hold the office. There is a great deal of discussion in the briefs about the meaning of the word "eligible," but that the word is not used at all in the provision in question.' It is apparent from this statement in that case that *there was no requirement that a person before his election* to the office of county surveyor should hold the certificate in question. The court *therefore* held that it was sufficient in order for him to legally hold the office after his election that he receive such a certificate before his term of office commenced. In the *instant* proceeding, the requirement of the Constitution is that *at the time of his election*, a person to be eligible to the office of a municipal judge shall have been admitted to practice for a period of five years. The cited cases from foreign jurisdictions are no more in point than the case of *Ward v. Crowell*, supra. None of these authorities justifies us in departing from the plain and explicit language of the Constitution as set forth in section 23 of article 6 thereof. * * * This section of the Constitution says nothing about the beginning of the term of office, but *explicitly makes the time of his election the time* when he must possess the qualifications necessary to make him eligible to the office." (Italics added.)

In my opinion the intention of the Legislature in adopting section 159a of the Code of Civil Procedure is manifestly clear. This section makes no reference to the matter of qualifications or eligibility of a candidate for election—at the time of election—or at any other time except the time he takes office; in fact it expressly provides that an incumbent may be elected to such office even though he may not have the qualifications provided for therein for one who is not an incumbent. It goes without saying that one may possess the required qualifications at the time of the election and fail to possess such qualifications at the time he takes office. In such event, it is

obvious that quo warranto would lie should he assume to undertake performance of the duties of his office. It is equally obvious that the same situation would exist if a candidate were elected who did not possess the required qualifications at the time of election. It must be assumed that the Legislature had this situation in mind at the time it adopted the statute in question, and therefore deliberately omitted the time of election as the time when eligibility should be determined, knowing full well that the crucial time when eligibility should be tested is at the time the candidate, if elected, takes office. This is certainly the most common sense view to take of a statute which speaks only of eligibility to hold office and not eligibility to become a candidate for office, and which expressly permits an incumbent who does not possess such qualifications not only to continue to hold his office but renders him eligible for election notwithstanding his lack of qualifications to hold the office if he were not an incumbent.

In my opinion the construction placed upon the statute in question by the majority is strained, unrealistic and utterly lacking in reason, logic, or common sense.

For the foregoing reasons I would deny the writ prayed for.



96 Cal.App.2d 876

**CALIFORNIA STATE AUTOMOBILE
ASS'N INTER-INSURANCE BUREAU
v. DOWNEY, Insurance Commissioner.
Civ. 14078.**

District Court of Appeal, First District,
Division 1, California.

April 10, 1950.

Hearing Denied June 8, 1950.

Proceeding by the California State Automobile Association Inter-Insurance Bureau against Wallace K. Downey, Insurance Commissioner of the State of California to compel by mandate, the Commissioner to restore pe-

titlone's right to do business which right was revoked because of the refusal of the Bureau to subscribe to or participate in the California Automobile Assigned Risk Plan. The Superior Court, City and County of San Francisco, Edward P. Murphy, J., entered a judgment denying the petition for the writ, and the petitioner appealed. The District Court of Appeal, Peters, P. J., held that the insurance business is one affected with a public interest and subject to regulation and that the statute does not violate the due process clause of the Federal Constitution, and the plan promulgated by the commissioner providing for equitable apportionment of risks among all insurers does not violate the assigned risk statute.

Judgment affirmed.

1. Constitutional law ⇨296(1)
Insurance ⇨3, 4

The insurance business is one affected with a public interest and subject to regulation and as long as statute regulating has a reasonable relation to a proper legislative purpose, and is neither arbitrary nor discriminatory, it is a valid enactment and cannot be successfully challenged under the due process clause of the federal Constitution. Insurance Code, §§ 11620-11627; U.S.C.A.Const. Amend. 14.

2. Constitutional law ⇨296(1)
Insurance ⇨4

Compulsory assigned risk law providing that after consultation with insurers writing automobile insurance, commissioner shall approve a reasonable plan for the equitable apportionment among such insurers of applicants for automobile insurance who are in good faith entitled to but are unable to procure such insurance through ordinary methods is a valid exercise of the state's police powers, and does not violate the due process clause of the federal Constitution. Insurance Code, §§ 11620-11627; Government Code, § 11523.

3. Insurance ⇨4

Where insurer had legal right to write automobile liability insurance on state wide basis for all applicants, but only insured a select group, insured had not "dedicated" its business to that group and compulsory Assigned Risk law does not compel insurer to render a service beyond scope of

its claimed dedication to the public service. Insurance Code, §§ 108, 11620-11627.

4. Insurance ⇨3

The state has the right to regulate a mutual or reciprocal insurance company, and to compel such companies to abide by reasonable regulations applicable to all.

5. Administrative law and procedure ⇨9

A valid statute cannot delegate unlimited powers to an administrative officer, and to be valid statute must provide an adequate yardstick for the guidance of the executive or administrative body or officer empowered to execute the power.

6. Insurance ⇨4

Statutes ⇨184, 217, 223.2(15)

Compulsory assigned risk law providing that commissioner after consultation with automobile insurers shall prove a reasonable plan for equitable apportionment among such insurers of applicants for auto insurance who are in good faith entitled to but are unable to procure such insurance through ordinary methods, may be considered with other statutes in pari materia, and must be considered in connection with its object and background. Insurance Code, §§ 11620-11627; Vehicle Code, §§ 410-420.

7. Administrative law and procedure ⇨9

Constitutional law ⇨62

Insurance ⇨4

Compulsory assigned risk law providing that commissioner after consultation with automobile insurers shall approve a reasonable plan for equitable apportionment among such insurers of applicants for auto insurance who are in good faith entitled to but are unable to procure such insurance through ordinary methods does not constitute an unlawful delegation of legislative power. Insurance Code, §§ 11620-11627.

8. Constitutional law ⇨42

Only class discriminated against can attack the constitutionality of a statute on the charge of unconstitutional discrimination.

9. Constitutional law ⇨42

Insurer licensed to write automobile liability insurance could not attack compul-

sory assigned risk law on ground that certain distinctions made therein were arbitrary or discriminatory, where none of the alleged discriminations operated against the insurer. Insurance Code, §§ 11620-11627; U.S.C.A.Const. Amend. 14.

10. Insurance ⇨11

Under compulsory assigned risk law, plan providing that application may be refused if accident and conviction records are such that applicant's operation of an automobile would endanger public safety or if on basis of a thorough investigation reasonable doubt exists as to whether applicant should be permitted to continue driving, was not objectionable on ground that it overlooked consideration of record of applicants with respect to suspension or revocation of drivers' licenses. Insurance Code, §§ 11620-11627; Administrative Code, §§ 2431.8, 2431.8a, 2445.1.

11. Insurance ⇨12½

Under compulsory assigned risk law providing in so far as possible underwriting policies shall be considered in making assignments, commissioner is not required to embody all underwriting policies of insurers into plan and insurer, an inter-insurance bureau insuring only its members, could not refuse an applicant merely because he was not a member of its association, and plan requiring it to insure number equitably apportioned to insurer did not violate assigned risk law. Insurance Code, §§ 11621, 11624(a)(2); Administrative Code, §§ 2431.8, 2431.8a, 2445.1.

Brobeck, Phleger & Harrison, San Francisco, attorneys for appellant.

Fred N. Howser, Attorney General of the State of California, T. A. Westphal, Jr., Deputy Attorney General of the State of California, Harold B. Haas, Deputy Attorney General of the State of California, attorneys for respondent.

John Adams, Jr., R. J. Reynolds, San Francisco, attorneys for the National Association for the Advancement of Colored People, Sidney L. Weinstock, San Francisco, attorney for California Association of Insurance Agents, Insurance Brokers

Society of Southern California, and The Society of Insurance Brokers; Leland B. Groezinger, San Francisco, attorney for American Mutual Alliance; Perry H. Taft, San Francisco, attorney for Association of Casualty and Surety Companies; Don R. Sessions, Los Angeles, attorney for American Automobile Insurance Company and Associated Indemnity Corporation; Alexander, Bacon & Mundhenk, San Francisco, attorneys for American Motorists Insurance Company and Ohio Casualty Company; T. Parker Lowe, Oakland, attorney for Anchor Casualty Company; Keith, Creede & Sedgwick, San Francisco, attorneys for California Compensation Insurance Company, Hardware Indemnity Insurance Company, and United Pacific Insurance Company; W. M. Scott, San Francisco, attorney for Canadian Indemnity Company; Arthur Park, San Francisco, attorney for Central Surety and Insurance Corporation; Hadsell, Sweet, Ingalls & Murman, San Francisco, attorneys for Continental Casualty Company, and Northwest Casualty Company; Albert J. Morrissey, San Francisco, attorney for Employers Casualty Company; Edwin A. Heafey, Oakland, attorney for Farmers Automobile Insurance Exchange; Charles H. Goebel, Los Angeles, attorney for Pacific Automobile Insurance Company; Hagar, Crosby & Crosby, Oakland, attorneys for Pacific Indemnity Company; and Richard E. Reese, San Francisco, attorney for Trinity Universal Insurance Company, Amici Curiae in support of respondent.

PETERS, Presiding Justice.

The Insurance Commissioner of California suspended the right of the California State Automobile Association Inter-Insurance Bureau to transact the automobile liability insurance business in this state because of the refusal of the Bureau to subscribe to or participate in the California Automobile Assigned Risk Plan. Cal. Admin. Code, Title 10, §§ 2400-2498. This Plan had been approved and promulgated by the Commissioner under the claimed authority of the Assigned Risk Law. Stats. of 1947, Chap. 1205, p. 2714, §§ 11620-11627 of the Insurance Code. Pursuant to section 11523 of the Government Code as amend-

ed in 1947, the Bureau sought, by mandate, to compel the Commissioner to restore its right to do business. From a judgment denying the petition for this writ the Bureau appeals.

There are no substantial controverted factual issues presented on this appeal. The basic contentions of appellant are that the Assigned Risk Law is unconstitutional and that, as applied to appellant, the Assigned Risk Plan is invalid.

The issues presented are of vital importance to those engaged in the automobile insurance industry, and to various segments of the public. This interest is partially reflected in the fact that amici curiae briefs have been filed, all in support of respondent, by 81 companies writing automobile insurance in California, another by an attorney representing the California Association of Insurance Agents, the Insurance Brokers Society of Southern California, and The Society of Insurance Brokers, while still another on behalf of The National Association for the Advancement of Colored People. These briefs, as well as the excellent briefs prepared by counsel for both litigants, and the two oral arguments, have been of great assistance to the court in deciding the somewhat complex questions presented.

Background of Appellant.

The California State Automobile Association was organized and incorporated in 1907 as a motor club for the purpose of advancing the interests of the motoring public. By the year 1914, many of its members requested that the Association care for their automobile insurance needs. Many members felt that the rates charged by the private companies were high and unsatisfactory. The Association, in the year mentioned, created appellant, the California State Automobile Association Inter-Insurance Bureau, in order to offer to its membership a plan of automobile insurance at a lower cost than the then prevailing rates.

The Bureau is somewhat difficult to classify. It is a reciprocal or inter-insurance exchange. It is open only to members of the Association. Its executive body, called

the "Insurance Board" is elected by the Board of Directors of the Association, and is composed of the same number of members as the board of directors of the Association. Participation by the members of the Association is voluntary. Each member desiring to join the Bureau executes a power of attorney to the same agent, authorizing him or it to enter into agreements of insurance. The members act as insurers of one another. No premiums, as such, are paid. Each member makes an annual deposit which is credited to him. The deposit fund is used to pay losses and expenses, for which purposes a proportionate amount is deducted from the deposit of each member. The operations of such organizations are regulated by sections 1280 to 1530 of the Insurance Code.

In many ways such an organization resembles a mutual insurance corporation. Its basic differences from such an organization are in mechanics of operation and in legal theory, rather than in substance. Appellant asserts that it is not a legal entity, which is undoubtedly technically correct. Obviously, it provides for a form of cooperative insurance by means of a joint venture or limited partnership. For various purposes, the law has treated such an organization as if it were a separate entity. Thus, persons, natural or corporate, holding the powers of attorney must procure a certificate of authority from the Insurance Commissioner, § 1350, Ins.Code; its finances are minutely regulated, 1370-1375, Ins. Code; it can sue or be sued in its own name, § 1450, Ins.Code; a member or subscriber cannot be sued on any obligation contained in the power of attorney until a final judgment against the inter-insurance bureau has been unsatisfied for 30 days, § 1451, Ins.Code; all moneys received from members and not returned are subject to the gross premium tax placed on insurance companies, § 1530, Ins. Code; *Industrial Indem. Exchange v. State Board of Equalization*, 26 Cal.2d 772, 161 P.2d 222; and for purposes of liquidation it is an entity. *Mitchell v. Pacific Greyhound Lines*, 33 Cal.App.2d 53, 91 P.2d 176.

History of the Assigned Risk Law.

The tremendous increase in the number of motor vehicles in recent years, the great number of automobile accidents, the enormous loss to the persons injured where the person at fault is uninsured and unable to respond in damages, and the natural desire of the automobile insurance companies to keep their losses down by limiting their policies to selected risks, have created many problems which the legislatures of many states have studied and attempted to solve. Nearly every state provides for the licensing of drivers, and many for their careful examination to weed out the unfit. Some states have provided for compulsory insurance as a prerequisite to the issuance of a driver's license, while others have provided a form of limited compulsory insurance by requiring certain persons to give proof of financial responsibility before they may secure a license to drive.

The California Legislature has given much thought to this problem. As early as 1929, it adopted a statute providing for the suspension of the license to operate a motor vehicle of certain persons for various reasons, including the failure of a driver or owner to pay a final judgment of \$100 or more for personal or property damage arising out of the operation of a motor vehicle. Stats. of 1929, Chap. 258, § 4, p. 560. This portion of the statute has been several times amended and has been codified in the Vehicle Code as section 410. The entire act is now found in sections 410 to 420 of the Vehicle Code. The act provides that one against whom such a judgment has been secured can lift the suspension only by paying the judgment and establishing his ability to pay claims that may arise from future accidents. Such ability to pay may be established by proof that the person involved is now insured, or he may post a surety bond, or he may deposit \$11,000 in cash with the State Treasurer.

Another step in the same direction was taken in 1935. In that year, the City Carriers' Act was adopted. Stats. of 1935, Chap. 312, p. 1057, Gen.Laws, Act 5134. That act applies to highway carriers operating in any city of the state, and requires

such operators to secure liability insurance or give other evidence of financial responsibility, as a condition prerequisite to securing a permit to operate trucks for hire.

These statutes had one effect that was perhaps not foreseen by the Legislature, and that was that many competent drivers, many of whom depended for a living upon driving a motor vehicle, were prevented from operating motor vehicles because of their inability to secure an insurance policy or to give other proof of their financial responsibility. This was particularly true of a large number of small truck operators to whom insurance companies were reluctant to issue policies and who could not make the \$15,000 cash deposit required. Many of these operators were refused insurance not because they were bad drivers, or not because they had a bad accident history or criminal record, but simply because many insurance companies believed that small truck operators, as a class, were a bad risk in view of the unfavorable loss ratios caused by the increasing accident rate, large jury verdicts, etc. Other large groups of drivers who apparently had difficulty in securing or were unable to secure insurance were violators of traffic laws, members of minority groups, particularly the colored drivers, persons with minor physical disabilities, the young and the old drivers, and, of course, those who had bad accident records.

Such a situation created much hardship and many inequities, and various solutions were offered to the Legislature, one of which was that the State go into the insurance business and assume these and other risks. This was a solution opposed and feared by the insurance companies. Faced with these various pressures, in 1942, all insurance companies, handling automobile insurance in California, including appellant, adopted a voluntary "assigned risk" plan, which provided a method for insuring some, but not all, of the groups that were unable, otherwise, to secure insurance. This plan was approved by the State Insurance Department and became effective July 1, 1942. Under this plan, approved applicants for insurance were allocated to the

subscribing insurers in proportion to the amount of automobile insurance written by each subscribing insurer the preceding year. In 1943, the Legislature facilitated the operation of the plan and recognized it by enacting sections 1110 to 1113 of the Insurance Code.

This voluntary plan alleviated, in some degree, the situation created by the statutes of 1929 and 1935, but it was only a partial palliative. It was strictly limited to persons required to procure and maintain insurance in order to operate their automobiles or trucks. Other persons who for one reason or another were deemed greater than ordinary risks by insurers were not covered by the voluntary plan.

Appellant, as already mentioned, was a subscriber to the voluntary plan, but all during the time it participated it adhered, strictly, to its policy of insuring only members of the California State Automobile Association, some of whom were members of the restricted groups. Late in 1946 or early in 1947, appellant withdrew from the plan. This immediately imperilled the soundness of the voluntary plan. One of the largest insurers in the state was refusing to take a share of the assigned risks, thus increasing the proportionate number other insurers were expected to take. The other insurers were reluctant to continue the voluntary plan under such circumstances. In this emergency the Legislature, then in session, promptly acted. It passed, as an emergency measure, the Compulsory Assigned Risk Law, Stats. of 1947, Chap. 39, p. 525, which became effective February 17, 1947, Insurance Code, § 11620. It provided that, after consultation with insurers writing automobile insurance, the Commissioner shall approve "a reasonable plan for the equitable apportionment among such insurers of applicants for automobile * * * insurance who are in good faith entitled to but are unable to procure such insurance through ordinary methods." Upon the adoption of such a plan "all such insurers shall subscribe thereto and shall participate therein." The Legislature declared the act to be an urgency measure "necessary for the immediate preservation of the public peace, health and safety", and

declared the nature of the emergency in the following language:

"Under provisions of the Vehicle Code, certain persons who have been involved in motor vehicle law violations are required to file insurance policies or other evidence of financial responsibility with the State in order to continue lawfully to operate motor vehicles upon the public highways of the State.

"Because insurers are naturally reluctant to grant insurance to such persons, it has been necessary to devise a plan for allocating such risks upon an equitable plan to the insurers engaged in the business. Such a plan, dependent upon the voluntary consent of all insurers, has been in effect for a number of years, but has recently ceased to operate because of the withdrawal of one of the subscribing insurers.

"Unless this act takes immediate effect, many persons who are insured under the former plan will be deprived of their insurance and those seeking to obtain such insurance will be unable to do so. Both classes will be deprived of the opportunity to operate motor vehicles upon the public highways, with consequent loss in earning power in many cases and serious hardship in others; or in the alternative may continue to operate such vehicles in violation of the law, with a resultant increased burden on law enforcement agencies and a probable increase in disrespect for law." Section 2.

Present Compulsory Assigned Risk Law.

The above statute was amended by the same legislature that had passed the emergency act, Stats. of 1947, Chap. 1205, p. 2714, by amending section 11620 of the Insurance Code and enacting sections 11621-11627 of that code. It is these statutes, and the plan adopted pursuant thereto, that are attacked by appellant in this proceeding. Section 11620, as then amended, provides in part as follows: "The commissioner, after a public hearing, shall approve or issue a reasonable plan for the equitable apportionment, among insurers admitted to transact liability insurance, of those applicants for automobile bodily in-

jury and property damage liability insurance who are in good faith entitled to but are unable to procure such insurance through ordinary methods. The commissioner may approve or issue reasonable amendments to such plan if he first holds a public hearing to determine whether the amendments are in keeping with the intent and purpose of this section. All such insurers shall subscribe to the plan and its amendments and, subject to Section 11621, participate therein."

Provision is then made in the section for a statutory notice of hearings on the proposed plan. Section 11621, after providing that assignments of risks shall not be made in certain instances not here involved, then states: "In so far as possible, assignments under the plan shall be consistent with the scope of territorial operations and underwriting policies of each subscriber." Section 11622 provides the amount of coverage required, while section 11623 authorizes the subscribing insurers to "form their own organization which shall, subject to review by the Insurance Commissioner, administer and operate the plan." Section 11624 provides that the plan adopted pursuant to the statute shall contain:

"(a) Standards for determining eligibility of applicants for insurance, and in establishing such standards the following may be taken into consideration in respect to the applicant * * *

"(1) His criminal conviction record;

"(2) His record of suspension or revocation of a license to operate an automobile;

"(3) His automobile accident record;

"(4) His age and mental, physical and moral characteristics which pertain to his ability to safely and lawfully operate an automobile;

"(5) The condition or use of the automobile.

"(b) Procedures for making application for insurance, for apportionment of eligible applicants among the subscribing insurers and for appeal to the commissioner by persons who believe themselves aggrieved by the operation of the plan,

"(c) Rules and regulations governing the administration and operation of the plan,

"(d) Provisions showing the basis upon which premium charges shall be made and

"(e) Such other provisions as may be necessary to carry out the purpose of this article."

Section 11625 provides that if any insurer fails to subscribe to the Plan, the Commissioner shall give such company ten days' written notice to subscribe. If the insurer still refuses to participate, the Commissioner "may, after hearing upon notice, suspend the certificate of authority of such insurer to transact liability insurance in this State until such insurer does so subscribe." Section 11626 provides for discipline of subscribers who violate the plan, while section 11627 provides that the term "insurer" includes "reciprocal or interinsurance exchanges."

At the same session of the Legislature that passed this statute there was also passed the Highway Safety Responsibility Law. Stats. of 1947, Chap. 1235, p. 2738, adding §§ 419 to 420.9 to the Vehicle Code. This law provides for the suspension, regardless of fault, of the license of the operator of any motor vehicle involved in an accident within the state in which injury to any person, or property damage in excess of \$100 results unless the operator is insured or puts up a case deposit. This law greatly aggravated the need for an assigned risk plan because it tremendously increased the number of persons required to carry insurance or give other evidence of their financial responsibility.

The Assigned Risk Plan.

The Commissioner, acting pursuant to the provisions of the Assigned Risk Law, held a hearing in October of 1947, on an assigned risk plan proposed by the automobile insurers operating in this state. Appellant appeared at that hearing and attacked the constitutionality of the Assigned Risk Law, but also stated that it would give consideration to accepting the plan voluntarily if the proposed plan were modified so as to give recognition to appellant's policy of insuring only members of the California State Automobile Association.

This condition was not acceptable to the Commissioner nor to the committee. The plan was adopted without such a provision, and appellant refused to subscribe to it. The Commissioner, acting pursuant to section 11625 of the Insurance Code, suspended appellant's permit to transact automobile liability insurance in California. The appellant sought to review and annul this order of suspension by means of a petition for writ of mandate filed in the Superior Court. That court denied the petition and appellant has appealed. By stipulation of counsel, and by order of this court, the operation of the suspension order was stayed pending the final determination of the case on appeal. § 1094.5(f), Code of Civ.Proc.

Provisions of the Challenged Plan.

Before directly discussing the contentions of appellant, reference should be made to the general provisions of the Assigned Risk Plan. The Plan is to be found in the California Administrative Code, Title 10, sections 2400 to 2498.

The Plan is available to all residents of California and to nonresidents using automobiles registered in this state. § 2404. Policies issued under the Plan shall provide a \$5,000-\$10,000 coverage. § 2406. The Plan is to be administered by a committee of five elected by the insurers and representing the various types of insurers doing business in this state. §§ 2421 and 2421.1. The committee appoints a manager who is to be the administrative executive of the Plan and who makes all assignments of risks. § 2422. Applicants "who are in good faith entitled" to insurance but are unable to procure it through ordinary channels, are eligible. § 2430. The same section provides that an applicant shall be deemed to be in good faith entitled to insurance unless he is within certain specified categories. The excluded categories include those who, within three years prior to their application, have been convicted more than once of any of the following offenses:

- a. Failing to stop and report when involved in an accident.
- b. Manslaughter or negligent homicide resulting from operation of the vehicle.

c. Theft or unlawful taking of a vehicle.

d. Any felony in which an automobile was used.

e. Driving under the influence of liquor and causing death or bodily injury to another.

f. Driving while licenses are suspended or revoked.

g. Permitting unlawful use of driver's license or any other offense under section 338 of the Vehicle Code, § 2431.1; or within the same three-year period has been convicted more than twice of:

a. Driving while intoxicated or under the influence of liquor.

b. Driving in a reckless manner where injury to person or property results.

c. Driving at excessive rate of speed where injury to person or property results. § 2431.

It is also provided that other persons not "in good faith entitled" to insurance are:

1. Those addicted to use of drugs. § 2431.1a.

2. Those habitually using alcohol to excess. § 2431.2a.

3. Those failing to disclose serious motor accidents or traffic violations in their applications. § 2431.3.

4. Those found to have operated vehicle more than once while license was suspended or revoked. § 2431.3a.

5. Those with defective automobiles who have failed to repair them at the Committee's demand. § 2431.4.

6. Those who failed to pay insurance premiums on automobile insurance during the past year. § 2431.5.

7. Those with a major mental or physical disability. § 2431.5a.

8. If the risk consists of or includes a vehicle carrying passengers for compensation. § 2431.6.

9. If the risk consists of a vehicle used in transporting explosives, gasoline or other highly inflammable or explosive materials. § 2431.6a.

10. Those under 18 who cannot show hardship. § 2431.7a.

11. Those whose driving would, in the opinion of the Committee, endanger public safety. The entire history of the applicant may be examined in making such a determination. § 2431.8.

Section 2445.1 provides: "Insofar as possible, assignments shall be consistent with the scope of territorial operations and underwriting policies of each insurer, of which the Manager shall have been notified in writing. Underwriting policy is policy founded on underwriting judgment of the hazards involved. Without in any way limiting or enlarging the meaning of the term 'underwriting policy,' policy excluding from insurance an applicant solely by reason of the fact of his non-membership in an organization is not underwriting policy. Underwriting policy excluding from insurance applicants solely by reason of facts or circumstances not sufficient to render them not in good faith entitled, under this Plan, to insurance is inconsistent with the purposes of this Plan and of the statute under which it is approved and issued."

The only other section now necessary to mention is section 2461 which provides that: "If the experience, physical or other condition of any risk assigned under the Plan is such as makes the hazard of the risk greater than that contemplated by * * * [the normal rates] * * * the insurer * * * may charge such rates and minimum premiums as are commensurate with the greater hazard of the risk, subject to the approval of the Committee."

Constitutional Arguments of Appellant.

Appellant directs its main arguments against sections 11620 and 11627 of the Insurance Code, contending that, for various reasons, those sections deny to it due process of law in violation of the Fourteenth Amendment to the United States Constitution. The arguments can be summarized as follows:

It is urged that the insurance business is not a public calling; that while the Unit-

ed States Supreme Court, in *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 34 S.Ct. 612, 58 L.Ed. 1011, L.R.A.1915C, 1189, upheld the regulation of charges made by such companies, that decision is predicated upon the assumption that insurance companies cannot be compelled to make contracts against their will; that the present statute compels appellant to enter into contracts against its will and thus treats appellant, a private business, as if it were a public utility; that although a business may be impressed with a public interest so as to be subject to state regulation, the right thus to regulate does not include the power of the state to compel businesses that have not dedicated their property to the public to enter into contracts against their will. *Allen v. Railroad Commission*, 179 Cal. 68, 88, 175 P. 466, 8 A.L.R. 249, is cited in support of this contention.

Appellant next argues that, even in the public utility filed, one who serves only a limited group cannot be compelled to serve others. In this connection reliance is placed on a line of cases which hold that a private carrier cannot be compelled to accept business, but may refuse service on the basis of convenience. *Forsyth v. San Joaquin Light & Power Corp.*, 208 Cal. 397, 281 P. 620; *Morel v. Railroad Commission*, 11 Cal.2d 488, 81 P.2d 144, and *Stephenson v. Binford*, 287 U.S. 251, 53 S. Ct. 181, 77 L.Ed. 288, 87 A.L.R. 721, are typical of the cases cited to support this argument. It is then argued that, even if the insurance business were subject to the same degree of control as a public utility, appellant cannot be compelled to accept non-member risks because appellant has heretofore restricted its operations to contracting only with members of the California State Automobile Association. Thus, it is contended, appellant is not a public insurer, and cannot be compelled to serve others. The power to regulate does not include the power to compel a company to furnish service. Such cases as *Associated Pipe Line Co. v. Railroad Commission*, 176 Cal. 518, 169 P. 62, L.R.A.1918C, 849; *Allen v. Railroad Commission*, 179 Cal. 68, 175 P.

466, 8 A.L.R. 249; *Frost v. Railroad Commission*, 197 Cal. 230, 240 P. 26, reversed in 271 U.S. 583, 46 S.Ct. 605, 70 L.Ed. 1101, 47 A.L.R. 457; *Morel v. Railroad Commission*, 11 Cal.2d 488, 81 P.2d 144; *Cudahy Packing Co. v. Johnson*, 12 Cal.2d 583, 86 P.2d 348; *Trask v. Moore*, 24 Cal.2d 365, 149 P.2d 854; *Ocean Park Pier Amusement Corp. v. Santa Monica*, 40 Cal.App. 2d 76, 104 P.2d 668, 879, and others, see, also, note 175 A.L.R. 1333, are relied upon as establishing the principle that a statute which subjects a contract carrier to the burdens of a public utility violates the due process clause. This principle is peculiarly applicable to cooperatives, according to appellant, it being contended that a cooperative cannot be regulated like a public utility. *Frost v. Railroad Commission*, 271 U.S. 583, 46 S.Ct. 605, 70 L.Ed. 1101, 47 A.L.R. 457; *Hissem v. Guran*, 112 Ohio St. 59, 146 N.E. 808; *State v. Nelson* 65 Utah 457, 238 P. 237, 42 A.L.R. 849; *Garkane Power Co. v. Public Service Commission*, 98 Utah 466, 100 P.2d 571, 132 A.L.R. 1490, are cited in support of this proposition.

It is next urged that the fact that a license is required does not give the State the power to deny to appellant the privilege of doing business or exacting an improper price for its approval. *Frost v. Railroad Commission*, supra; *Danskin v. San Diego Unified School Dist.*, 28 Cal.2d 536, 171 P.2d 885; *Union Pacific R. Co. v. Public Service Commission*, 248 U.S. 67, 39 S.Ct. 24, 63 L.Ed. 131, are supported as establishing this proposition.

Finally, it is argued that the Plan is not essential to the Financial Responsibility Law; that it forces the members of the Association to pay for injuries caused by non-member drivers who are bad risks, and that, in effect, the Plan constitutes an attack on a non-profit cooperative by its competitors. For these and other reasons appellant urges that the Plan violates its constitutional rights.

Discussion of the Constitutional Arguments.

Most of the cases cited by appellant deal only with the application of general rules

to the particular facts there involved, and are applicable here, if at all, only indirectly by way of analogy. Appellant does, however, cite one case that contains language that directly upholds its position. That case is *Employers' Liability Assur. Corporation v. Frost*, 48 Ariz. 402, 62 P.2d 320, 107 A.L.R. 1413, decided in 1936, by the Arizona Supreme Court. An annotation on the case is to be found in 107 A.L.R. 1421, and a supplementary annotation in 123 A.L.R. 139. The *Frost* case involved a state statute which compelled insurance companies writing workmen's compensation insurance to accept all applications, and to waive the right to investigate and inform itself of the risks and hazards incident thereto. The court, among other things, held that the statute violated the freedom to contract right guaranteed by the Fourteenth Amendment. The court pointed out that, 62 P.2d at page 324: "The courts have gone far in upholding the right of the state to regulate and control insurance business within its boundaries, but we have found no case where the facts, as here, called for a decision upon the power of the Legislature to make it mandatory upon an insurance company qualifying under its laws to carry a certain kind of insurance to insure all risks of that kind 'for which application may be made to it which are not prohibited by law.'" This case is contrary to the decisions of the Supreme Judicial Court of Massachusetts, and of the Supreme Court of Texas, decisions which had been rendered when the Arizona court decided its case in 1936, but which are not referred to by it. See *In re Opinion of the Justices*, 1925, 251 Mass. 569, 147 N.E. 681; *Harris v. Traders' & General Ins. Co.*, Tex.Civ.App.1935, 82 S.W.2d 750; *Texas Employers' Ins. Ass'n v. U. S. Torpedo Co.*, Tex.Civ.App.1928, 8 S.W.2d 266, affirmed in 1930 in Tex.Com. App., 26 S.W.2d 1057; see, also, the later Massachusetts case of *Factory Mut. Liability Ins. Co. v. Justices of Superior Court*, 1938, 300 Mass. 513, 16 N.E.2d 38, and the later, 1939, Texas case of *Federal Underwriters Exchange v. Walker*, Tex.Civ.App., 134 S.W.2d 388. Several of these cases will be discussed later.

The Arizona Supreme Court, as an alternative ground for its decision, pointed out that the Arizona State Compensation Insurance Fund was allowed, but not compelled, to accept insurance from employers. After quoting the pertinent portion of the statute so providing the Court stated 62 P.2d at page 323: "This language is permissive and not mandatory. The provisions of section 1422, however, leave to insurance companies no alternative; they must write all applications. There is no reason, real or apparent, for this provision unless it be that it was put into the law as a deterrent to private insurance companies to enter the field of compensation insurance in competition with the state compensation fund. If that was the motive, the law should have prohibited insurance companies from selling compensation insurance in Arizona and not undertaken to compel them to insure all applications regardless of the hazards." This ground of the decision is undoubtedly sound; the freedom of contract argument is not.

The difficulty with appellant's argument, and with the Arizona case, is that they disregard or treat cavalierly, most of the relatively recent constitutional law cases dealing with the subject of the police power, and rely upon the earlier cases containing a very restricted viewpoint of the State's police power. Thus, many of the principles discussed in *Frost v. Railroad Commission*, 271 U.S. 583, 46 S.Ct. 605, 70 L.Ed. 1101, 47 A.L.R. 457, and *Michigan Public Utilities Commission v. Duke*, 266 U.S. 570, 45 S.Ct. 191, 60 L.Ed. 445, 36 A.L.R. 1105, relied upon by appellant, which cases held that a contract carrier could not be subjected to the burdens imposed on a public utility, were drastically modified as early as 1932, in *Stephenson v. Binford*, 287 U.S. 251, 53 S.Ct. 181, 77 L.Ed. 288, 87 A.L.R. 721. That case, and those following it, have held that if the business is affected with a public interest, and the insurance business is—*German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 34 S.Ct. 612, 58 L.Ed. 1011, L.R.A.1915C, 1189, the validity of the regulation depends primarily upon whether the challenged

legislation is reasonably appropriate to the ends sought to be attained.

Starting in 1934, with the case of *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469, there has been a marked development and advance in the attitude of the United States Supreme Court towards regulatory legislation. That case held that the State of New York could, by statute, fix the minimum and maximum sales prices of milk in that state. *Nebbia* argued that such a statute violated the due process and equal protection clauses of the Fourteenth Amendment. Some of the comments of Mr. Justice Roberts, the author of the majority opinion, are peculiarly applicable to the present case. Thus, 291 U.S. at page 523, 54 S.Ct. at page 510, it is stated: "Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest."

And 291 U.S. at page 525, 54 S.Ct. at page 510: "The Fifth Amendment, * * * and the Fourteenth, * * * do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."

And 291 U.S. at page 527, 54 S.Ct. at page 512: "The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned. * * * And statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the state's competency."

Nebbia argued that the milk industry was not a public utility, and that the public power over rates could be validly exercised only over business affected with a public interest—that is, according to *Nebbia*, only over public utilities. The court conceded that the milk industry was not a public utility, but held that it was a business affected with a public interest and therefore subject to regulation. Quoting from *Munn v. Illinois*, 94 U.S. 113, 24 L.Ed. 77, the Court 291 U.S. at page 533, 54 S.Ct. at page 514, held that: "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large." On the same page this thought was expressed: "Thus understood, 'affected with a public interest' is the equivalent of 'subject to the exercise of the police power'; and it is plain that nothing more was intended by the expression." Still referring to the *Munn* case, the Court continued the discussion as follows, 291 U.S. at page 533, 54 S.Ct. at page 514:

"In the further discussion of the principle it is said that when one devotes his property to a use, 'in which the public has an interest,' he in effect 'grants to the public an interest in that use' and must submit to be controlled for the common good. The conclusion is that if *Munn* and *Scott* wished to avoid having their business regulated they should not have embarked their property in an industry which is subject to regulation in the public interest.

"The true interpretation of the court's language [in *Munn v. Illinois*] is claimed to be that only property voluntarily devot-

ed to a known public use is subject to regulation as to rates. But obviously Munn and Scott had not voluntarily dedicated their business to a public use. They intended only to conduct it as private citizens, and they insisted that they had done nothing which gave the public an interest in their transactions or conferred any right of regulation. The statement that one has dedicated his property to a public use is, therefore, merely another way of saying that if one embarks in a business which public interest demands shall be regulated, he must know regulation will ensue."

In further discussing this subject, the Court directly discussed the insurance business. It pointed out that, because of the great need for insurance protection, and because competing insurers had agreed upon a fixed schedule of rates, the court had upheld, in *German Alliance Insurance Co. v. Lewis*, 233 U.S. 389, 34 S.Ct. 612, 58 L. Ed. 1011, L.R.A.1915C, 1189, a statute fixing the premium rates on fire insurance. Still referring, by analogy, to the field of insurance, the Court, 291 U.S. at page 535, 54 S.Ct. at page 515, stated: "Many other decisions show that the private character of a business does not necessarily remove it from the realm of regulation of charges or prices. * * * Insurance agents' compensation may be regulated, though their contracts are private, because the business of insurance is considered one properly subject to public control."

And, 291 U.S. at page 536, 54 S.Ct. at page 515, it stated: "It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. * * * The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. * * * These decisions must rest, finally, upon

the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells.

"So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*. 'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine.' *Northern Securities Co. v. United States*, 193 U.S. 197, 337-338, 24 S.Ct. 436, 457, 48 L.Ed. 679. And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal."

The *Nebbia* case has been frequently cited with approval, and its doctrine of state power over business and industry steadily expanded. Whenever a state determines, in good faith, that a practice of an industry is injurious to the public, the state may control the practice even where the legislation directly affects the internal affairs of a business or industry, as long as the legislation is neither arbitrary nor

discriminatory. A few citations and examples will serve to illustrate the extent of this control.

In *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536, 69 S.Ct. 251, 257, 6 A.L.R.2d 473, the Court stated: "This Court beginning at least as early as 1934, when the *Nebbia* case was decided, has steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases [*Adair v. United States*, 208 U.S. 161, 28 S.Ct. 277, 52 L.Ed. 436, 13 Ann.Cas. 764]. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. [Citing cases.] Under this constitutional doctrine the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare."

In *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703, 108 A.L.R. 1330, the court upheld the constitutionality of the state of Washington's minimum wage law for women and minors. The court reiterated the principle that freedom of contract is a qualified and not an absolute right, and again stated that test of unconstitutionality was whether the legislation was arbitrary or capricious, "that is all we have to decide." 300 U.S. at page 399, 57 S.Ct. at page 585.

In *Osborn v. Ozlin*, 310 U.S. 53, 60 S.Ct. 758, 84 L.Ed. 1074, the court upheld the constitutionality of a Virginia statute which provided that insurance companies doing a casualty and risk business within the state must handle such insurance "through regularly constituted and registered resident agents or agencies of such companies", Code 1942, § 4222, and that such resident agents should receive the usual commissions and could not share more than one-half of a commission with a non-resident licensed

broker. Speaking of the power which the state has over the regulation of insurance companies, the Court said, 310 U.S. at page 65, 60 S.Ct. at page 762: "It is not our province to measure the social advantage to Virginia of regulating the conduct of insurance companies within her borders insofar as it affects Virginia risks. Government has always had a special relation to insurance. The ways of safeguarding against the untoward manifestations of nature and other vicissitudes of life have long been withdrawn from the benefits and caprices of free competition. The state may fix insurance rates, * * * it may regulate the compensation of agents, * * * it may curtail drastically the area of free contract * * *. States have controlled the expenses of insurance companies * * *. They have also promoted insurance through savings banks * * *. In the light of all these exertions of state power it does not seem possible to doubt that the state could, if it chose, go into the insurance business, just as it can operate warehouses, flour mills, and other business ventures, * * * or might take 'the whole business of banking under its control,' * * *. If the state, as to local risks, could thus preempt the field of insurance for itself, it may stay its intervention short of such a drastic step by insisting that its own residents shall have a share in devising and safeguarding protection against its local hazards. * * * All these are questions of policy not for us to judge. For it can never be emphasized too much that one's own opinion as to the wisdom of a law must be wholly excluded when one is doing one's judicial duty. The limit of our inquiry is reached when we conclude that Virginia has exerted its powers as to matters within the bounds of her control."

A case peculiarly applicable here is *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 63 S.Ct. 602, 87 L.Ed. 777, 145 A.L.R. 1113. There the issue before the court was whether appellant reciprocal insurance associations (insurers against fire and other related risks) whose attorneys in fact were located in Illinois, could constitutionally be made subject to the laws of New York as

a condition of insuring property in that state. After holding that New York had the power to regulate these companies, the court considered the question of whether the particular regulations objected to by the appellants were in violation of the due process clause. Particularly objected to by the appellants was a prohibition against making new agreements with subscribers who did not have assets in excess of ten thousand dollars. The Court said, 318 U.S. at page 321, 63 S.Ct. at page 607: "The appellants earnestly insist that theirs is a successful system of co-operative insurance which gives complete security with substantial economy to their members, and that their New York subscribers may lose the benefits of this form of insurance by reason of the reciprocals' inability to comply with the requirements of the New York law. That the reciprocals save for their members from 25 to 50 per cent of the cost of ordinary commercial insurance and that the members are well satisfied with the system they have created is not controverted by counsel for the state of New York. However persuasive such arguments might be if addressed to the state legislature, they present no constitutional barrier which prevents New York from enforcing these regulations if it chooses." See, also, *Hardware Dealers' Mut. Fire Insurance Co. v. Glidden Co.*, 284 U.S. 151, 52 S.Ct. 69, 76 L.Ed. 214.

In California, it has been held that: "It is settled law of California that the business of insurance is one affected with a public interest." *Caminetti v. State Mut. Life Ins. Co.*, 52 Cal.App.2d 321, 324, 126 P.2d 165, 168. In that case the appellate court affirmed an order of the lower court refusing to vacate an order appointing the Commissioner as conservator for a mutual insurance company where the evidence showed that the payment of a \$1,000 monthly salary to the executive vice-president was hazardous to the company.

Many other cases could be cited, but these are sufficient to illustrate the trend of decisions. The above cases deal with general principles, and not with the specific problem here involved. But we are not

without authority—state authority it is true—on the precise question. Massachusetts enacted a compulsory automobile insurance law requiring all drivers to be licensed, and all licensed drivers to give security for civil liability growing out of the operation of motor vehicles. One form of approved security was a liability insurance policy. The statute, in detail, provided for the form of such policies by requiring them to contain certain provisions and prohibited others, and also regulated premiums. The statute also provided that if any applicant was refused a policy, or if his policy was canceled, he could apply to a statutory board of appeal which was authorized to determine if such refusal or cancellation was "reasonable," and whether the applicant was a "proper person" to whom a policy should be issued. If the board of appeal decided in favor of the applicant, the insurance company was required to issue a policy, and, upon refusal, its license to do business was to be suspended. In an advisory opinion to the Legislature—In re Opinion of the Justices, 251 Mass. 569, 147 N.E. 681—the Supreme Judicial Court of Massachusetts held that the statute, in all respects, was constitutional. After holding that the business of automobile liability insurance affected the public interest, and after upholding the compulsory provisions of the act including the provisions relating to the content of the policies and the regulation of charges, etc., the Court upheld the provision requiring insurance companies to issue policies to applicants found reasonably entitled to insurance by the board of appeals. At page 613, of 251 Mass., at page 701 of 147 N.E. the Court discussed this problem as follows: "The several features of the proposed bill set forth in the eighth question as provisos constitute serious limitations upon customary methods of conducting the insurance business. The question whether a particular risk shall be assumed by an insurer or surety is an important factor in the conduct of such business. * * * Character, physical capacity, sight, hearing, financial responsibility, record of past conduct, personal habits, nature and extent of business and general reputation are among the elements

of essential significance in determining whether motor vehicle liability bonding or insurance for any particular applicant shall be undertaken. To subject the determination of such a vital question by an insurer or surety to review is a great interference with freedom of contract. The right to freedom of contract is secured as a general rule by the constitutions of the commonwealth and nation; but there are exceptions where legislative interference with that right is permissible. We are of opinion that the proposed bill in this aspect does not transcend legislative power. The right of the citizen to register a motor vehicle whereby he may travel upon the ways is made strictly conditional upon his depositing cash or securities or upon procuring a motor vehicle liability policy or bond. This, too, is a great interference with freedom of action. The refusal by corporations to issue such policy or sign such bond may drive one out of business or seriously impair his convenience. Where such paramount interests are at stake with sole reference to the use of public ways provided wholly at the expense of the government, there is constitutional basis for legislative regulation to the end that no injustice may be done. Unwarranted discrimination may arise against certain applicants. Instances may arise of honest difference of opinion whether a policy or bond ought to be issued at all, or whether, after issuance, it ought to be canceled. To provide an impartial administrative tribunal to settle such controversies, although going to the verge of power, cannot in our opinion be pronounced in excess of the authority conferred by the Constitution upon the General Court."

In Factory Mut. Liability Ins. Co. v. Justices of Superior Court, 300 Mass. 513, 16 N.E.2d 38, in a contested case, the highest court of Massachusetts upheld an order of the board of appeal ordering the insurance company to issue a policy to an applicant who had been refused a policy. There is some language in the opinion particularly applicable here. At page 40 of 16 N.E.2d the Court stated:

"When our Legislature enacted the compulsory motor vehicle insurance law, by

which all persons registering motor vehicles are required to provide security for the payment of claims for damages arising from their operation on the public ways, it foresaw the necessity for providing at the same time a procedure under which individuals could compel companies engaging in the business to insure them in the absence of sound reasons for refusal. * * *

"* * * Nor can a company limit the power of the board and the court to determine whether a refusal is proper and reasonable under all the circumstances by insistence upon answers deemed by it to be satisfactory to such questions as it may see fit to include in an application blank. *And it is plain that no company attempting to engage in this business can take the position that it will insure only pleasure vehicles or limit its operations to that part of the field in which there is the least risk and the most profit.* The compulsory law contemplates, and its successful operation requires, that as to their obligations to issue policies all companies alike should abide by the orders of the board or of the court." (Italics added.)

A similar statute has been upheld in Texas. *Harris v. Traders' & General Ins. Co.*, Tex.Civ.App., 82 S.W.2d 750; *Texas Employers' Ins. Ass'n v. U. S. Torpedo Co.*, Tex.Civ.App., 8 S.W.2d 266, affirmed in Tex.Com.App., 26 S.W.2d 1057; *Federal Underwriters Exchange v. Walker*, Tex. Civ.App., 134 S.W.2d 388.

[1,2] No further reference to the authorities need be made on this phase of the case. The insurance business is one affected with a public interest, and subject to regulation. As long as the statute has a reasonable relation to a proper legislative purpose, and is neither arbitrary nor discriminatory, it is a valid enactment and cannot be successfully challenged under the due process clause of the federal Constitution. That a valid legislative purpose here existed is too clear to require extended discussion. For the protection of persons using the highways, the Legislature determined that certain drivers of motor vehicles had to be insured, or give security. Many in these affected groups could

not secure a policy or give security. Their means of livelihood, in many cases, was jeopardized. Their right to use the highways was greatly limited. Some means whereby applicants in good faith entitled to insurance could get it, had to be provided. This could be done either by the State going into the insurance business, or by an assigned risk plan affecting all insurers. The Legislature determined to adopt the latter alternative. The Legislature also determined that such a plan could not operate successfully unless all companies writing liability policies were required to take their share of assigned risks. Otherwise, as pointed out by the Massachusetts court, *supra*, one company could select its risks, and thus gain what the Legislature has determined to be an unfair advantage over its competitors. Unless appellant is required to assume its share of the assigned risks on penalty of losing its license, it will gain an unfair advantage over its competitors. This is a phase of the insurance business clearly subject to regulation. No company can be compelled to assume a risk. But if it refuses to accept an assigned risk, its right to do business in this state may be terminated. The cases heretofore cited clearly establish that the due process clause is no impediment to such a statute. The State's police powers clearly encompass such regulation.

The argument that such legislation compels appellant to enter into contracts of insurance against its will, and thus impairs appellant's constitutional right to freedom of contract, and destroys one of the essential elements of a contract—consent—has been fully answered in the cases cited above. The State has said that insurance companies that enter the liability field cannot limit their activities to the most profitable type of business, but must share proportionately the less profitable policies. This infringement on the freedom of contract is justifiable, for reasons already stated. The Plan has a reasonable relation to a valid legislative purpose. It is not arbitrary, capricious, or discriminatory. There is therefore no violation of the due process clause.

[3] Appellant, in the briefs and oral arguments, has laid much stress on the contention that, as applied to appellant, the statute compels it to render a service beyond the scope of its claimed dedication to the public service. The argument is fallacious. It is based on the theory that heretofore it has limited its policies to members of the California State Automobile Association, a select group. If appellant has "dedicated" its business to the public service, it has dedicated it to the writing of automobile liability insurance. The extent of its "dedication" cannot be measured by its past customs or practices, but must be measured by the extent of its powers under the law. While appellant has heretofore only insured a select group, that does not mean that appellant has "dedicated" its business to that group. Under the law, Insurance Code, § 108, this company has the legal right to write automobile liability insurance on a statewide basis and for all applicants. That is the real extent of its "dedication."

[4] Nor does the plan give the competitors of appellant any unfair advantage—in fact, to exclude appellant from the plan would be to give it a most unfair advantage over other companies. Appellant writes an appreciable proportion of the automobile liability insurance written in this state. To permit it to select its risks, and to deny that right to its competitors would be most unfair. The right of the State to regulate a mutual or reciprocal insurance company, and to compel such companies to abide by reasonable regulations applicable to all, is too clear to require further discussion. That is not discrimination—it is applying the rule of uniformity.

Delegation of Legislative Authority to the Commissioner.

[5] The second major contention of appellant is that the statute is invalid because it fails to provide an adequate yardstick for the guidance of the Commissioner, and thus unlawfully delegates to him legislative powers. There can be no doubt that it is the law that a valid statute cannot

delegate unlimited powers to an administrative officer and that, to be valid, the statute must "provide an adequate yardstick for the guidance of the executive or administrative body or officer empowered to execute the law." *Blatz Brewing Co. v. Collins*, 69 Cal.App.2d 639, 645, 160 P.2d 37, 41, quoting from 11 Am.Jur. 955, § 240; see, also, *American Distilling Co. v. State Board of Equalization*, 55 Cal. App.2d 799, 131 P.2d 609, also see 24 Cal. L.Rev. 184; 23 Cal.L.Rev. 435; 8 So.Cal. L.Rev. 226, 255; 29 Cal.L.Rev. 110, 120. It is this principle appellant seeks to here invoke.

The theory of appellant is that, under the statute, the Commissioner is free to determine, at his arbitrary will, what types of applicants insurers will be compelled to insure, and what types they may refuse to insure. It will be remembered that § 11620 of the Insurance Code requires the Commissioner to "approve or issue a reasonable plan for the equitable apportionment * * * of those applicants for automobile bodily injury and property damage liability insurance who are in good faith entitled to but are unable to procure such insurance through ordinary methods." Section 11621 requires assignments under the plan "In so far as possible" to be "consistent with the scope of territorial operations and underwriting policies of each subscriber." Section 11624 requires the plan to contain "Standards for determining eligibility of applicants for insurance," and provides that the Commissioner in establishing such standards "may" take into consideration five specified factors.

It is the basis of appellant's argument on this point that these statutes limit the Commissioner in making assignments only to those "in good faith entitled", and that such words, in fact and in law, place no limitation at all upon the powers of the Commissioner. It is claimed that section 11624 constitutes no limitation on the Commissioner because its provisions are permissive and not mandatory. Such a statute provides no standard at all on the power of the Commissioner, and constitutes an unlawful delegation of legislative power,

according to appellant. Reliance is placed on such cases as *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446; *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947; *State v. Hines*, 163 Kan. 300, 182 P.2d 865.

The rule that the statute must provide a yardstick to define the powers of the executive or administrative officer is easy to state but rather hard to apply. Probably the best that can be done is to state that the yardstick must be as definite as the exigencies of the particular problem permit.

The cases cited by appellant set out a pretty rigid standard. Very broad language can be found in them, but such language must be read in connection with the particular problem under discussion. There are several cases decided by the United States Supreme Court, more recent than those cited by appellant, where the problem is exhaustively discussed and where the principles to be applied are set forth at length. One such case is *Lichter v. United States*, 334 U.S. 742, 68 S.Ct. 1294, 92 L.Ed. 1694, where the court upheld the constitutionality and Renegotiation Act, 50 U.S.C. A.Appendix, § 1191. Under attack on the ground of unconstitutional delegation of legislative powers to administrative officers, was the section of the statute which provided that cabinet secretaries could renegotiate contracts under which "excessive profits" had been or would be realized, and further allowed the Secretary to recover "excessive profits" paid to contractors under the re-negotiated contracts. No definition of "excessive profits" was contained in the statute. The court held that the phrase "excessive profits" constituted a sufficient yardstick in view of its context, and because of the administrative practices later incorporated into the act, and the nature of the war power there being employed. Certainly, such a standard is far less definite than the one here employed. In discussing standards upheld in other cases the Court stated, 334 U.S. at page 786, 68 S.Ct. at page 1317.

"The following, somewhat comparable, legislative specifications are among those

which have been held to state a sufficiently definite standard for administrative action:

"‘Just and reasonable’ rates for sales of natural gas, * * *; ‘public interest, convenience, or necessity’ in establishing rules and regulations under the Federal Communications Act, 47 U.S.C.A. § 151 et seq., * * *; prices yielding a ‘fair return’ or the ‘fair value’ of property, * * *; ‘unfair methods of competition’ distinct from offenses defined under the common law, * * *; ‘just and reasonable’ rates for the services of commission men, * * *; and ‘fair and reasonable’ rent for premises, with final determination in the courts, * * *."

Another leading case is *Yakus v. United States*, 321 U.S. 414; 64 S.Ct. 660, 88 L.Ed. 834, in which the court held that there was no unconstitutional delegation of power by Congress to the Price Administrator in the Emergency Price Control Act of 1942, 50 U.S.C.A. Appendix, § 901 et seq. Section 1 (a) described the general purpose of the Act. By section 2(a), the Administrator was authorized to promulgate regulations fixing prices of commodities which "in his judgment will be generally fair and equitable and will effectuate the purposes of this Act" when in his judgment, their prices "have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act." The section also provided that "so far as practicable * * * the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 * * * and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, * * *."

The statute was upheld as providing a sufficient standard. There is much stated in the opinion that is here applicable. At page 423 of 321 U.S., the Court stated:

"Congress enacted the Emergency Price Control Act in pursuance of a defined policy and required that the prices fixed by the Administrator should further that policy and conform to standards prescribed by the Act. The boundaries of the field of the Administrator's permissible action are

marked by the statute. It directs that the prices fixed shall effectuate the declared policy of the Act to stabilize commodity prices so as to prevent war-time inflation and its enumerated disruptive causes and effects. In addition the prices established must be fair and equitable, and in fixing them the Administrator is directed to give due consideration, so far as practicable, to prevailing prices during the designated base period, with prescribed administrative adjustments to compensate for enumerated disturbing factors affecting prices. In short the purposes of the Act specified in § 1 denote the objective to be sought by the Administrator in fixing prices—the prevention of inflation and its enumerated consequences. The standards set out in § 2 define the boundaries within which prices having that purpose must be fixed. It is enough to satisfy the statutory requirements that the Administrator finds that the prices fixed will tend to achieve that objective and will conform to those standards, and that the courts in an appropriate proceeding can see that substantial basis for those findings is not wanting.

"The Act is thus an exercise by Congress of its legislative power. In it Congress has stated the legislative objective, has prescribed the method of achieving that objective—maximum price fixing—and has laid down standards to guide the administrative determination of both the occasions for the exercise of the price-fixing power, and the particular prices to be established." After distinguishing the *Schechter* case the Courts stated, 321 U.S. at page 424, 64 S.Ct. at page 667:

"The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate. The essentials of the legislative function are the determination of the legislative policy and its formulation and promulga-

tion as a defined and binding rule of conduct—here the rule, with penal sanctions, that prices shall not be greater than those fixed by maximum price regulations which conform to standards and will tend to further the policy which Congress has established. These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective. It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework. * * *

"Nor does the doctrine of separation of powers deny to Congress power to direct that an administrative officer properly designated for that purpose have ample latitude within which he is to ascertain the conditions which Congress has made prerequisite to the operation of its legislative command. Acting within its constitutional power to fix prices it is for Congress to say whether the data on the basis of which prices are to be fixed are to be confined within a narrow or a broad range. In either case the only concern of courts is to ascertain whether the will of Congress has been obeyed. This depends not upon the breadth of the definition of the facts or conditions which the administrative officer is to find but upon the determination whether the definition sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will."

At page 426 of 321 U.S., at page 668 of 64 S.Ct. appears the following pertinent illustrations: "The authority to fix prices only when prices have risen or threaten to rise to an extent or in a manner inconsistent with the purpose of the Act to prevent inflation is no broader than the authority to fix maximum prices when deemed necessary to protect consumers against unreasonably high prices, sustained in Sun-

shine Anthracite Coal Co. v. Adkins, supra [310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263] or the authority to take possession of and operate telegraph lines whenever deemed necessary for the national security or defense, upheld in Dakota Central Tel. Co. v. South Dakota, 250 U.S. 163, 39 S.Ct. 507, 63 L.Ed. 910, 4 A.L.R. 1623; or the authority to suspend tariff provisions upon findings that the duties imposed by a foreign state are 'reciprocally unequal and unreasonable', held valid in Field v. Clark, supra (143 U.S. 649, 12 S.Ct. [495], 504, 36 L.Ed. 294)." Other powers mentioned by the court as within the constitutional limitation are set forth, 321 U.S., on page 427, 64 S.Ct. on page 668, as follows: "* * * the power to approve consolidations in the 'public interest', * * *; or the power to regulate radio stations engaged in chain broadcasting 'as public interest, convenience or necessity requires', * * *; or the power to prohibit 'unfair methods of competition' not defined or forbidden by the common law, Federal Trade Commission v. R. F. Keppel & Bro., 291 U.S. 304, 54 S.Ct. 423, 426, 78 L.Ed. 814; * * *; or the similar direction that in adjusting tariffs to meet differences in costs of production the President 'take into consideration' 'in so far as he finds it practicable' a variety of economic matters, sustained in Hampton, Jr., & Co. v. United States, supra (276 U.S. 394, 48 S.Ct. [348], 349, 72 L.Ed. 624); or the similar authority, in making classifications within an industry, to consider various named and unnamed 'relevant factors' and determine the respective weights attributable to each, held valid in Opp Cotton Mills v. Administrator, supra [312 U.S. 126, 61 S.Ct. 524, 85 L.Ed. 624]."

The United States Supreme Court has also commented on this problem in American Power & Light Co. v. Securities and Exchange Comm., 329 U.S. 90, 67 S.Ct. 133, 91 L.Ed. 103. The problem there involved and its solution are disclosed in the following quotation, 329 U.S. at page 104, 67 S.Ct. at page 142:

"Section 11(b) (2) [15 U.S.C.A. § 79 k(b) (2)] itself provides that the Commission shall act so as to ensure that the cor-

porate structure or continued existence of any company in a particular holding company system does not 'unduly or unnecessarily complicate the structure' or 'unfairly or inequitably distribute voting power among security holders.' " The objection that this was an insufficient standard was rejected.

At page 105 of 329 U.S., at page 142 of 67 S.Ct. the Court stated: "* * * These standards are certainly no less definite in nature than those speaking in other contexts in terms of 'public interest,' 'just and reasonable rates,' 'unfair methods of competition' or 'relevant factors.' The approval which this Court has given in the past to those standards thus compels the sanctioning of the ones in issue. * * *

"The judicial approval accorded these 'broad' standards for administrative action is a reflection of the necessities of modern legislation dealing with complex economic and social problems. * * * The legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations."

[6, 7] Enough has been quoted to illustrate how similar problems have been handled by the highest court. It is clear that the fact that the Commissioner has some discretion, is no valid constitutional objection to the statute. It is also clear that the Assigned Risk Law does not have to be considered in a vacuum. Other statutes *in pari materia* may, of course, be considered. The original Assigned Risk Law with its urgency clause, may be looked to in order to ascertain the legislative purpose. So too, we may properly consider

the various statutes requiring insurance or security from certain automobile drivers. The background of the present statute, the problem it was designed to meet, the voluntary plan, its breakdown, all serve to give meaning and substance to the provisions of the statute under consideration. Thus, when section 11620 of the Insurance Code declares that it is the policy of the law to allow the Commissioner to issue a plan for the equitable apportionment of applicants in good faith entitled to insurance, the statute does not stand alone but must be considered in connection with its object and its background. If the statute was to be effective, great discretion had to be left to the Commissioner to meet the various and complex problems with which he was to be presented. Rigid standards were not reasonably practicable. While the statute must furnish the administrator with a yardstick, it need not furnish a micrometer. The policy of the statute is clear. In our opinion, the yardstick furnished complies with constitutional requirements.

Does the Plan Violate the Statute?

The next contention of appellant is that, if it be assumed that the statute is valid, the Plan actually adopted violates the provisions of the statute and is therefore void.

[8, 9] The appellant attacks the Plan in several minor and one major respect. The first minor attack is against various provisions of the Plan on the ground that certain distinctions made therein are arbitrary or discriminatory. None of these alleged discriminations operates against appellant. It is elementary that only a member of the class discriminated against can attack the constitutionality of a plan on the charge of unconstitutional discrimination.

[10] Another minor objection to the Plan is the claim that it overlooks consideration of the record of applicants with respect to suspension or revocation of drivers' licenses. Insurance Code, § 11624(a) (2). However, appellant has apparently overlooked sections 2431.8 and 2431.8a of the Plan, which provide that the application may be refused if the accident and conviction records are such that his operation of an automobile would endanger public safety,

or if, on the basis of a thorough investigation of the applicant's record, reasonable doubt exists as to whether the applicant should be permitted to continue driving.

The main attack against the Plan is based on the last sentence of section 11621 of the Insurance Code which reads as follows: "In so far as possible, assignments under the plan shall be consistent with the scope of territorial operations and underwriting policies of each subscriber."

[11] The Plan provides, § 2445.1, that "In so far as possible, assignments shall be consistent with the scope of territorial operations and underwriting policies of each insurer, of which the Manager shall have been notified in writing. Underwriting policy is policy founded on underwriting judgment of the hazards involved. Without in any way limiting or enlarging the meaning of the term 'underwriting policy,' policy excluding from insurance an applicant solely by reason of the fact of his non-membership in an organization is not underwriting policy. Underwriting policy excluding from insurance applicants solely by reason of facts or circumstances not sufficient to render them not in good faith entitled, under this Plan, to insurance is inconsistent with the purposes of this Plan and of the statute under which it is approved and issued." Appellant argues at length that this provision of the Plan is invalid, indefinite and irrational. The argument, omitting certain technical attacks on the provision, none of which is sound, amounts to this — Section 11621 of the Insurance Code requires that any plan adopted shall "In so far as possible" be consistent with the underwriting policies of the insurer. The policy of insuring only members of the California State Automobile Association is an underwriting policy of appellant. The Plan, § 2445.1, declares this not to be an "underwriting policy." The Plan therefore violates the statute.

The obvious answer to appellant's argument is that all "underwriting policies" of

an insurer do not have to be given recognition by the Plan. Section 11621 of the Insurance Code does not compel the Commissioner to embody all such underwriting policies into the Plan. The language is "In so far as possible" such underwriting policies shall be considered in making assignments. If it be assumed that a policy or practice of writing insurance only for members of the Association is an "underwriting policy," such policy is directly opposed to the purpose, intent and spirit of the statute. Certainly, section 11621 does not require the Commissioner to embody into the Plan a policy of a particular insurer that is violative of the statute. It is apparent that if membership in arbitrarily selected groups were to be recognized as a proper base of underwriting policy, the way would be open whereby any company could evade legitimate assignments on the ground that the particular applicant was not a member of the selected group. Thus, the entire purpose of the statute would be defeated.

It is apparent that the Commissioner cannot have a plan providing for "equitable apportionment" of risks among all insurers unless he has the power to assign to appellant applicants who are non-members of the Association. Section 2445.1a of the Plan provides that when a member of the Association applies for insurance under the Plan, the member shall preferably be assigned to appellant. However, appellant cannot refuse an applicant merely because he is not a member of the Association. This would seem to be as "equitable" an apportionment as is possible without destroying the effect of the statute.

Thus, whether it be considered that the Commissioner gave no consideration to appellant's policy of writing insurance only for members of the Association, or that he gave such consideration "In so far as possible," the Plan does not violate the statute.

The judgment appealed from is affirmed.

BRAY, J., and SCHOTTKY, Justice pro tem., concur.

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**BARLOW v. LOS ANGELES COUNTY
FLOOD CONTROL DIST. et al.**

Civ. 17433.

District Court of Appeal, Second District,
Division 2, California.

April 14, 1950.

Action by Edward M. Barlow, as administrator, against the Los Angeles County Flood Control District, Harold L. Debus, Gladys H. Debus, and others, to recover for the wrongful death of Arthur M. Barlow, deceased. The Superior Court for Los Angeles County, William B. McKesson, J., rendered a judgment for defendants, and the plaintiff appealed. The District Court of Appeal, Wilson, J., held that the Flood Control District was not a public corporation made liable by statute for injuries or death due to defective condition of its property, but that the complaint stated a cause of action against the defendants Debus as owners of a lot through which a flood control channel ran.

Judgment reversed as to the defendants Debus with directions, and affirmed as to the Flood Control District.

McComb, J., dissented in part.

1. Municipal corporations ☞1016

A public corporation of the state may be sued only in those cases specifically authorized by law.

2. Levees and flood control ☞36

Under the statute providing that municipalities shall be liable for injuries to persons resulting from dangerous or defective works and property, a flood control district is not made liable for injuries or death to private individuals due to dangerous or defective conditions of its property. Gen.Laws, Act 5619, § 2.

3. Levees and flood control ☞36

Complaint against flood control district, which alleged merely that district constructed a wall one foot in height along bank of water channel into which decedent fell, was insufficient to charge negligence and permit recovery for wrongful death of decedent. Gen.Laws, Act 5619, § 2.

4. Levees and flood control ☞36

In action for wrongful death of pedestrian who walked from roadway into flood control channel, complaint alleging that owners of lot not occupied by flood control channel maintained pavement thereon of material of same type as that used for pavement of adjacent street and joined pavement with that of street so that there was no noticeable difference between surface of street and owners' property, and alleging that owners did not guard edge of flood control channel running through their property, presented an issue of negligence for the jury.

5. Levees and flood control ☞36

Where pavement of street was allegedly similar to that of adjoining property, and there was allegedly neither warning by barrier, light or otherwise to indicate to pedestrian as he walked in darkness that he had passed beyond line of street onto private property, pedestrian had a right to believe that he was continuing on public street and to assume that he might do so without danger; and having created such a condition, it was property owners' duty to guard against pedestrian's falling into flood control channel passing through the private property. Vehicle Code, § 564.

6. Negligence ☞33(1)

A property owner owes no duty to a trespasser.

7. Negligence ☞111(1), 136(20)

If a person maintains an excavation or other dangerous agency or installation on his land in close proximity to a public street without an enclosure or other protection to persons and without warning of danger, a complaint stating such facts, alleging that plaintiff suffered injuries as a result of having fallen into the excavation or having come into contact with dangerous agency or installation, is good against a demurrer; and question of defendant's negligence in maintaining such unprotected agency or installation is one of fact for the jury.

8. Negligence ☞33(2), 42

When property adjoining or connected with a public highway is so paved that a

person traveling in darkness cannot ascertain when he has passed from highway onto such other property, and by means of such pavement traveler is led to believe that he is on the highway, such traveler is not a trespasser when he passes over the line onto the private property, and if injured by falling into an unguarded excavation may recover damages from the property owner who has maintained the condition.

Edward Flam, Derthick & Cusack, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, and J. P. Wright, Deputy County Counsel, Los Angeles, for respondent Los Angeles County Flood Control Dist.

Bishop Moore, Los Angeles, for respondents Harold L. Debus and Gladys H. Debus.

WILSON, Justice.

This is an action to recover damages for the wrongful death of decedent, Arthur M.

Barlow. Defendants Flood Control District and Debus filed separate demurrers to the first amended complaint which were sustained without leave to amend. Plaintiff presented a motion for leave to file a second amended complaint.¹ The motion was denied and judgment was thereafter entered in favor of defendants, from which plaintiff has appealed.

The amended complaint alleges that decedent died as the result of having fallen into the flood control channel hereinafter described; that defendants Debus are the owners of Lot 174 which fronts on Brookside Lane; that they granted an easement thereover to defendant Flood Control District; that the latter constructed a channel within the boundaries of its easement to a depth of approximately 12 feet below the grade of Brookside, the floor and walls of which were constructed of rock and cement and the easterly wall of the channel extended approximately one foot above the grade of the lane; that the easement extends to the extreme easterly boundary of Lot 174 along the northerly 11 feet of

1. The proffered second amended complaint contained in addition to the allegations set forth in the first amended complaint the following:

"The flood control channel constructed by the defendant Los Angeles County Flood Control District followed said easement diagonally across said Lot 174 and thus caused a triangular piece of said lot to remain between the said channel and the Westerly line of said Brookside Lane. The owners of said Lot 174, prior to the year 1948, constructed a garage on the Southerly base of the above described triangular piece of Lot 174 and negligently and carelessly caused the remaining or Northern portion of said triangular piece of land to be hard surfaced or paved with the same type of material that was used in the construction of the pavement of Brookside Lane and joined the surface or pavement of said triangular piece with the pavement of Brookside Lane without noticeable offset and thereby caused said triangular piece of Lot 174 lying between the Westerly boundary line of said Brookside Lane and the unguarded easterly edge of said flood control channel to appear to be a part of said Brookside Lane.

"The situation thus created was one which was designed to mislead and de-

ceive any person traveling in a northerly direction on the westerly side of Brookside Lane in the darkness, and it did mislead and deceive Arthur M. Barlow on the night of May 31, 1948, as hereinafter described and caused him to believe that he was traveling within and upon the paved portion of said Brookside Lane while passing said Lot 174, while in reality he had departed from said highway, and fell into the easterly side of said flood control channel without having made an apparent or noticeable departure from said public highway.

"Plaintiff is informed and believes and upon such ground alleges that said condition was created by the defendants Harold L. Debus, Gladys M. Debus, Addie M. Venio, Jane Doe and John Doe or their predecessors in interest and if created by their predecessors in interest the defendants negligently and carelessly permitted said hazardous condition to exist on their premises approximately adjacent to the public highway. Attached hereto and marked Exhibit A is a photograph showing the garage herein referred to and the paved triangular area of said Lot 174 and its juncture with the pavement of Brookside Lane. The wooden railing or barrier marked with the letter B on said photograph has been erected since May 31, 1948."

the frontage of the lot on Brookside Lane and from that point bears southwesterly across the remainder of the lot; that on May 31, 1948, at about 8:30 P.M., decedent was walking in a northerly direction on the left or westerly side of Brookside and while passing Lot 174, at a time when the flood control channel was concealed from him by reason of darkness, he walked from the roadway into the channel and suffered injuries which resulted in his death; that the point where decedent fell into the channel was approximately two feet west from the westerly boundary of Brookside Lane, that is to say, a portion of Lot 174 approximately two feet in width lay between the westerly line of Brookside and the easterly wall of the flood control channel at the point where decedent fell; that there was no protecting fence, railing or other device to prevent a pedestrian lawfully using the street from falling into the channel, and no notice, light or warning device was maintained by defendants to warn a traveler using Brookside Lane of the existence of the danger; that the maintenance of the flood control channel and the approaches thereto on and adjacent to Brookside constituted a trap or hazard to persons traveling thereon.

1. *The cause of action against the Flood Control District.*

[1-3] Neither the first amended complaint nor the proposed second amended complaint stated a cause of action against defendant District. A public corporation of the State may be sued only in those cases specifically authorized by law. *Whiteman v. Anderson-Cottonwood Irr. Dist.*, 60 Cal.App. 234, 243, 212 P. 706. Plaintiff contends that defendant Flood Control District is brought within the rule above stated by section 2 of the Public Liability Act, Stats.1923, ch. 328, p. 675, 2 Deering's General Laws, 1944 ed., p. 2062, Act No. 5619, which reads in part as follows: "Counties, municipalities and school districts shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works and property * * *." Defendant Flood Control District is not one of the public corporations made

liable by the statute for injuries or death due to the dangerous or defective condition of its property, hence there was no error in the order sustaining the demurrer of the district without leave to amend. *Brandenburg v. L. A. County Flood Control Dist.*, 45 Cal.App.2d 306, 114 P.2d 14. See also *Whiteman v. Anderson-Cottonwood Irr. Dist.*, supra; *Sherbourne v. Yuba County*, 21 Cal. 113, 81 Am.Dec. 151; *Miller v. City of Palo Alto*, 208 Cal. 74, 280 P. 108. *House v. Los Angeles County Flood Control District*, 25 Cal.2d 384, 153 P.2d 950, did not overrule the *Brandenburg* case. In the *House* case it was charged that the district removed a safe and secure protection to the plaintiff's land and substituted an unsafe and negligently planned bank resulting in the overflow of her property. No comparable allegation appears in the instant case. The construction of a wall one foot in height along the bank of the channel, without further allegation, is insufficient to charge negligence and recoverable damage.

In the instant case there is no allegation that there was any defect in the plan of the public improvement or negligence in its construction, or that the procedure followed by the district was so grossly incompetent and contrary to good engineering practices as to constitute negligence. There is nothing in *Hunt v. Authier*, 28 Cal.2d 288, 169 P.2d 913, 171 A.L.R. 1379, sustaining plaintiff's position.

2. *The cause of action against defendants Debus.*

[4] The proposed second amended complaint stated a cause of action against defendants Debus, and it was error to refuse to permit its filing. The allegation that they, the owners of the portion of the lot not occupied by the flood control channel, maintained a pavement thereon of material of the same type as that used for the pavement of the adjacent street and joined their pavement with that of the street so that there was no noticeable difference between the surface of the street and defendants' property and that they did not guard the edge of the flood control channel, presents an issue of negligence that should be placed before a jury.

Section 367, Restatement of the Law of Torts, reads as follows: "Dangerous Conditions upon Land Appearing to Be a Highway. A possessor of land who so maintains a part thereof that he knows or should know that others will reasonably believe it to be a public highway, is subject to liability for bodily harm caused to them while using such part as a highway, by his failure to exercise reasonable care to maintain it in a reasonably safe condition for travel."²

In Prosser on Torts, page 604, is the following language which is sustained by the cases cited by the author: "[I]f he [an occupier of land abutting on a highway] so maintains a part of his land that it appears to be a highway, as where he paves a strip next to the street, or gives a private way the appearance of a public one, he must use reasonable care to see that there is no danger to those who are misled into using it. It is often said in such cases that there is an implied 'invitation' to enter, but the true basis of liability seems to be the misrepresentation as to the character of the property."

[5] There was no sidewalk along the street. Decedent was walking northerly along the westerly side of the street as pedestrians are required to do. Vehicle Code, sec. 564. Since the pavement of the street was similar to that of defendants' property and there was neither warning by barrier, light or otherwise to indicate to him as he walked in the darkness that he had passed beyond the line of the street onto defendants' lot, he had a right to believe he was continuing his journey in the public street and to assume he might do so

without danger. The existence of the pavement on defendants' property was an invitation to him so to do. Its location was such as to mislead and deceive any person traveling along Brookside Lane in the darkness and apparently did deceive decedent and led him to his death. Having created such a condition it was the duty of defendants to guard against his falling into the channel.

[6] Decedent was not a trespasser within the rule that a property owner owes no duty to a trespasser. In *Folkins v. Johnston*, 124 Cal.App. 169, 12 P.2d 153, 155, the defendant was constructing a state highway. At a point where the new construction separated from the old road the plaintiffs' automobile, traveling at night, instead of turning from the new highway, which had been paved for only a short distance beyond the point of separation, continued into the uncompleted new highway. The latter was unprotected by barriers, lights or other warning. The automobile ran into a pile of gravel which also was without any warning device. The contractor having created a situation of danger was held responsible for the damage. The court held that the fact that the gravel pile on the new highway was 55 feet beyond the point where the roads separated and that the plaintiffs could not have reached it without trespassing was no defense; that by the condition created by the contractor the plaintiffs "were lulled into a security in entering the unfinished part of the road on the appearance of the same being completed."

While defendants did not construct the flood control channel, they were maintain-

2. Comments a, c and d following section 367 read:

"a. One whom a possessor of land intentionally or negligently misleads into believing that part of his land is a public highway, is entitled to expect that the possessor will afford him a security similar to that which he would be entitled to expect were the land actually a highway."

"c. The rule stated in this Section applies not only where the possessor of land has paved a strip of his land adjoining the highway or has otherwise dealt with it so as to make it appear to be part of the highway, but also where

he has so constructed a private road branching off from a public highway that he should realize that persons traveling on the highway would reasonably regard it as a continuance thereof."

"d. In addition, the possessor, having misled others into believing that part of his premises is a public highway, is under the same duty to them in respect to the maintenance of the rest of his land adjacent thereto and in respect to the activities conducted thereon as though such part were actually a public highway."

ing the pavement that led to its brink which was a trap for every pedestrian traveling along the street in the darkness. The situation thus existing through the agency of defendants made them amenable to the same rules to which they would have been responsive had they actually made the excavation. That they too late became aware of their duty is attested by the photograph of the scene of the accident attached to the proposed second amended complaint, which shows a guardrail along the bank of the flood control channel, and the allegation in the pleading that the guardrail had been constructed subsequently to decedent's death.

[7] The text of the Restatement and the accompanying comments are supported by the rule expressed in the California cases, to wit, that if a person maintains an excavation or other dangerous agency or installation on his land in close proximity to a public street without an enclosure or other protection to persons and without warning of danger a complaint stating such facts and alleging that the plaintiff suffered injuries as a result of having fallen into the excavation or of having come into contact with the dangerous agency or installation is good against a demurrer. *Carroll v. Central Counties Gas Co.*, 74 Cal.App. 303, 307, 240 P. 53; *Malloy v. Hibernia S. & L. Society*, 3 Cal. Unrep. 76, 78, 21 P. 525; *Marton v. Jones*, 44 Cal.App. 299, 301, 186 P. 410; *County of Alameda v. Tielslau*, 44 Cal.App. 332, 336, 186 P. 398; *Folkins v. Johnston*, supra. The same rule has been stated in other jurisdictions. *Crogan v. Schiele*, 53 Conn. 186, 1 A. 899, 5 A. 673, 55 Am.Rep. 88; *Ruocco v. United Adv. Corp.*, 98 Conn. 241, 119 A. 48, 30 A.L.R. 1237; *Haughey v. Hart*, 62 Iowa 96, 17 N.W. 189, 49 Am.Rep. 138. The question of defendant's negligence in maintaining such an unprotected agency or installation is one of fact for the jury to determine. *Gerberich v. Southern Cal. Edison Co.*, 5 Cal.2d 46, 50-51, 53 P.2d 948; *Norton v. City of Pomona*, 5 Cal.2d 54, 61, 53 P.2d 952.

[8] When property adjoining or connected with a public highway is so paved that a person traveling in the darkness cannot ascertain when he has passed from

the highway onto such other property and by means of such pavement the traveler is led to believe he is on the highway, such traveler (1) is not a trespasser when he passes over the line onto the private property, and (2) if injured by falling into an unguarded excavation may recover damages from the property owner who has maintained the condition which led him to believe he was on the public pavement. *Folkins v. Johnston*, supra; *Crogan v. Schiele*, supra.

The general rule, which defendants contend absolves them from liability, that the owner of property owes no duty to trespassers to keep his property in a safe condition or to warn of danger existing thereon is applicable where the injured person is clearly a trespasser on his own volition and where the conditions are such that by the ordinary exercise of his senses he could have avoided the danger. The rule is subject to many exceptions, some of which are stated in the cases above cited, and insofar as the instant case is concerned they need no further elaboration. The cases relied on by defendants are so dissimilar to the case at bar that they afford no support to the judgment. In *Doyle v. Pacific El. Ry. Co.*, 6 Cal.2d 550, 59 P.2d 93, the minor plaintiff climbed a ladder from the balcony of a dance hall through an opening in the ceiling and fell through a skylight. Obviously the defendant could not reasonably have expected such an occurrence and was not negligent in failing to protect against it. A mere casual reading of *Leslie v. City of Monterey*, 139 Cal.App. 715, 34 P.2d 837, and *Galiano v. Pacific G. & E. Co.*, 20 Cal.App.2d 534, 67 P.2d 388, is sufficient to show neither has any analogy whatsoever to the instant case.

The judgment is reversed as to defendants Debus with directions to permit plaintiff to amend his pleading further as to them in such manner as he deems proper. The judgment is affirmed as to Los Angeles County Flood Control District.

MOORE, P. J., concurs

McCOMB, Justice (dissenting in part).

I would affirm the judgment of the trial court as to each defendant.

In re THURSTON'S ESTATE.

KUCHEL, Controller, v. TRAMMELL et al.
Civ. 17429.

District Court of Appeal, Second District,
Division 2, California.

April 19, 1950.

Hearing Granted June 12, 1950.*

Proceeding in the matter of the estate of Johnson Thurston, deceased. An order fixing inheritance tax was entered by the Superior Court, Los Angeles County, Fred Miller, J., and Thomas H. Kuchel, Controller of the State of California, appealed, opposed by George W. Trammell, as executor of the estate of Johnson Thurston, deceased, and others. The District Court of Appeal, Moore, P. J., held that the transfer of property by decedent to his children was not taxable under the inheritance tax law.

Order affirmed.

1. Taxation ☞878(1)

In order to justify levy of an estate tax something must be transferred in view of death or by virtue of death. Revenue and Taxation Code, §§ 13301-14901.

2. Taxation ☞856

The tax provided for by the Inheritance Tax Act is a "succession tax", payable for privilege of succeeding to property. Revenue and Taxation Code, §§ 13301-14901.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Succession Tax".

3. Taxation ☞878(1)

Where decedent and wife conveyed property to their three children, reserving to themselves a life interest, and thereafter decedent executed quitclaim deed releasing and conveying all interest in the property reserved by him to his children for adequate consideration, and it was established that neither of the conveyances was made in contemplation of death, the transfer of the property to decedent's children was not taxable under inheritance tax law. Revenue and Taxation Code, §§ 13301-14901.

Deputy Inheritance Tax Attorney, Walter H. Miller, Assistant Inheritance Tax Attorney, Los Angeles, J. D. Lear, Assistant Inheritance Tax Attorney, Sacramento, for appellant.

Geo. W. Trammell, Long Beach, for respondents.

MOORE, Presiding Justice.

Appeal from order fixing inheritance tax.

October 3, 1941, decedent and his wife by grant deed conveyed to their three children portions of six lots in block 66, Long Beach Townsite, reserving to themselves a life interest. The transfer was without restriction and was not made in contemplation of death. On December 29, 1942, in consideration of \$10,000 paid by his children decedent executed and delivered to them a quitclaim deed whereby he released and conveyed all his interest in the property, reasonably worth \$134,000. This conveyance also was not made in contemplation of death. The price paid was a valuable and adequate consideration. After the quitclaim by decedent he never received any of the income from the property or enjoyed any beneficial interest therein, but the children collected the income, and the beneficial interest was enjoyed by them.

The foregoing facts were found after a trial of the objections by the executor to the Report of Inheritance Tax Appraiser which had included the portions of block 66 above mentioned with other property owned by decedent at the time of his decease. Upon finding the facts above recited, the court ordered that the transfer of the six lots is not taxable under the Inheritance Tax Law.

As grounds for reversal of that part of the order exempting the transfer of the six lots from such taxation, appellant contends that the tax was imposed upon the original transfer in pursuance of a strictly literal interpretation of the statute. Revenue and Taxation Code, Part 8, sections 13301-14901, in effect on May 19, 1946, the date of decedent's death. He admits that if the tax is imposed upon the shifting of possession and enjoyment brought about by the grantor's death respondent should pre-

James W. Hickey, Chief Inheritance Tax Attorney, Sacramento, Morton L. Barker,

* Subsequent opinion 223 P.2d 12.

vail, since possession and enjoyment were transferred on the release of the life estate, but he argues that if it is the beneficial succession that is taxable, such beneficial succession is present; that the children succeeded to the enjoyment of the estate in remainder at the death of the grantor and that there was no merger of the interests; that while a merger at law follows immediately upon the union of a greater and a lesser estate in the same ownership, a merger does not so follow in equity; that in equity a merger does not follow automatically but is allowed or denied according to whether it will best subserve the intent of the parties, citing *Ito v. Schiller*, 213 Cal. 632, 635, 3 P.2d 1; *Jameson v. Hayward*, 106 Cal. 683, 688, 39 P. 1078, 46 Am.St.Rep. 268; *Pacific States Savings & Loan Company v. Strobeck*, 139 Cal.App. 427, 33 P.2d 1063; *Newman v. Hye*, 64 Cal.App.2d 296, 148 P.2d 910; *In re Hollander's Estate*, 123 N.J.Eq. 52, 195 A. 805.

In the first place, there could have been no beneficial succession for the reason that the children owned both the life estate and the remainder at decedent's death. As to the contention that a merger is allowed or denied according to the intention of the parties it is the law as enunciated by the cited cases that in the absence of an expression of intent, equity looks to the interest of the person in whom the estates have been united.

[1-3] In order to justify the levy of an estate tax something must be transferred in view of death or by virtue of death. The tax is concerned with a shifting of economic benefits, *Paul's Estate and Gift Taxation*, Vol. I, sec. 7.04, p. 293, and to authorize it the decedent must have had, either at the time of transfer in contemplation of death or at the time of his death, an interest in the property whose transfer is to be taxed. From a view of the Inheritance Tax Act in its entirety, the legislative intent is that the tax shall be measured by beneficial succession and the tax to be levied is a succession tax, payable for the privilege of succeeding to property. *In re Estate of Rath*, 10 Cal.2d 399, 405, 75 P.2d 509, 115 A.L.R. 836. If the

amount of the tax is proportionate to the benefit transferred by the death of the grantor, then, clearly, no tax should be levied on the six lots in block 66 which had belonged to the children more than three years prior to the decease of Johnson Thurston. If it had been intended that the tax should be on the transfer and not on a beneficial succession the act would have made it collectible at the time of the transfer. But it was made collectible at death because it is payable for the privilege of succeeding to property left by the deceased. Being ever on the alert for available revenues and diligent in the enforcement of payment thereof the State has provided for the prompt payment of all taxes on accrual. By reason of the fact that such custom is the copper lining of every taxing scheme, it is inconceivable that, in the development and enactment of the Inheritance Tax Act, the legislature would have provided for the levying of a tax on the transfer of property and at the same time have arranged for its payment three or thirty years after the transfer.

The order is affirmed.

McCOMB and WILSON, JJ., concur.



96 Cal.App.2d 926

Ex parte LANDE.

Cr. 4451.

District Court of Appeal, Second District,
Division 1, California.

April 11, 1950.

Proceeding in the matter of the application of Fred Lande for a writ of habeas corpus to secure his release from custody for contempt of court for failure to pay judgment for support of child. The District Court of Appeal, White, P. J., held that the order of commitment was in excess of jurisdiction in view of the court's declared opinion at conclusion of contempt hearing that Fred Lande was unable to comply with the support judgment.

Writ granted and petitioner discharged from custody.

1. Habeas corpus ☞94

Generally, court is limited on habeas corpus to single question of jurisdiction.

2. Contempt ☞67

Habeas corpus ☞22(2), 92(3)

A person found guilty of contempt has remedies of habeas corpus and of certiorari, and in each of them the scope of inquiry which court can make is precisely the same, and where necessary in order to determine jurisdiction, the writs extend to the entire record of the lower court and to the evidence itself. Code Civ. Proc. § 1222.

3. Habeas corpus ☞1, 21

Habeas corpus can be used, not as a test of jurisdiction, but to review question of law that cannot otherwise be raised or is so important as to render ordinary procedure inadequate, and thus it lies to test whether there is probable cause to justify committing magistrate in holding petitioner for trial and whether complaint charges public offense even though such question falls within jurisdiction of trial court and may be raised on appeal. Pen.Code, § 1487.

4. Contempt ☞66(7)

Parent and child ☞3(3)

The adjudication in contempt proceeding by court having jurisdiction of person and subject matter of question of fact of ability to pay in conformity with original child support order cannot be reviewed, and prima facie case is established by production of original order and proof of nonpayment, but contemnor can purge himself of contempt by showing among other things that since the making of the original order he has become unable to comply therewith.

5. Parent and child ☞3(3)

An order revoking suspension of judgment of contempt of court for failure to comply with child support order and directing enforcement of judgment will be without legal effect if judgment was without authority of law.

6. Contempt ☞51, 60(3)

"Contempt of court" is specific criminal offense and is summary in character and is not a civil proceeding though ancillary to a civil action, and mere preponderance of evidence is insufficient.

7. Habeas corpus ☞92(3)

In habeas corpus proceeding, district court of appeal could examine proceedings at hearing in superior court to determine whether superior court exceeded its jurisdiction in committing petitioner for contempt of court for failure to comply with child support order, notwithstanding that on face of commitment it would appear that superior court was possessed of jurisdiction.

8. Parent and child ☞3(3)

Where superior court was of declared opinion at conclusion of contempt hearing that father was unable to comply with child support order, superior court was without jurisdiction to impose penalty for contempt for failure to comply with such order.

9. Habeas corpus ☞106

A judgment of contempt can be sustained on habeas corpus only when there is a conclusion arrived at by the court and a finding based thereon that the contemnor has the ability to comply with the order but willfully refuses so to do.

Schecter & Husar, Los Angeles, for petitioner.

W. E. Simpson, District Attorney, Jere J. Sullivan, Deputy District Attorney, Ralph F. Bagley, Deputy District Attorney, Los Angeles, for respondent.

WHITE, Presiding Justice.

This is an application for *habeas corpus* from a commitment of Fred Lande (hereinafter referred to as petitioner) on a judgment finding him guilty of contempt of court and sentencing him to a term of five days in the Los Angeles County Jail.

The charges of contempt upon which the commitment was based arise out of a

judgment entered June 16, 1947 ordering said petitioner to pay the sum of \$17.50 per week for the support of his child. The commitment recites that on the hearing of an order to show cause held February 14, 1950 as to why petitioner should not be punished for contempt in wilfully failing to comply with the foregoing order, and at which hearing petitioner was present, the court found that he was present at the time of trial and heard the original order made and pronounced, and "that said defendant had the ability to comply with the order, but had wilfully refused to do so". Whereupon petitioner was sentenced to five days in the county jail.

It further appears from the commitment that "said sentence was suspended upon the following conditions: that the hearing be continued to February 17, 1950, to give defendant an opportunity to pay the delinquency and defendant having been ordered to return on the 17th day of February, 1950, and after further hearing the Court now finds that the defendant has not complied with the aforementioned conditions upon which sentence was suspended in that nothing has been paid; the Court now directs that the order of 14th day of February 1950 suspending the sentence be vacated and set aside and said sentence of 14th day of February 1950 is now ordered into effect, and defendant is so committed to the county jail, pursuant to said sentence."

On the hearing before us the petitioner urges that the order of commitment was in excess of the jurisdiction of the court because the record does not disclose that any contempt was committed, in that the evidence shows and the court concluded that petitioner was unable to comply with the original order, but nevertheless pronounced judgment against him.

Respondent's contention is, that because the Superior Court had jurisdiction of both the person and the subject matter, this court is without power to review the proceedings in *habeas corpus* and the judgment of the court below is therefore final.

[1] It is of course elementary that as a general rule on *habeas corpus*, the court is limited to the single question of juris-

diction, but there are exceptions to this rule as will be hereinafter pointed out.

[2] The statute, section 1222 of the Code of Civil Procedure, declares that the judgment in cases of contempt is final and conclusive. Therefore, to one who has been adjudged guilty of contempt there remains but two remedies: *habeas corpus* and *certiorari*, and in each of them the scope of the inquiry which the court can make is precisely the same. Where necessary in order to determine jurisdiction, both the foregoing writs extend to the entire record of the court below and, to the evidence itself, when necessary. In *re Lake*, 65 Cal.App. 420, 423, 224 P. 126. If, by reference to the whole of the record of the court below, even to the evidence itself, we can see that the court exceeded its power and consequently acted without authority of law, we have the right of such examination. In *re Lake*, *supra*, 65 Cal.App. at page 424, 224 P. 126. As was said by Chief Justice Hughes in *Bowen v. Johnston*, 306 U.S. 19, 26, 27, 59 S.Ct. 442, 446, 83 L.Ed. 455, "It must never be forgotten that the writ of *habeas corpus* is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired. * * * the rule is not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent."

[3] It should also be remembered that under our own California law there are situations in which *habeas corpus* is used, not as a test of jurisdiction, but to review a question of law that cannot otherwise be raised or is so important as to render the ordinary procedure inadequate. Thus it lies to test whether there is probable cause to justify the committing magistrate in holding the petitioner for trial. *Pen.Code*, sec. 1487; *Ex parte Williams*, 52 Cal.App. 566, 199 P. 347; *Application of Hartwell*, 28 Cal.App. 627, 153 P. 730; see also cases cited in 13 Cal.Jur. 230, sec. 12; 25 Am.Jur. 170, sec. 37. The writ also lies to test whether the complaint charges a public offense, *Ex parte Williams*, 121 Cal. 328, 53 P. 706; *Ex parte McNulty*, 77 Cal. 164,

19 P. 237, 11 Am.St.Rep. 257, and that, even though this question falls within the jurisdiction of the trial court and may be raised on appeal.

[4] In the instant proceeding, petitioner attacks the jurisdiction of the court below on the ground that there was no showing that he had the ability to pay in conformity with the terms of the original order. We are cognizant of the rule that this being a question of fact, adjudication thereof, the court having jurisdiction of the person and subject matter, cannot be reviewed. That on the contempt hearing a *prima facie* case was established by the production of the original order to pay and proof of non-payment. In re Carpenter, 36 Cal.App.2d 274, 278, 97 P.2d 476. But upon such contempt proceeding the contemner may purge himself of the contempt by showing among other things, that since the making of the original order he has become unable to comply therewith. In re Carpenter, supra, 36 Cal.App.2d at page 278, 97 P.2d 476.

That petitioner herein did so purge himself and that the court below so found at the conclusion of the contempt proceeding, is the contention here made.

In support of such contention petitioner has brought before us a certified Reporter's Partial Transcript of the contempt hearing, the correctness of which is not disputed by respondent. From such transcript it appears that at the conclusion of the hearing on the order to show cause in re contempt, the court said: "I don't know, I have examined this file and certainly over the past few months, and perhaps for a longer period, this thing is like a couple of squirrels in a cage, going around and around. We are getting nowhere and accomplishing nothing. *It is very obvious that this man can't pay \$17.50 a week out of \$32.72 a week. Unless there is some showing of another amount of money, how can the man pay it? There is no point in finding him guilty of contempt of an order that he simply can't comply with.*" (Emphasis added.)

After further discussion between counsel for the plaintiff, for petitioner, who was

defendant in that proceeding, and the court, the judge said: "Is the matter submitted?" After a short colloquy between respective counsels in which the court's query was not answered, the court stated: "There is something that should be straightened out but I have to go on what is before me. The order heretofore made as to modification is denied; the order to show cause in re attorney fees is denied. The defendant is clearly guilty of contempt. He has paid what he thinks he should pay and not what he is able to pay. The Court finds he is in arrears and that he has had the ability to comply with the order but has wilfully failed and refused. I sentence him to the County Jail for five days and remand him to the custody of the Sheriff. This won't settle anything, but * * *".

Thereupon, the following occurred:

"Mr. Schecter (attorney for petitioner herein): At the outset Your Honor stated it was obvious this man couldn't pay it. I am frankly amazed at the turn-about here since Your Honor first started to speak.

"The Court: I hoped that some agreement or something could be reached, but apparently it can't, with the attitude on both sides, so I have nothing to do but * * *".

Following further discussion by petitioner's counsel the court stated: "On Counsel's representation that there is a possibility of raising some money to apply on this arrearage, I am going to suspend execution of this sentence until Friday of this week. That will be the 17th. Defendant is ordered to return at 9:30 on Friday, the 17th."

[5] We are not furnished with a record of what transpired on February 17, at which time the court vacated the suspension of sentence imposed on February 14, other than appears in the commitment presented to us with respondent sheriff's return. But whatever may have occurred on February 17, no new judgment was pronounced on that day. The order was simply that the order suspending the previous judgment of February 14 sentencing petitioner to five days in jail be vacated, and that such previous judgment be enforced.

ed. Manifestly, if the previous suspended judgment was without authority of law, then the order of February 17 revoking its suspension and directing its enforcement was equally without legal effect.

[6] Contempt of court is a specific criminal offense and summary in character. Though ancillary to a civil action it is not a civil proceeding. So distinctly criminal in its nature is a contempt proceeding that a mere preponderance of evidence is insufficient. *Hotaling v. Superior Court of State of California*, 191 Cal. 501, 504, 505, 217 P. 73, 29 A.L.R. 127.

[7, 8] While upon the face of the commitment it would appear that the court was possessed of jurisdiction, yet by examining the proceedings at the hearing in the court below, as we have a right to do in determining whether the court exceeded its jurisdiction, it is manifest to us from the statement of the court hereinbefore quoted, that at the conclusion of the hearing on February 14, the court was convinced that 'it is very obvious that this man can't pay \$17.50 a week out of \$32.72 a week * * There is no point in finding him guilty of contempt of an order that he simply can't comply with.' If a *prima facie* case of contempt was made out by presenting the original order and a showing of petitioner's failure to comply with it, the trial court was of the declared and announced opinion at the conclusion of the contempt hearing, that petitioner was unable to comply with the terms of the original order and was thereby purged of contempt. Under the showing made by the record now before us it must be concluded that the court below was admittedly without jurisdiction to impose a penalty for contempt, and that in issuing the commitment here under attack, acted in excess of its authority.

[9] The superior court is clothed with ample means and authority to compel petitioner herein to obey its orders in re the support of his minor child. With that phase of its jurisdiction we are not here concerned. We are here confronted with a situation in which petitioner was adjudged in contempt for failing to comply with an order which, according to the court be-

low, "he simply can't comply with." It is fundamental that a judgment of contempt can be sustained only when there is a conclusion arrived at by the court and a finding based thereon that the contemnor has the ability to comply with the order but wilfully refuses so to do.

For the reasons herein stated it follows that the writ should be granted and the petitioner discharged from custody. It is so ordered.

DORAN and DRAPEAU, JJ., concur.



96 Cal.App.2d 951

NICOLAI v. NICOLAI.

Civ. 17083.

District Court of Appeal, Second District,
Division 3, California.

April 13, 1950.

Hearing Denied June 8, 1950.

Action by Mary B. Nicolai against Albert F. Nicolai for divorce. The defendant filed a cross-complaint for divorce on the ground of extreme cruelty. The Superior Court, Santa Barbara County, Ernest D. Wagner, J., at time second divorce action was called for trial granted defendant's motion that a final decree in first action be entered nunc pro tunc as of July 14, 1941 and the plaintiff filed a purported appeal from the order granting that motion and appealed from judgment awarding interlocutory decree of divorce to defendant on his cross-complaint and from other orders. The District Court of Appeal, Wood, J., held that the order granting a motion to enter a judgment nunc pro tunc being an intermediate ruling of the court was not appealable and since court had jurisdiction to make order and there was no appeal from final decree, and that evidence sustained other findings of trial judge. Purported appeal from order in action No. 31861 dismissed, and interlocutory judgment of divorce in action No. 40425 and other orders affirmed. Defendant's motion to dismiss appeal from interlocutory judgment for divorce denied.

1. Appeal and error ⇨82(1)

An order granting a motion to enter a judgment nunc pro tunc being an intermediate ruling of the court, is not appealable.

2. Appeal and error ⇨82(1)

In second divorce action, where defendant's motion to have final decree entered in first divorce nunc pro tunc action was granted and trial court had jurisdiction to make order, and there was no appeal from final decree, it would not be determined whether court properly exercised its discretion in making order, and attempted appeal from order would be dismissed. Civ.Code, § 133.

3. Divorce ⇨124, 162

In wife's second divorce action, where final decree in first divorce action was entered nunc pro tunc as of July 14, 1941, and there was no appeal from that judgment, parties were single persons on July 24, 1941, date of alleged remarriage, and evidence sustained finding that parties were intermarried on that date.

4. Divorce ⇨130

In divorce action, evidence of wife's extreme cruelty justified granting of divorce to husband on cross-complaint.

5. Evidence ⇨434(2)

Where wife obtained interlocutory decree of divorce on July 13, 1940, which approved parties' property settlement agreement of June 18, 1940 and there was no appeal from that interlocutory decree or from final decree and wife did not plead fraud or undue influence with respect to agreement of July 22, 1938 or agreement of June 18, 1940, refusing to permit plaintiff's counsel to examine plaintiff as to circumstances of 1938 reconciliation was not error.

6. Husband and wife ⇨279(3)

In wife's second divorce action, evidence sustained finding that parties' property settlement agreement of June 18, 1940 was still in effect and that agreement was not rescinded by remarriage of parties on July 24, 1941.

7. Divorce ⇨253

In wife's second divorce action, evidence sustained findings of trial judge as to amounts of parties' community and separate property.

8. Divorce ⇨252

Where interlocutory decree granted divorce to husband on cross-complaint on ground of extreme cruelty of wife, trial court was not required to make even division of community property.

9. Divorce ⇨253

In divorce action, evidence sustained award of community property to the respective parties.

10. Deeds ⇨211(3)

In divorce action, evidence sustained finding that a deed, executed by husband purporting to convey his separate realty to himself and wife as joint tenants was procured through fraud of wife.

11. Deeds ⇨194(5)

Although the recording of a deed at request of grantor creates a presumption of delivery of deed, presumption may be rebutted.

12. Deeds ⇨208(5)

In divorce action, evidence sustained finding that joint tenancy deed executed by husband and recorded by husband's attorney and kept in his possession was not delivered to wife.

13. Divorce ⇨182

In divorce action, where at time wife's motion for alimony pending appeal was heard, she had \$600 and was receiving \$25 per month and her board and lodging for services she was rendering as a housekeeper, denial of motion without prejudice was not an abuse of discretion.

14. Divorce ⇨182

In divorce action, order granting wife \$400 as counsel fee on her appeal was not an abuse of discretion.

15. Divorce ⇨85

In divorce action, where wife moved that court direct officers of building and loan association to permit her or her counsel to

inspect any deposit accounts in name of husband's brother, but brother was not a party to action and there was no prima facie showing that any account in building and loan association was that of husband, denial of motion to permit inspection was not error.

16. Divorce 181

In divorce action, evidence sustained finding that after wife's motion for new trial was denied October 7, 1948, a notice of appeal was delivered to office of clerk on October 12, 1948 and was lost therein and justified trial court in ordering on March 16, 1949, that copy of notice of appeal be filed *nunc pro tunc* as of October 12, 1948 and husband's motion to dismiss appeal from interlocutory judgment of divorce would be denied. Code Civ.Proc § 1045.

Charles K. Flint, Santa Maria and Gene M. Harris, Santa Barbara, for appellant.

W. P. Butcher, Santa Barbara and T. A. Twitchell, Santa Maria, for respondent.

WOOD, Justice.

Plaintiff and defendant intermarried in 1935. An interlocutory decree of divorce in favor of plaintiff was entered on July 13, 1940. The parties intermarried again on July 24, 1941, but at that time a final decree of divorce had not been entered. After the second marriage they lived together until October 9, 1947. On October 15, 1947, plaintiff commenced an action for divorce, based upon the second marriage. Defendant answered and filed a cross-complaint for divorce. When the action came on for trial on May 28, 1948, the final decree in the first action had not been entered. Counsel for plaintiff did not know, prior to the day of trial, that the final decree had not been entered. Counsel for defendant had ascertained, the day before the trial, that the final decree had not been entered. The plaintiff and defendant (who had remarried one year and ten days after the interlocutory decree in the first action had been entered) believed that they were divorced after the expira-

tion of one year from the time the interlocutory decree was granted. When the second action was called for trial, counsel for defendant made a motion that a final decree in the first action be entered *nunc pro tunc* as of July 14, 1941. That motion was granted and the final decree was entered accordingly.

Upon the trial of the second action, the defendant obtained an interlocutory decree of divorce on his cross-complaint.

Plaintiff, after having given notice of appeal in the second action, made a motion that the court order defendant to pay alimony pending the appeal and to pay counsel fees and costs on appeal. The court denied, without prejudice, the motion regarding alimony, and ordered that defendant pay \$400 as counsel fees and that he pay the actual costs incurred on appeal.

Plaintiff also made a motion that the court make an order directing the officers of a building and loan association to permit plaintiff or her counsel to inspect any deposit accounts in the association in the name of Alfred Nicolai (defendant's brother). That motion was denied.

Plaintiff filed a notice of appeal in the first action (No. 31861 in the superior court) stating that she appeals from the order therein granting a motion for entry of final decree of divorce *nunc pro tunc* as of July 14, 1941. Plaintiff appeals, in the second action (No. 40425), from (1) the interlocutory judgment of divorce in the second action; (2) the order therein denying her motion for alimony; (3) the order therein granting counsel fees to her; and (4) the order therein denying her motion for inspection of accounts.

[1] An order granting a motion to enter a judgment *nunc pro tunc*, being an intermediate ruling of the court, is not appealable. *Mather v. Mather*, 22 Cal.2d 713, 720, 140 P.2d 808. Plaintiff did not appeal from the final judgment. The court had jurisdiction under the provisions of section 133 of the Civil Code to cause the final decree to be entered *nunc pro tunc*. Said section 133 provides that "Whenever either of the parties in a divorce action is, under the law, entitled to a final judgment,

but by mistake, negligence or inadvertence the same has not been signed, filed or entered, if no appeal has been taken from the interlocutory judgment or motion for a new trial made, the court, on the motion of either party thereto or upon its own motion, may cause a final judgment to be signed, dated, filed and entered therein granting the divorce as of the date when the same could have been given or made by the court if applied for. * * * Upon the filing of such final judgment, the parties to such action shall be deemed to have been restored to the status of single persons as of the date affixed to such judgment, and any marriage of either of such parties subsequent to one year after the granting of the interlocutory judgment * * * shall be valid for all purposes as of the date affixed to such final judgment, upon the filing thereof."

[2] Since the order granting the motion to enter the final decree *nunc pro tunc* is not appealable and the court had jurisdiction to make the order, and since there is no appeal from the final decree, it is not necessary to determine whether the court properly exercised its discretion in making the order. The attempted appeal from said order should be dismissed.

[3] Upon the appeal from the interlocutory judgment of divorce in the second action, plaintiff asserts that the finding that the parties intermarried on July 24, 1941, is not supported by the evidence. Her argument in support of this assertion is that since the final decree in the first divorce action had not been entered the parties were not single persons at the time of the alleged second marriage on July 24, 1941, and since the court erred (according to plaintiff's argument) in entering the final decree in that action, the parties did not marry on July 24, 1941. As above stated, the final decree in the first divorce action was entered *nunc pro tunc* as of July 14, 1941, and there was no appeal from that judgment. It has been established therefore that the parties were single persons on July 24, 1941. The finding that the parties intermarried on said date is supported by the evidence.

Plaintiff asserts further that the findings that she was guilty of extreme cruelty, and that defendant was not guilty of extreme cruelty, are not supported by the evidence. The court found the allegations of paragraph V of defendant's cross-complaint were true. In that paragraph the defendant alleged, among other things, that: plaintiff constantly cursed defendant, and on numerous occasions called him vile and abusive names (the names were specifically stated); on numerous occasions she threw dishes at him, and on one occasion she threw a chair at him; she clawed his face; she refused to cook meals for him; she threatened to break all the windows in his automobile; she tore up the marriage license and stated "It doesn't mean a thing"; she always nagged him about money matters; she repeatedly stated that she was "really going to clean him this time." The defendant testified that the plaintiff said and did the things alleged in said paragraph; he did not testify that she said she was "really going to clean him this time." Some of the testimony of defendant was corroborated by other witnesses. A witness, called by defendant, testified that plaintiff said that she was "really going to clean him this time." Plaintiff testified that she did curse defendant and call him vile names, but she also testified that when she cursed him and called him those names she was then repeating "right back" to him everything he called her.

The court also found that the allegations of paragraph V of the second amended complaint were untrue. In that paragraph the plaintiff alleged, among other things, that the defendant never gave plaintiff money to buy clothes; he would not permit her to use the automobile; he never took her to a dinner or show; when they went to a certain dance he refused to enter the hall until after midnight so they could gain admission for half price; he continually quarreled with her about money that had been spent for household needs; he refused to pay plaintiff's hospital bill and thereby forced her to borrow money and pay the bill in order to be released from the hospital; he was always cursing plaintiff and calling her vile and abusive names;

and every pay day he used physical violence upon her. Plaintiff testified that defendant said and did the things alleged therein. Some of her testimony was corroborated by other witnesses.

[4] It is not necessary to state specifically herein the vile names and curse words referred to by the parties. The evidence as to extreme cruelty was conflicting, and the trial judge resolved the conflict in favor of the defendant. In his memorandum of opinion the trial judge stated that the "evidence preponderates overwhelmingly in favor of the defendant." The findings regarding extreme cruelty are supported by the evidence.

Plaintiff asserts also that the court erred in excluding evidence offered by plaintiff to show fraud and undue influence on the part of defendant in inducing plaintiff to execute the property settlement agreements of July 22, 1938, and June 18, 1940. In February, 1938, the parties built a house, which cost \$2,800, on land which was the separate property of defendant. (The land was inherited by defendant.) The cost of the house was paid with community funds and with \$1,700 of defendant's separate funds. About June 1, 1938, the parties separated and remained separated about six weeks. About July 20, 1938, the parties became reconciled, and she executed a quitclaim deed in favor of the defendant whereby she quitclaimed any interest she might have in said real property. On July 22, 1938, they entered into a property settlement agreement which stated, among other things, that the real property was defendant's separate property, and that defendant should pay \$1,000 to plaintiff in settlement of her claims against the defendant. The parties separated again on June 1, 1940.

The parties entered into a property settlement agreement on June 18, 1940, whereby plaintiff transferred all her interest in certain furniture and an automobile to defendant and the defendant transferred all his interest in certain furniture and an automobile to plaintiff. That agreement also provided that defendant "may pay the wife the said sum of \$1,000.00," referred to in

the agreement of July 22, 1938, by paying \$500 on the execution of said agreement of June 18, 1940, and the balance at the rate of \$40 per month; that the plaintiff released the defendant from all obligations to make a will as provided in the agreement of July 22, 1938; that each party released the other from all obligations and claims; and that plaintiff waived any claim for alimony.

[5] Plaintiff commenced an action for divorce on June 26, 1940. She obtained an interlocutory decree of divorce on July 13, 1940, which approved the property settlement agreement of June 18, 1940. One of the recitals in that decree was that said property settlement agreement of June 18, 1940, wherein a complete disposition of all the property of the parties was made, was fair and equitable. There was no appeal from that interlocutory decree, and there was no appeal, as above stated, from the final decree of divorce which was entered *nunc pro tunc*. Plaintiff did not plead fraud or undue influence with respect to the agreement of July 22, 1938, or the agreement of June 18, 1940. She did allege, however, that the community property of the parties consisted of real property (which was the same as that described in said agreements) "and other property the exact nature of which the defendant has concealed from the plaintiff." At the trial herein (second divorce action) plaintiff's counsel, in referring to the reconciliation in 1938, asked the plaintiff as follows: "Under what circumstances did you reconcile?" Counsel for defendant objected to the question upon the ground that the "contract speaks for itself." In reply to the objection counsel for plaintiff stated there was a question "of undue influence and statements by the husband." The judge stated that the action was not one to set aside any agreement. The objection was sustained. It appears that this was the only offer that was made regarding fraud or undue influence. The interlocutory decree, where the agreement of 1940 was approved, became final many years before the present divorce action was tried. That agreement of 1940 referred to certain provisions in the agreement of 1938. The

cour did not err in sustaining said objection.

[6] Plaintiff also asserts that the finding that the property settlement agreement of June 18, 1940, was still in effect is not supported by the evidence. She argues that her uncontradicted testimony shows that said agreement was rescinded by the parties. In support of her argument she refers to her testimony that after the second marriage she took the furniture back and she returned to the defendant about \$600 of the \$1,000 which she had received in the settlement, and that the money returned by her was used to pay part of the expenses of drilling a well on the real property. She argues further that the defendant did not introduce any evidence that the property divided between the parties under said agreement was not returned and commingled after the second marriage ceremony. Whether or not there was a rescission by the conduct of the parties was a question of fact for the determination of the trial court. An important factor in the determination of such a question is the demeanor of the witnesses while testifying. The trial judge was not required to find, under the evidence here, that the conduct of the parties effected a rescission of the written agreement which had been approved in the former action. The trial judge, in his written opinion, stated that after observing the demeanor of the plaintiff on the witness stand and in the courtroom he concluded that the remarriage "was consummated with but one thought in mind—that she would clean" the defendant. The court did not err in finding that said agreement was still in effect. Plaintiff also asserts that said agreement was rescinded by the remarriage of the parties. That was also a question of fact for the trial court and its finding thereon cannot be disturbed under the evidence here.

[7] Plaintiff also asserts that the findings defining the community property are not supported by the evidence. The court found that the community property consisted of furniture, two automobiles, \$1,000 in the possession of plaintiff (which

was withdrawn by her from a joint bank account before the separation) and \$2,077-22 in the joint bank account (which amount the parties had divided equally between themselves). The court found that the defendant had separate property as follows: \$3,647.88 in a building and loan association; \$2,500 in a postal savings account; a \$5,000 life insurance policy; certain furniture; and certain real property. The portion of the community property awarded to the plaintiff consisted of the furniture in her possession, the automobile in her possession, and \$500. The portion of the community property awarded to the defendant consisted of the furniture in his possession and the automobile in his possession. The court also awarded to each party the amount he or she had withdrawn from the bank account. The court also adjudged that the defendant was the sole owner of the real property; that the defendant was the owner of certain oil royalties and that plaintiff had no interest therein. The matter of determining the amounts of community and separate property was also a question of fact for the trial court. The evidence supports the findings upon that issue.

[8,9] Plaintiff asserts also that the awards of community property are not supported by the evidence. It seems that such property was divided about evenly between the parties. The court was not required, however, to make an even division of the property, since the interlocutory decree was granted to defendant (cross-complainant) upon the ground of extreme cruelty of plaintiff. The evidence supports the award of community property.

[10] Plaintiff asserts also that the court erred in finding that a deed, executed by defendant purporting to convey said real property (defendant's separate property) to himself and plaintiff as joint tenants, was procured through fraud of plaintiff. The court found that prior to the signing of the deed the plaintiff fraudulently represented to the defendant that if the defendant would deed said real property to himself and plaintiff as joint tenants, and if she should leave the defendant, she would

immediately reconvey the real property to him; that said representation was false and was made without any intention on the part of plaintiff to perform it, and was made to induce defendant to execute said joint tenancy deed; that defendant relied on said representation; and that defendant did not discover the falsity of said representation until after the separation (which was on October 9, 1947). Defendant testified that plaintiff promised to reconvey the property to him if she left him. As above stated, a witness, called by defendant, testified that plaintiff said that she was really "going to clean" defendant this time. The judge stated in his memorandum opinion, as above shown, that he concluded that plaintiff intended to "clean" the defendant, and that in his opinion the deed was secured by fraud on the part of plaintiff. The evidence was legally sufficient to support said finding.

[11, 12] Plaintiff also asserts that the court erred in finding that the joint tenancy deed was not delivered. In regard to making the joint tenancy deed, defendant testified that plaintiff told him that in case of his death she wanted to be protected so that she would get the real property, that a will did not mean anything, that the property would be his separate property, and if she left him she would deed it back to him. He also testified that he never intended to give up his title to the property; that it was his intention that the deed would be effective only in case he died, and he so advised plaintiff; that he did not deliver the deed to plaintiff; that he made it in an attorney's office where it has been ever since; and that the attorney had it recorded. The attorney testified that he prepared the deed, caused it to be recorded, and has had it in his possession since it was recorded. Plaintiff testified that the deed never was handed to her, that on one occasion the deed was on the kitchen table, that the deed was "folded up," that she did not read it, and she never saw it thereafter. Although the recording of a deed at the request of the grantor creates a presumption of delivery of the deed, that presumption may be rebutted. Whether or not the deed was delivered was a question of fact

for the trial court. The evidence was legally sufficient to support said finding.

[13] Upon plaintiff's appeal from the order denying her motion for alimony pending appeal, she contends that the court abused its discretion in denying said motion. The trial judge, in ruling upon said motion, stated that he could not in good conscience order the payment of further alimony. At the time the motion was heard, plaintiff had \$600 and she was receiving \$25 per month and her board and lodging for services she was rendering as a housekeeper. Since the plaintiff was apprehensive about her ability to continue with such work, the motion was denied without prejudice. The trial judge did not abuse his discretion.

[14] Upon plaintiff's appeal from the order granting \$400 as counsel fees on appeal, she contends that said amount was not reasonable, and that the court abused its discretion in not allowing a larger sum. This contention is not sustainable.

[15] As above stated, plaintiff also appeals from the order denying her motion that the court direct the officers of a building and loan association to permit her or her counsel to inspect any deposit accounts in the name of defendant's brother, Alfred Nicolai. She asserts that the court erred in denying the motion since "it is probable" that defendant had money on deposit there in the name of his brother. Defendant had testified that in 1933, before his marriage, he had placed \$1,700 in a savings account in the name of his brother because he (defendant) had been in an automobile accident. The brother was not a party to the action herein. There was no prima facie showing that any account in the building and loan association was that of defendant. The court did not err in denying the motion.

[16] Defendant (respondent) asserts that the appeal from the interlocutory judgment of divorce should be dismissed for the reason the appeal was not taken within proper time. The said judgment was entered August 7, 1948. A motion for a new trial, which was made within proper time, was denied October 7, 1948. On

March 9, 1949, plaintiff filed a notice stating that on March 14, 1949, she would apply to the trial court for an order directing the clerk to enter and place in the file of said action, *nunc pro tunc* as of October 12, 1948, a copy of the notice of appeal which was filed with the clerk on October 12, 1948, and which notice was lost, misplaced or improperly filed in the office of said clerk. When the motion came on for hearing defendant objected to the hearing on the ground that the court did not have jurisdiction to entertain it for the reason no notice of appeal was filed within the time prescribed by law. It was stipulated that the register of actions and the file in the action did not show that the notice had been filed. It was also stipulated that a copy of a notice of appeal was served on Mr. Twitchell on October 12, 1948. The record shows that a copy of the notice of appeal and notice to prepare clerk's and reporter's transcripts was filed March 16, 1949, *nunc pro tunc* as of October 12, 1948. The record, however, does not show the ruling of the court upon said motion. It is stated in appellant's reply brief that the court made an order on March 16, 1949, directing that "a copy be placed in the files in place of the lost original Notice of Appeal." The parties have discussed the matter of said motion, in their briefs, on the basis that the motion had been granted. It will be assumed that the court granted the motion. If the original notice of appeal was in fact delivered to the office of the clerk on October 12, 1948, and was lost

in said office, the trial court was empowered to order that a copy of the notice be filed and used instead of the original. Code Civ.Proc., sec. 1045; and see *Davis v. Schneider*, 91 Cal.App. 187, 266 P. 959, and *Knowlton v. Mackenzie*, 110 Cal. 183, 189, 42 P. 580, and *Industrial Indem. Co. v. Ind. Acc. Comm.*, 95 Cal.App.2d 804, 214 P.2d 41. The evidence was sufficient to support a finding that the notice was delivered to the office of the clerk on October 12, 1948, and was lost therein. The court was justified in ordering that the copy of the notice of appeal be filed *nunc pro tunc* as of October 12, 1948. Respondent's motion to dismiss the appeal from the interlocutory judgment of divorce should be denied.

The purported appeal from the order, in action No. 31861, granting defendant's motion to enter the final decree of divorce *nunc pro tunc* as of July 14, 1941, is dismissed. The interlocutory judgment of divorce, in action. No. 40425, and the order in said action denying plaintiff's motion for alimony pending appeal, and the order in said action granting counsel fees to plaintiff, and the order in said action denying plaintiff's motion for inspection of accounts, are affirmed. Respondent's (defendant's) motion to dismiss the appeal from the interlocutory judgment of divorce is denied.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; CARTER, J., dissenting.





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